United States Environmental Protection Agency

Office of Solid Waste and Emergency Response

EPA

DIRECTIVE NUMBER: 9900.1

TITLE: Final RCRA Civil Penalty Policy

APPROVAL DATE:

EFFECTIVE DATE: 5/8/84

ORIGINATING OFFICE: OWPE

☒ **FINAL**

☐ **DRAFT**

STATUS:

REFERENCE (other documents):

OSWER OSWER OSWER
/E DIRECTIVE DIRECTIVE DI

United States Environmental Protection Agency
Washington, DC 20460

EPA OSWER Directive Initiation Request

Interim Directive Number: 9900.1

Originator Information

Name of Contact Person	Mail Code	Telephone Number
Virginia Steiner	WH-527	475-9329

Lead Office: ☐ OERR ☐ OSW ☐ OUST ☒ OWPE ☐ AA-OSWER

Approved for Review

Signature of Office Director: | Date:

Title:

Final RCRA Civil Penalty Policy

Summary of Directive:

Policy on assessing final penalties under RCRA for Subtitle C Violations assessments include: Potential for Harm; economic benefit; adjustment factors; non-monetary alternatives to penalties and hypotheticals,

monetary assessments
economic benefit
potential for harm
Penalty Policy RCRA

Type of Directive *(Manual, Policy Directive, Announcement, etc.)*: Policy

Status: ☐ Draft ☒ Final ☐ New ☐ Revision

Does this Directive Supersede Previous Directive(s)? ☐ Yes ☐ No Does It Supplement Previous Directive(s)? ☐ Yes ☐ No

If "Yes" to Either Question, What Directive *(number, title)*

Review Plan: ☐ AA-OSWER ☐ OERR ☐ OSW ☐ OUST ☐ OWPE ☐ Regions ☐ OECM ☐ OGC ☐ OPPE ☐ Other *(Specify)*

This Request Meets OSWER Directives System Format

Signature of Lead Office Directives Officer: M. A. [illegible] | Date: 5-30-86

Signature of OSWER Directives Officer: | Date:

EPA Form 1315-17 (10-85)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 8 1984

MEMORANDUM

SUBJECT: Final RCRA Civil Penalty Policy

FROM: Courtney M. Price
Assistant Administrator for Enforcement
and Compliance Monitoring

Lee M. Thomas
Assistant Administrator for Solid Waste
and Emergency Response

TO: Addressees

Attached is the Final RCRA Civil Penalty Policy which is being issued jointly by our Offices.

In response to comments received from both Headquarters and Regional Offices on the January 31, 1984, Second Draft, the following changes have been made:

- the Potential for Harm section has been rewritten and new examples have been included to better explain the concepts of major, moderate and minor;
- the penalties listed in the matrix have been altered slightly in order to fill the gaps between each cell;
- the RCRA Civil Penalty Policy provides for the calculation of the economic benefit of non-compliance. The economic benefit formula included in the policy takes into account two types of costs, avoided and delayed. Definitions and examples of these terms have been included. The IRS interest rates to be used in the formula have been included for the years 1980-1984;
- the cut-off below which no economic benefit analysis needs to be conducted has been reduced from $10,000 to $2,500 because the lower figure is more appropriate for the RCRA program;

- various sections (e.g., adjustment factors) have been altered or added to conform with the Agency Civil Penalty Policy issued February 16, 1984;

- non-monetary alternatives to penalties have been removed as an option at this time;

- the hypotheticals have been completely revised and now include illustrations of the economic benefit analysis and a completed penalty computation worksheet.

In response to comments received during the RCRA Enforcement Section Chiefs meeting held in March, we plan to develop additional guidance on calculating the economic benefit of noncompliance, including identifying sources of cost information for various regulatory areas. In addition, the Agency is endeavoring to contruct a more sophisticated model that would calculate the economic benefit of noncompliance through the consideration of the following factors:

1) Capital (delayed) costs;
2) After-tax operating and maintenance (avoided) costs;
3) Period of noncompliance;
4) Penalty payment date relative to the period of noncompliance;
5) Investment tax credit;
6) Tax benefits from depreciation, and
7) The firm's cost of capital or the rate of return the firm uses to evaluate alternative investments.

The formula contained in today's policy should be considered as an interim model to assist in calculating economic benefit. In approximately six months, the Agency will provide a revised version of the model that incorporates to the extent feasible the above factors. We would appreciate your comments on the practicability of a more sophisticated formula which encompasses these factors.

The response to the drafts of the RCRA Civil Penalty Policy was very favorable. A significant number of comments were received from all of the Regions and several Headquarters Offices. A considerable effort has been made to incorporate those comments where appropriate. We greatly appreciate your involvement in the development of this important and long-awaited policy.

Attachment

FINAL

RCRA CIVIL PENALTY POLICY

May 8, 1984

TABLE OF CONTENTS

Page

I. Introduction 1

II. Relationship to Agency Penalty Policy 3

III. Summary of the Policy 3

IV. Administrative Record 5

V. Determination of Gravity-Based Penalty 5

A. Potential for Harm 6

B. Extent of Deviation from Requirement 8

C. Penalty Assessment Matrix 10

VI. Multiple and Multi-Day Penalties 11

A. Assessing Multiple Penalties 11

B. Assessing Multi-Day Penalties 12

VII. Effect of Economic Benefit of Noncompliance 12

A. Types of Economic Benefit 14

B. Calculation of Economic Benefit 14

VIII. Adjustment Factors and Effect of Settlement 16

A. Adjustment Factors 16

(1) Good faith efforts to comply/lack of good faith (Degree of Cooperation/noncooperation).17

(2) Degree of willfulness and/or negligence 17

(3) History of noncompliance 18

(4) Ability to pay 20

(5) Other unique factors 20

B. Effect of Settlement 21

IX. Appendix: Penalty Computation Worksheet 22

X. Hypothetical Applications of the Penalty Policy.....24

RCRA CIVIL PENALTY POLICY

I. INTRODUCTION

To respond to the problem of improper management of hazardous waste, Congress amended the Solid Waste Disposal Act with the Resource Conservation and Recovery Act (RCRA) of 1976. Although the Act has several objectives, Congress' overriding purpose in enacting RCRA was to establish the statutory framework for a national system that would ensure the proper management of hazardous waste.

Section 3008(a) of RCRA, 42 U.S.C. §6928(a), provides that if any person is in violation of a requirement of Subtitle C, the Administrator of the Environmental Protection Agency (EPA) may, among other options, issue an order requiring compliance immediately or within a specified time period. Section 3008(c), 42 U.S.C. §6928(c), provides that any order issued may assess a penalty, taking into account:

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

Section 3008(g) further provides EPA with the authority to assess civil penalties of up to $25,000 per day of violation.

This document sets forth the Agency's policy for assessing administrative penalties under RCRA, 42 U.S.C. §6901 et seq.*/ The purpose of the policy is to assure that RCRA civil penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA are eliminated; that persons are deterred from committing RCRA violations; and that compliance is achieved.

The policy provides internal guidelines to aid EPA compliance/enforcement personnel in assessing appropriate penalties. It also provides a mechanism whereby compliance/enforcement personnel may, within specified boundaries, exercise discretion in negotiating administrative consent agreements and orders, and otherwise modify the proposed penalty when special circumstances warrant it. The policy will be supplemented as necessary.

---

*/ Because there is no RCRA judicial civil penalty policy, compliance/enforcement personnel may rely on this administrative civil penalty policy in assessing penalties in judicial cases.

This document does not discuss whether assessment of an administrative civil penalty is the correct enforcement response to a particular violation. Rather, this document focuses on determining what the proper civil penalty should be once a decision has been made that a civil penalty is the proper enforcement remedy to pursue. For guidance on when to assess administrative penalties, consult the following:

- Guidance on Developing Compliance Orders Under Section 3008 of RCRA, July 7, 1981;*/
- RCRA, Section 3005(e); Continued Operation of Hazardous Waste Facilities by Owners or Operators Who Have Failed to Achieve Interim Status, July 31, 1981;
- Guidance on Developing Compliance Orders Under Section 3008 of RCRA; Enforcement of Ground-Water Monitoring Requirements at Interim Status Facilities, January 22, 1982;*/
- Guidance on Developing Compliance Orders Under Section 3008 of RCRA; Enforcement of the Financial Responsibility Requirements Under Subpart H of 40 CFR Parts 264 and 265, October 6, 1982;*/
- Guidance on Developing Compliance Orders Under Section 3008 of RCRA; Failure to Submit and Submittal of Incomplete Part B Permit Applications, September 9, 1983.

The discussions of specific penalty assessments set out in the second and fifth guidances, above, are superseded by this document. The portions of these guidances which do not address specific penalty assessments remain operative.

The RCRA Civil Penalty Policy is immediately applicable and should be used to calculate penalties for all RCRA administrative actions instituted after the date of the policy, regardless of the date of violation.

---

*/ These three guidances classify RCRA violations as either Class I, II, or III, and state that Section 3008 compliance orders should generally be issued to address Class I, Class II, and continued or flagrant Class III violations. The Agency is in the process of developing a RCRA enforcement response policy which could change the current scheme for classifying and responding to violations. Compliance/enforcement personnel should continue to rely on the existing guidance until the new enforcement response policy is issued.

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

II. RELATIONSHIP TO AGENCY PENALTY POLICY

The RCRA Civil Penalty Policy sets forth a system of penalty assessment consistent with the established goals of the Agency's new civil penalty policy which was issued on February 16, 1984. These goals consist of:

- Deterrence;
- Fair and equitable treatment of the regulated community; and
- Swift resolution of environmental problems.

The RCRA penalty policy also adheres to the Agency policy's framework for assessing civil penalties by:

- Calculating a preliminary deterrence amount consisting of a gravity component;
- Determining any economic benefit of noncompliance; and
- Applying adjustment factors to account for differences between cases.

III. SUMMARY OF THE POLICY

The penalty calculation system consists of (1) determining a gravity-based penalty for a particular violation, (2) considering economic benefit of noncompliance where appropriate, and (3) adjusting the penalty for special circumstances. Two factors are considered in determining the gravity-based penalty:

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

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

MATRIX

Extent of Deviation from Requirement

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$25,000 to 20,000	$19,999 to 15,000	$14,999 to 11,000
MODERATE	$10,999 to 8,000	$7,999 to 5,000	$4,999 to 3,000
MINOR	$2,999 to 1,500	$1,499 to 500	$499 to 100

Where a company has derived significant savings by its failure to comply with RCRA requirements, the amount of economic benefit from noncompliance gained by the violator will be calculated and added to the gravity-based penalty. A formula for computing economic benefit is included.

After determining the appropriate penalty based on gravity and, where appropriate, economic benefit, the penalty may be adjusted upwards or downwards to reflect particular circumstances surrounding the violation. The factors that should be considered are:

- Good faith efforts to comply/lack of good faith;
- Degree of willfulness and/or negligence;
- History of noncompliance;
- Ability to pay; or
- Other unique factors.

These factors (with the exception of factors which increase the penalty such as history of noncompliance) generally will be

considered after proposing the penalty in the complaint, i.e., during the settlement stage. However, the Regions have the discretion to apply the adjustment factors when determining the initial penalty, if the information supporting adjustment is available.

The policy also discusses the appropriate assessment of multiple and multi-day penalties.

A detailed discussion of the policy follows. In addition, this document includes a few hypothetical cases where the step-by-step assessment of penalties is illustrated. The steps included are choosing the correct penalty cell on the matrix, calculating the economic benefit of noncompliance, where appropriate, and adjusting the penalty assessment before and after issuance of the complaint.

IV. ADMINISTRATIVE RECORD

In order to support the penalty proposed in the complaint, compliance/enforcement personnel must include in the case file an explanation of how the proposed penalty amount was calculated. The case file must also include a justification of any adjustments made after issuance of the complaint. In ongoing cases, the assessment rationale would be exempt from the mandatory disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552, because producing such records would interfere with enforcement proceedings, 40 CFR §2.118(a)(7). Nevertheless, the Agency may elect to release penalty information after a complaint has been issued. Once an enforcement action has been completed, the justification of the penalty assessment would no longer be exempt from disclosure.

A penalty computation worksheet to be included in the case file is attached. (See: Appendix.)

V. DETERMINATION OF GRAVITY-BASED PENALTY

RCRA Section 3008(c) states that the seriousness of the violation must be taken into account in assessing penalties. The gravity-based penalty is determined according to the seriousness of the violation. The seriousness of a violation is based on two factors which are used to assess the appropriate gravity-based penalty:

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

A. Potential for Harm

The RCRA requirements were promulgated in order to prevent harm to human health and the environment. Thus, noncompliance with any RCRA requirement could result in a situation where there is a potential for harm. The potential for harm resulting from a violation may be determined by:

- the likelihood of exposure to hazardous waste posed by noncompliance, or
- the adverse effect noncompliance has on the statutory or regulatory purposes or procedures for implementing the RCRA program.

By answering questions like the following, compliance/enforcement personnel can determine the likelihood of exposure in a particular situation:

- What is the quantity of waste?
- Is human life or health potentially threatened by the violation?
- Are animals potentially threatened by the violation?
- Are any environmental media potentially threatened by the violation?

There may be violations where the likelihood of exposure resulting from the violation is small, difficult to quantify, or nonexistent, but which nevertheless may disrupt the RCRA program (e.g., failure to comply with financial requirements). This disruption may also present a potential for harm to human health or the environment, due to the adverse effect noncompliance can have on the statutory or regulatory purposes or procedures for implementing the RCRA program.

For each of the above considerations -- likelihood of exposure and adverse effect on implementing the RCRA program -- the emphasis is placed on the potential harm posed by a violation rather than on whether harm actually occurred. The presence or absence of direct harm in a noncompliance situation is something over which the violator may have no control. Such violators should not be rewarded by assessing lower penalties when the violations do not result in actual harm.

Compliance/enforcement personnel should evaluate whether the potential for harm is major, moderate, or minor in a particular

situation. The degree of potential harm represented by each category is defined as:

- MAJOR (1) violation poses a substantial likelihood of exposure to hazardous waste; and/or

  (2) the actions have or may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the RCRA program.

- MODERATE (1) the violation poses a significant likelihood of exposure to hazardous waste; and/or

  (2) the actions have or may have a significant adverse effect on the statutory or regulatory purposes or procedures for implementing the RCRA program.

- MINOR (1) the violation poses a relatively low likelihood of exposure to hazardous waste; and/or

  (2) the actions have or may have an adverse effect on the statutory or regulatory purposes or procedures for implementing the RCRA program.

The following examples illustrate the difference between major, moderate, and minor potential for harm.

Example 1 - Major Potential for Harm

40 CFR §265.143 requires that owners or operators of hazardous waste facilities establish financial assurance for closure of their facilities. The purpose of this requirement is to assure that funds will be available for proper closure of facilities. Under §265.143(a)(2), the wording of a trust agreement establishing financial assurance for closure must be identical to the wording specified in 40 CFR §264.151(a)(1). Failure to word the trust agreement as required may appear inconsequential. However, even a slight alteration of the language could change the legal effect of the financial instrument so that it would no longer satisfy the intent of the regulation. When the language of the agreement differs from the requirement such that funds would not be available to close the facility properly, the lack of identical wording would have a substantial adverse effect on the regulatory scheme. This violation would be assigned to the major potential for harm category.

Example 2 - Moderate Potential for Harm

Under 40 CFR §262.34, a generator may accumulate hazardous waste on-site for 90 days or less without having interim status or a permit provided that among other requirements, each container

or tank of waste is labeled or marked clearly with the words, "Hazardous Waste." In a situation where a generator is storing compatible waste, has labeled half of its containers, and has clearly identified its storage area as a hazardous waste storage area, there is some indication that the unlabeled containers hold hazardous waste. However, because there is a chance that the unlabeled containers could be removed from the storage area, and that without labels the Agency would not know if the waste had been stored for more than 90 days, this situation poses a significant likelihood of exposure to hazardous waste (although the likelihood is not as great as it would be if neither the storage area nor any of the containers were marked). The moderate potential for harm category would be appropriate in this case.

Example 3 - Minor Potential for Harm

Owners or operators of hazardous waste facilities must, under 40 CFR §265.53, submit a copy of their contingency plans to all local police departments, fire departments, hospitals, and State and local emergency response teams that may be called upon to provide emergency services. If a facility has a complete contingency plan, including a description of arrangements agreed to by local entities to coordinate emergency services (§265.52), but failed to submit copies to all of the local entities, there is a potential for harm. However, because a complete plan exists and arrangements with all of the local entities have been agreed to, the likelihood of exposure and adverse effect on the implementation of RCRA would be relatively low. The minor potential for harm category would be appropriate in this situation.

B. Extent of Deviation from Requirement

The "extent of deviation" from RCRA or its regulatory requirements relates to the degree to which the violation renders inoperative the requirement violated. In any violative situation, a range of potential noncompliance with the subject requirement exists. In other words, a violator may be substantially in compliance with the provisions of the requirement or it may have totally disregarded the requirement (or a point in between). As with potential for harm, extent of deviation may be either major, moderate, or minor. In determining the extent of deviation, the following definitions should be used:

- MAJOR the violator deviates from the requirements of the regulation or statute to such an extent that there is substantial noncompliance.

- MODERATE the violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended.

- MINOR the violator deviates somewhat from the regulatory or statutory requirements but most of the requirements are met.

A few examples will help demonstrate how the evaluation procedure described above is used to select a category:

Example 1 - Closure Plan

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

Example 2 - Failure to Maintain Adequate Security

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

The range of potential noncompliance with the security requirements is quite broad. In a particular situation, the violator may prove to have totally failed to supply any security systems. Total noncompliance with regulatory requirements such as this would result in classification into the major category. In contrast, the violation may consist of a small oversight such as failing to lock an access route on a single occasion. Obviously, the degree of noncompliance in the latter situation is less significant. With all other factors being equal, the less significant noncompliance should draw a smaller penalty assessment. In the matrix system this is achieved by choosing the minor category.

C. Penalty Assessment Matrix

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

Extent of Deviation from Requirement

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$25,000 to 20,000	$19,999 to 15,000	$14,999 to 11,000
MODERATE	$10,999 to 8,000	$7,999 to 5,000	$4,999 to 3,000
MINOR	$2,999 to 1,500	$1,499 to 500	$499 to 100

The lowest cell (minor potential for harm/minor extent of deviation) contains a penalty range from $100 to $499. Provision for this low range of penalties has been made because the assessment of low penalties has proven to be an effective compliance tool. The highest cell (major potential for harm/major extent of deviation) is limited by the maximum statutory penalty allowance of $25,000 per day of violation.

The selection of the exact penalty amount within each cell is left to the discretion of compliance/enforcement personnel in any given case. Compliance/enforcement personnel should be careful to consider the seriousness of the violation only in selecting the penalty amount within the range. The reasons the violation was committed, the intent of the violator, and other factors related to the violator are not considered at this point; they will be considered at the adjustment stage.

VI. MULTIPLE AND MULTI-DAY PENALTIES

A. Assessing Multiple Penalties

In certain situations, EPA may find that a particular firm has violated several RCRA regulations. A separate penalty should be assessed for each violation that results from an independent act (or failure to act) by the violator and is substantially distinguishable from any other charge in the complaint for which a penalty is to be assessed. A given charge is independent of, and substantially distinguishable from, any other charge when it requires an element of proof not needed by the others. In many cases, violations of different sections of the regulations constitute independent and substantially distinguishable violations. For example, failure to implement a groundwater monitoring program, 40 CFR §265.90, and failure to have a written closure plan, 40 CFR §265.112, are violations which result from different sets of circumstances and which pose separate risks. In the case of a firm which has violated both of these sections of the regulations, a separate count should be charged for each violation. For penalty purposes, each of the violations should be assessed separately and the amounts totalled.

It is also possible that different violations of the same section of the regulations could constitute independent and substantially distinguishable violations. For example, in the case of a firm which has open containers of hazardous waste in its storage area, 40 CFR §265.173(a), and which also ruptured different hazardous waste containers while moving them on site, 40 CFR §265.173(b), there are two independent acts. The violations result from two sets of circumstances (improper storage and improper handling) and pose distinct risks. In this situation, two counts with two separate penalties would be appropriate. For penalty purposes, each of the violations should be assessed separately and the amounts totalled.

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

In general, multiple penalties are not appropriate where the violations are not independent or substantially distinguishable. Where a charge derives from or merely restates another charge, a separate penalty is not warranted. If an owner/operator of a storage facility failed to specify in his waste analysis plan the parameters for which each hazardous waste will be analyzed, 40 CFR §265.13(b)(1), and failed to specify the frequency with which the initial analysis of the waste will be repeated, 40 CFR §265.13(b)(4), he has violated the requirement that he develop an adequate waste analysis plan. The violations result from the same factual event (failure to develop an adequate plan), and pose one risk (storing waste improperly due to inadequate analysis). In this situation, both sections violated should be cited in the complaint, but one penalty, rather than two, should be assessed. The fact that two separate sections were violated will be taken into account in choosing higher "potential for harm" and "extent of deviation" categories on the penalty matrix.

B. Assessing Multi-Day Violations

RCRA provides EPA with the authority to assess civil penalties of up to $25,000 per violation per day, with each day that non-compliance continues to be assessed as a separate violation. Multi-day penalties should generally be calculated in the case of continuing egregious violations. However, per day assessment may be appropriate in other cases.

In the case of continuing violations, the Agency has the authority to calculate penalties based on the number of days of violation since the effective date of the requirement and up to the date of coming into compliance. The gravity-based penalty derived from the penalty matrix should be multiplied by the number of days of violation.

VII. EFFECT OF ECONOMIC BENEFIT OF NONCOMPLIANCE

The new Agency civil penalty policy mandates the consideration of the economic benefit of noncompliance to a violator when penalties are assessed. In accordance with the goals of the Agency policy, the RCRA Civil Penalty Policy sets forth a system for calculating the economic benefit of noncompliance with RCRA requirements.

An "economic benefit component" should be calculated and added to the gravity-based penalty when a violation results in significant economic benefit to the violator. The following are examples of regulatory areas which should undergo an economic benefit analysis:

- Groundwater monitoring
- Financial requirements
- Closure/post-closure
- Waste determination
- Waste analysis
- Clean-up of discharge
- Part B submittals

For many RCRA requirements, the economic benefit of noncompliance may be difficult to quantify or relatively insignificant. Examples of these types of violations are failure to submit a report or failure to maintain records. In general, compliance/enforcement personnel need not calculate the benefit component where it appears that the amount of that component is likely to be less than $2,500. This figure is more appropriate for the RCRA program than the $10,000 cut-off in the Agency policy because of the amount of economic benefit associated with many RCRA violations.

It is generally the Agency's policy not to settle cases (i.e., the penalty amount) for an amount less than the economic benefit of noncompliance. However, the new Agency civil penalty policy does set out three general areas where settling the total penalty amount for less than the economic benefit may be appropriate. The RCRA policy has added a fourth exception for cases where ability to pay is a factor. The four exceptions are as follows:

- the economic benefit component consists of an insignificant amount (i.e., less than $2,500);
- there are compelling public concerns that would not be served by taking a case to trial;
- it is highly unlikely that EPA will be able to recover the economic benefit in litigation;
- the company has documented an inability to pay the total proposed penalty.

If a case is settled for less than the economic benefit component, a justification must be included in the case file.

A. Types of Economic Benefit

Compliance/enforcement personnel should examine two types of economic benefit from noncompliance in determining the economic benefit component:

- Benefit from delayed costs; and
- Benefit from avoided costs.

Delayed costs are expenditures which have been deferred by the violator's failure to comply with the requirements. The violator eventually will have to spend the money in order to achieve compliance. Delayed costs are the equivalent of capital costs. Examples of violations which result in savings from delayed costs are:

- Failure to install ground-water monitoring equipment;
- Failure to submit a Part B permit application; and
- Failure to develop a waste analysis plan.

Avoided costs are expenditures which are nullified by the violator's failure to comply. These costs will never be incurred. Avoided costs are the equivalent of operating and maintenance costs. Examples of violations which result in savings from avoided costs are:

- Failure to perform annual and semi-annual ground-water monitoring sampling and analysis;
- Failure to follow the approved closure plan in removing waste from a facility, where reremoval is not possible; and
- Failure to perform waste analysis before adding waste to tanks, waste piles, incinerators, etc.

B. Calculation of Economic Benefit

Because the savings that are derived from delayed costs differ from those derived from avoided costs, the economic benefit from delayed and avoided costs are calculated in a different manner. For avoided costs, the economic benefit equals the cost of complying with the requirement, adjusted to reflect income tax effects on the

company. For delayed costs, the economic benefit does not equal the cost of complying with the requirements, since the violator will eventually have to spend the money to achieve compliance. The economic benefit for delayed costs consists of the amount of interest on the unspent money that reasonably could have been earned by the violator during noncompliance. If noncompliance has continued for more than a year, compliance/enforcement personnel should calculate the economic benefit of both the delayed and avoided costs for each year.

The following formula is provided to help calculate the economic benefit component:

Economic
Benefit = Avoided Costs (1-T) + (Delayed Costs x Interest Rate)

In the above formula, T represents the firm's marginal tax rate. In the absence of specific information regarding the violator's tax status, compliance/enforcement personnel should assume that the company's marginal tax rate is 46%, the Federal corporate tax rate for firms whose before-tax profits are greater than $100,000. Thus, compliance/enforcement personnel should assume that T = .46.

Compliance/enforcement personnel should calculate interest by using the interest rate charged by the Internal Revenue Service (IRS) for delinquent accounts. The IRS interest rates for 1980 through 1984 are as follows:

2/1/80	-	1/31/82	12%
2/1/82	-	12/31/82	20%
1/1/83	-	6/30/83	16%
7/1/83	-	6/30/84	11%

Interest rates for years other than those listed above are available from your local IRS office.

The economic benefit formula provides a reasonable estimate of the economic benefit of noncompliance. If a respondent believes that the economic benefit it derived from noncompliance differs from the estimated amount, it should present information documenting its actual savings to compliance/ enforcement personnel at the settlement stage.

See Section X of this document for hypothetical applications of the economic benefit formula. The Agency plans to develop additional guidance on calculating the economic benefit of noncompliance, including identifying sources of cost information

for various regulatory areas, and providing an Agency methodology for computing economic benefit. For this reason, the economic benefit formula set out in this document is for interim use only.

VIII. ADJUSTMENT FACTORS AND EFFECT OF SETTLEMENT

A. Adjustment Factors

As mentioned in Section V of this document, the seriousness of the violation is considered in determining the gravity-based penalty. The reasons the violation was committed, the intent of the violator, and other factors related to the violator are not considered in choosing the appropriate penalty from the matrix. However, any system for calculating penalties must have enough flexibility to make adjustments that reflect legitimate differences between similar violations. RCRA §3008(c) states that in assessing penalties, EPA must take into account any good faith efforts to comply with the applicable requirements. The new Agency civil penalty policy sets out several other adjustment factors to consider. These include the degree of willfulness and/or negligence, history of noncompliance, ability to pay, and other unique factors.

The adjustment factors can increase, decrease or have no effect on the penalty amount to be paid by the violator. Note, however, that no upward adjustment can result in a penalty greater than the statutory maximum of $25,000 per day of violation. Adjustment of a penalty may take place before issuing the proposed penalty in the complaint, or after assessment of the proposed penalty (as part of the settlement process). Most factors, in practice, will be considered at the settlement stage with the burden of proof for mitigation on the respondent. However, penalties may be adjusted before determining the proposed assessment if the necessary information is available. Compliance/enforcement personnel should use whatever information on the violator (and violation) is available at the time of initial assessment. Issuance of a complaint should not be delayed in order to collect additional adjustment information. The history of noncompliance factor should be used only to increase a penalty; the ability to pay factor should be used only to decrease a penalty. Justification for adjustments must be included in the case file.

In general, these adjustment factors will apply only to the gravity-based penalty derived from the matrix, and not to the economic benefit component if calculated. (See Section VII of this document for exceptions.)

Application of the adjustment factors is cumulative, i.e., more than one factor may apply in a case. For example, if the base penalty derived from the matrix is $9,500, and upward

adjustments of 10% will be made for both history of noncompliance and degree of willfulness and/or negligence, the total adjusted penalty would be $11,400 ($9,500 + 20%).

The following discussion of the factors to consider is consistent with the new Agency civil penalty policy. For the purposes of simplification, the percentage ranges for the adjustment factors in the Agency policy have been altered slightly for use in the RCRA Civil Penalty Policy.

At this stage of the RCRA program it is difficult to determine what types of non-monetary alternatives or alternative payments would foster the goals of the program. As compliance/enforcement personnel gain more experience in enforcing RCRA, use of these alternatives may prove to be advantageous to the public interest. Until such time, these alternatives, as set forth in the new Agency civil penalty policy, are not an option under the RCRA Civil Penalty Policy.

(1) Good faith efforts to comply/lack of good faith (Degree of cooperation/noncooperation)

Under §3008(a) of RCRA, good faith efforts to comply with the requirements must be considered in assessing a penalty. Good faith can be manifested by the violator promptly reporting its noncompliance. Assuming such self-reporting is not required by law, this behavior can result in mitigation of the penalty. Prompt correction of environmental problems also can constitute good faith. Lack of good faith, on the other hand, can result in an increased penalty. Compliance/enforcement personnel have discretion to make adjustments up or down by as much as 25% of the gravity-based penalty. Adjustments may be made in the 26%-40% range of the gravity-based penalty, but only in unusual circumstances. No downward adjustment should be made if the good faith efforts to comply primarily consist of coming into compliance.

(2) Degree of willfulness and/or negligence

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

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

- 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;
- whether the violator knew of the legal requirement which was violated.

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

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

Subject to the above guidance, compliance/enforcement personnel have discretion in all cases to make adjustments up or down by as much as 25% of the gravity-based penalty. Adjustments in the 26-40% range may be made, but only in unusual circumstances.

(3) History of noncompliance (upward adjustment only)

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

Some of the factors the compliance/enforcement personnel should consider are the following:

- 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 problem.

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

For purposes of the section, a "prior violation" includes any act or omission for which a formal enforcement response has occurred (e.g., EPA or State notice of violation, warning letter, complaint, consent agreement, final order, or consent decree). 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, compliance/enforcement personnel should ascertain who in the organization had control and oversight responsibility for compliance with RCRA or other environmental laws. In those cases the violation will be considered part of the compliance history of that regulated party.

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

Subject to the above guidance, compliance/enforcement personnel have discretion to make upward adjustments by as much as 25% of the gravity-based penalty. Adjustments for this factor in the 26-40% range may be made, but only in unusual circumstances.

(4) Ability to pay (downward adjustment only)

The Agency generally will not request penalties that are clearly beyond the means of the violator. Therefore EPA should consider the ability of a violator to pay a penalty. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially troubled business. EPA reserves the option, in appropriate circumstances, to seek penalties that might put a company out of business. It is unlikely, for example, 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 burden to demonstrate inability to pay rests on the respondent, as it does with any mitigating circumstances. Thus, a company's inability to pay usually will be considered at the settlement stage, and then only if the issue is raised by the respondent. If the respondent fails to provide sufficient information, then compliance/enforcement personnel 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.

When it is determined that a violator cannot afford the penalty prescribed by this policy, or that payment of all or a portion of the penalty will preclude the violator from achieving compliance or from carrying out remedial measures which the Agency deems to be more important than the deterrence effect of the penalty (e.g., payment of penalty would preclude proper closure/post-closure), the following options may 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.
- Consider an installment payment plan with interest.
- Consider straight penalty reductions as a last recourse.

The amount of any downward adjustment of the penalty is dependent on the individual financial facts of the case.

(5) Other unique factors

This policy allows an adjustment for unanticipated factors which may arise on a case-by-case basis. Compliance/ enforcement personnel have discretion to make adjustments by as much as 25% of

the gravity-based penalty for such reasons. Adjustments for these factors in the 26-40% range may be made, but only in unusual circumstances.

B. Effect of Settlement

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

In many cases, the fact of a violation will be less of an issue than the amount of the penalty assessed. The burden always is on the violator to justify any mitigation of the assessed penalty. The mitigation, if any, of the penalty assessed in the complaint should follow the guidelines in the Adjustment Factors section of this document. The consent agreement must include a general statement of the reasons for mitigating the proposed penalty. Specific percentage reductions for individual factors need not be included.

IX. APPENDIX

PENALTY COMPUTATION WORKSHEET

Company Name: _____

Regulation Violated _____

Asessments for each violation should be determined on separate worksheets and totalled.

(If more space is needed, attach separate sheet.)

Part I - Seriousness of Violation Penalty

1. Potential for Harm: _____

2. Extent of Deviation: _____

3. Matrix Cell Range: _____

Penalty Amount Chosen: _____

Justification for Penalty Amount Chosen:

4. Per-Day Assessment: _____

Part II - Penalty Adjustments

	Percentage Change*	Dollar Amount
1. Good faith efforts to comply/lack of good faith:	_____	_____
2. Degree of willfulness and/or negligence:	_____	_____
3. History of noncompliance:	_____	_____
4. Other unique factors:	_____	_____

5. Justification for Adjustments:

* Percentage adjustments are applied to the dollar amount calculated on line 4, Part I.

PENALTY COMPUTATION WORKSHEET (cont.)

6. Adjusted Per-day Penalty (Line 4, Part I + Lines 1-4, Part II):	_____
7. Number of Days of Violation:	_____
8. Multi-day Penalty (Number of days x Line 6, Part II):	_____
9. Economic Benefit of Noncompliance:	_____
Justification:	
10. Total (Lines 8 + 9, Part II):	_____
11. Ability to Pay Adjustment:	
Justification for Adjustment:	_____
12. Total Penalty Amount (must not exceed $25,000 per day of violation):	_____

X. HYPOTHETICAL APPLICATIONS OF THE PENALTY POLICY

(1)(A) Violation: By notification dated August 15, 1980, Company A informed EPA that it conducts activities at its facility involving hazardous waste. In its notification, Company A indicated that it only generated hazardous waste. A 1983 inspection revealed that Company A was also storing hazardous waste, and had been since 1979. Company A had not filed a Part A Permit Application and was thus operating without a permit or interim status, in violation of §3005 of RCRA. In addition, Company A was in violation of §3010 of RCRA by failing to notify EPA that it was storing hazardous waste. Failure to notify and operating without a pemit or interim status constitute independent and substantially distinguishable violations. Each violation should be assessed separately and the amounts totalled. The inspectors indicated that Company A's storage area was secure and that, in general, the facility was well managed. However, there were a number of violations of the interim status standards. The complaint issued to Company A assessed penalties for the Part 265 violations as well as the statutory violations. This example will discuss the §3005 and §3010 violations only.

(B) Seriousness: (i) Failure to Notify: Potential for Harm. Moderate - EPA was prevented from knowing that hazardous waste was being stored at the facility. However, because Company A notified EPA that it was a generator, EPA did know that hazardous waste was handled at the facility. The violation may have a significant adverse effect on the statutory purposes or procedures for implementing the RCRA program. Extent of Deviation. Moderate - although Company A did not notify EPA that it stored hazardous waste, it did notify the Agency that is was a generator. Company A significantly deviated from the requirement, but part of the requirement was implemented as intended. (ii) Operating without a permit. Potential for Harm. Moderate - although Company A was operating without a permit or interim status, its facility generally was well managed. However, there were a number of Part 265 violations. This situation may pose a significant likelihood of exposure which may have a significant adverse effect on the statutory purposes for implementing the RCRA program. Extent of Deviation. Major - substantial noncompliance with the requirement because Company A did not notify EPA that it stored hazardous waste, and did not submit a Part A.

(C) Gravity-based Penalty: (i) Failure to notify. Moderate potential for harm and moderate extent of deviation lead one to the cell with the range of $5,000 to $7,999. The mid-point is $6,500. (ii) Operating without a permit. Moderate potential for harm and major extent of deviation lead one to the cell with the range of $8,000 to $10,999. The midpoint is $9,500. (iii) Total penalty: $6,500 + $9,500 = $16,000.

(D) Settlement adjustment: Company A raised and documented that it had cash flow problems. It did not convince EPA that the penalty should be mitigated. An installment plan was accepted by both parties as a means of payment. Penalty remained at $16,000.

(2)(A) Violation: Company B failed to prevent unknowing entry of persons onto the active portion of its surface impoundment facility. The fence surrounding the area had several holes. 40 CFR §265.14.

(B) Seriousness: Potential for Harm. Major - some children already have entered the area; potential for harm due to exposure to waste may be substantial because of the lack of adequate security around the site. Extent of Deviation. Moderate - there is a fence, but it has holes. Significant degree of deviation, but part of the requirement was implemented.

(C) Gravity-based Penalty: Major potential for harm and moderate extent of deviation yield the penalty range of $15,000 to $19,999. The midpoint is $17,500.

(D) Pre-complaint Adjustment: During the inspection of the facility, EPA discovered that the operator of Company B had been made aware of the above occurrence more than three months earlier, but had failed to repair the fence or increase security in that area. The penalty is adjusted upwards 25% for willfulness and/or negligence. $17,500 + $4,375 = $21,875. [Penalty calculation using the Penalty Computation Worksheet follows this hypothetical.]

(E) Settlement Adjustment: Company B gave evidence at settlement of labor problems with security officers and reordering and delivery delays for a new fence. Company B was very cooperative and stated that a new fence had been installed after issuance of the complaint and that

security would be provided for by another company in the near future. Even though the company was very cooperative, its actions were only those required under the regulations. No justification for mitigation for good faith efforts to comply exists. No change in $21,875 penalty.

PENALTY COMPUTATION WORKSHEET

Company Name: Company B

Regulation Violated 265.14

Asessments for each violation should be determined on separate worksheets and totalled.

(If more space is needed, attach separate sheet.)

Part I - Seriousness of Violation Penalty

1. Potential for Harm: Major
2. Extent of Deviation: Moderate
3. Matrix Cell Range: $15,000 - $19,999

   Penalty Amount Chosen: $17,500

   Justification for Penalty Amount Chosen: midpoint of range

4. Per-Day Assessment: $17,500

Part II - Penalty Adjustments

	Percentage Change*	Dollar Amount
1. Good faith efforts to comply/lack of good faith:	N/A	N/A
2. Degree of willfulness and/or negligence:	25%	$4,375
3. History of noncompliance:	N/A	N/A
4. Other unique factors:	N/A	N/A

5. Justification for Adjustments:

* Percentage adjustments are applied to the dollar amount calculated on line 4, Part I.

PENALTY COMPUTATION WORKSHEET (cont.)

6. Adjusted Per-day Penalty (Line 4, Part I + Lines 1-4, Part II):	$21,875
7. Number of Days of Violation:	N/A
8. Multi-day Penalty (Number of days x Line 6, Part II):	N/A
9. Economic Benefit of Noncompliance:	N/A
Justification:	
10. Total (Lines 8 + 9, Part II):	$21,875
11. Ability to Pay Adjustment:	
Justification for Adjustment:	N/A
12. Total Penalty Amount (must not exceed $25,000 per day of violation):	$21,875

(3)(A) **Violation:** A 1984 inspection of Company C's land disposal facility revealed that Company C had failed to implement a ground-water monitoring system by November 1981 as required under 40 CFR §265.90. The facility had taken no steps to implement a system: it failed to install monitoring wells (§265.91), and to obtain and analyze samples (§265.92); no outline of a ground-water quality assessment program had been prepared (§265.93); and no records were kept nor reports submitted to the Agency (§265.94). All of the violations arise from the same set of circumstances. Because Company C did not install wells, no sampling and analysis could occur. Without sampling and analysis, Company C did not have information with which to prepare a quality assessment program outline, keep records, or submit reports to the Agency. Therefore, the violations are not independent and substantially distinguishable in this situation. [See: Assessing Multiple Penalties]. A single penalty assessment is appropriate, with each section of the regulations that was violated cited in the complaint.

(B) Seriousness: Potential for Harm. Major - the violation could pose a substantial likelihood of exposure and could have a substantial adverse effect on the purposes for implementing the RCRA program. Extent of Deviation. Major - none of the requirements were implemented as intended.

(C) Gravity-based Penalty: Major potential for harm and major extent of deviation yield the cell with the penalty range of $20,000 to $25,000. The mid-point is $22,500.

(D) Economic Benefit of Noncompliance: Ground-water monitoring has been identified as an area for which an economic benefit component may be significant. The following estimates of the costs of complying with the ground-water monitoring requirements are taken from a January 1982 report prepared for EPA by Geraghty & Miller, Inc., entitled, Development of Ground-Water Monitoring Requirements and Costs for Current RCRA Regulatory Requirements, Contract No. 68-01-5838:

First Year Costs

Cost of ground-water quality assessment plan outline and ground-water sampling and analysis plan (COP)	$2,000
Cost of wells (COW), 1 upgradient and 3 downgradient	$9,000
Cost of sampling (COS)	$1,640

Cost of analysis (COA)	$11,360
Cost of report (COR), report for determining system needs, not report required under §265.94	$3,200
TOTAL	$27,200

Second Year Costs

Cost of sampling and cost of analysis (COS, COA), assuming no contamination found	$1,900

Assumptions: geology is unconsolidated material; hollow-stem auger drilling; PVC construction material; ground-water sampling by hand bailing; wells dug 50 ft. deep; estimated costs remained constant over time.

COP, COW, COR, and first year COS and COA are delayed costs. Company C eventually will make these expenditures in order to achieve compliance. Second year and subsequent COS and COA are avoided costs. Company C has permanently avoided incurring these costs.

Calculation of Economic Benefit Component

For each year of noncompliance (1981-1984), the economic benefit component should be calculated using the formula set out in Section VII:

Economic Benefit = Avoided Costs (1-T) + (Delayed Costs x Interest Rate)

1981: By November 1981, Company C was required to implement its ground-water monitoring system by installing wells, obtaining and analyzing samples at least quarterly, and preparing a quality assessment program outline.

Delayed costs = $27,200
Avoided costs = $0
IRS interest rate = 12%
Assume T = .46

Economic Benefit = $0 + ($27,200 x 12%)
= $3,264

1982: Company C still had not implemented its groundwater monitoring system. In addition, it had not obtained and analyzed samples at least annually or semi-annually, depending on the indicator parameter.

Delayed costs = $27,200
Avoided costs = $1,900
IRS interest rate = 20%
Assume T = .46

Economic Benefit = $1,900 (1-.46) + ($27,200 x 20%)
= $6,466

1983: Company C still had not implemented its groundwater monitoring system. In addition, it had not obtained and analyzed samples at least annually or semi-annually, depending on the indicator parameter.

Delayed costs = $27,200
Avoided costs = $1,900
IRS interest rate = 13.5% (the average of 16% and 11%)
Assume T = .46

Economic Benefit = $1,900 (1-.46) + ($27,200 x 13.5%)
= $4,698

Total Economic Benefit = $3,264 + $6,466 + $4,698
= $14,428

Penalty proposed in complaint = gravity-based penalty + economic benefit component
= $22,500 + $14,428
= $36,928

Because noncompliance continued over a three year period, the proposed penalty does not exceed $25,000 per day of violation.

(E) Settlement Adjustment: Company C did not request a settlement conference but did comply with the Compliance Order and paid the proposed penalty.

(4)(A) Violation: Pursuant to §3007(a) of RCRA, EPA sent a letter to Company D requesting that it furnish information relating to hazardous waste. Specifically, five separate records were requested. The letter required a response to EPA within 14 calendar days of Company D's receipt of the letter. One month after Company D received EPA's information request, it submitted three of the five documents requested. EPA sent a second letter requesting the two remaining documents. Company D failed to respond to the request.

(B) Seriousness: Potential for Harm. Moderate - Based on the nature of the information requested, EPA determined that Company D's failure to submit information relating to hazardous waste to EPA as requested may have a significant adverse effect on the purposes and procedures for implementing the RCRA program. Extent of Deviation. Moderate - Company D did submit some of the information requested. It significantly deviated from the requirement, but part of the requirement was implemented as intended.

(C) Gravity-based Penalty: Moderate - potential for harm and moderate extent of deviation yield the penalty range of $5,000 to $7,999. The midpoint is $6,500.

(D) Pre-Assessment Adjustments - On two previous occasions at different facilities, Company D failed to respond completely to §3007 requests for different information. In those cases, EPA issued administrative complaints with proposed penalties of $6,500 and $8,125 respectively. Both cases resulted in Consent Agreements and Final Orders which were entered into before EPA requested the information in the present case. The penalty is adjusted upwards 50% for history of noncompliance. $6,500 + $3,250 = $9,750. Compliance/enforcement personnel determined that the penalties assessed in the previous cases had failed to deter Company D from repeated noncompliance with RCRA. For this reason, a multi-day penalty of $9,750 per day from the date the information was due to EPA was assessed.

(E) Settlement Adjustment: Company D failed to convince EPA that any penalty mitigation was justified. Settlement negotiations broke down and the case went to an administrative hearing.

(5)(A) Violation: Company E's Part B Permit Application was called in by EPA in 1983. Company E, a land disposal facility, failed to submit its Part B by the date specified when the application was called-in. EPA issued a Notice of Deficiency requiring submission of a complete Part B within 30 days. EPA also issued a warning letter stating that failure to submit a complete Part B application is a violation of 40 CFR §270.10(a) which may result in the assessment of civil penalties and the initiation of procedures to terminate the facility's interim status. Company E sent EPA a one-page response several weeks after the date stipulated in the Notice of Deficiency. The response was seriously incomplete. Thus, Company E failed to submit a complete Part B in violation of 40 CFR §270.10(a).

(B) Seriousness: Potential for Harm. Moderate - inspections of Company E's facility have revealed a generally well-managed operation. However, failure to carry out the applicable requirements of 40 CFR §270.14-270.29 could pose a significant likelihood of exposure in this situation. The violation could have a significant adverse effect on the procedures for implementing the RCRA program. Extent of Deviation. Major - Part B application was seriously incomplete.

(C) Gravity-based Penalty: Moderate potential for harm and major extent of deviation lead one to the cell with the range of $8,000 to $10,999. The mid-point is $9,500.

(D) Economic Benefit of Noncompliance: Failure to submit or submittal of an incomplete Part B application has been identified as an area for which an economic benefit component may be significant. In a document prepared by EPA's Office of Solid Waste requesting clearance from the Office of Management and Budget to call in Part B applications, it was estimated that the cost of preparing a Part B for a land disposal facility was approximately $150,000. The document, entitled, FY 1984 Burden Hours for RCRA Land Disposal Permitting Standards is dated November 18, 1983.

The economic benefit component should be calculated using the formula set out in Section VII:

Economic Benefit = Avoided Costs (1-T) + (Delayed Costs x Interest Rate)

Failure to submit a complete Part B is a delayed cost. Company E eventually will spend the money in order to achieve compliance. No avoided costs are associated with this violation. The economic benefit should be calculated for a one year period. The IRS interest rate for 1983 is 13.5% (the average of 16% and 11%).

Economic Benefit = $0 + ($150,000 x 13.5%)
= $20,250

Penalty proposed in complaint = gravity-based penalty + economic benefit component
= $9,500 + $20,250
= $29,750

Because noncompliance continued over a period of several months, the proposed penalty does not exceed $25,000 per day of violation.

(E) **Settlement Adjustment:** At the settlement conference, Company E raised and documented that it was in a poor financial state and would be unable to pay the full penalty. Company E also told the Agency that it intended to cease handling hazardous waste. Because of the company's inability to pay, and because of the Agency's desire that Company E put what money it has into proper closure and post-closure care at its facility, the penalty was reduced to $5,000. A Compliance Order was issued putting Company E on a schedule for closing its facility in accordance with its approved closure plan.