UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 74
Date Signed: May 25, 1994

MEMORANDUM

SUBJECT: New Public Water System Supervision Program Settlement Penalty Policy

FROM: James R. Elder, Director
Office of Ground Water and Drinking Water

TO: Regional Water Management Division Directors
Regional Counsels

Attached is the Agency's new penalty policy to be used in establishing appropriate settlement penalties in the Public Water System Supervision Program. We wish to thank you and your staff for their comments on the May 1993 and earlier drafts of this policy. Those comments have been carefully considered and incorporated in the final policy.

This policy applies to all civil judicial actions and to all administrative complaints for penalties files or issued against public water systems after the effective date of this policy. In addition, this policy applies to all pending civil judicial actions in which the government has not yet transmitted to the defendant an oral or written proposed settlement penalty figure which has been approved by Agency Headquarters.

The effective date of this policy is May 25, 1994. This policy implements the Agency's Policy on Civil Penalties (#GM-21) and A Framework for Statute Specific Approaches to Penalty Assessments (#GM-22).

This penalty policy is intended to promote a more consistent, Agency-wide approach to calculation of settlement penalties in the Public Water System Supervision program. We believe that this penalty policy, when effectively applied, will promote the goals of improving recovery of the economic benefit of noncompliance, providing substantial deterrence for noncompliance, and providing fair and equitable treatment of the regulated community.

In the coming weeks, we will ensure that sample calculations are sent to you to provide guidance in performing calculations in accordance with this policy. We will also determine whether there is a need to conduct training workshops to provide further guidance on the application of this policy. In the interim, questions on the application of this policy may be directed to Andy Hudock at 202-501-6032 or David Hindin at 501-6004.

Attachment

cc: (w/attachment)
ORC Water Branch Chiefs
Regional PWSS Branch Chiefs
John Cruden, DOJ
Joel Gross, DOJ

U.S. Environmental Protection Agency
Public Water System Supervision Program Settlement Penalty Policy
for Civil Judicial Actions and Administrative Complaints for Penalties

Effective May 25, 1994

I. INTRODUCTION

This document sets forth the policy of the U.S. Environmental Protection Agency for establishing appropriate settlement penalties in civil judicial actions and in administrative complaints for penalties in the Public Water System Supervision (PWSS) Program. This policy applies to all civil judicial actions and to all administrative complaints for penalties initiated after the effective date of this policy, and to all pending civil judicial actions in which the government has not yet transmitted to the defendant an oral or written proposed settlement penalty figure which has been approved by Agency Headquarters. This policy provides, based on the circumstances of the case, the lowest penalty figure which the Federal Government is generally willing to accept in settlement; however, there may be circumstances so egregious that the Federal Government should instead seek the statutory maximum and should not even consider acceptance of a lower figure. This policy implements the Agency's Policy on Civil Penalties (#GM-21) and A Framework for Statute Specific Approaches to Penalty Assessments (#GM-22).

An appropriate penalty is one that accomplishes three objectives. First, it should deter violations of the law by placing the violator in a worse position financially than those in the regulated community who have complied in a timely fashion. Second, there must be fair and equitable treatment of the regulated community. Therefore., the penalty should be consistent with the Agency's penalty policy and promote a consistent and logical approach to the assessment of civil penalties, while allowing for factors unique to the PWSS Program. Third, the penalty should result in expeditious resolution of the identified problem(s). Such resolution can be achieved through an incentive, such as mitigating the penalty for supplemental environmental projects, or a disincentive, such as increasing the penalty figure for recalcitrance or for degree of willfulness if settlement negotiations are drawn out.

Penalty figures are calculated using several components which are based on the three objectives set forth above. The quantitative application of each of these components is described in detail in Section III of this policy.

II. STATUTORY BASIS

The Safe Drinking Water Act (SDWA) requires the Agency to protect public water supplies (PWSs). Part B of the SDWA requires EPA to promulgate National Primary Drinking Water Regulations (NPDWRs). Part D provides the Agency with the authority to deal with "emergencies" and Part E (among other things) provides the Agency with the authority to order monitoring and reporting for contaminants and conduct inspections. To promote effective enforcement of the NPDWRs, several sections of the SDWA grant civil penalty authority to the Agency. These sections are as follows:

PART B:

(a) **Section 1414(b)**: The court may, taking into account the seriousness of the violation, the population at risk, and other appropriate factors, impose on the violator a civil penalty not to exceed $25,000 for each day in which such violation occurs.

(b) **Section 1414(g)(3)**: Violation of an administrative order can result in a $5,000 maximum penalty assessed administratively; up to $25,000 per day of violation may be obtained in a civil action to enforce the order.

PART D:

(c) **Section 1431(b)**: The statutory maximum is $5,000 per day in a civil action for violation of an emergency order.

(d) **Section 1432(c)**: Tampering with a PWS carries a maximum civil penalty of $50,000; a maximum civil penalty of $20,000 can be imposed for an attempt or threat to tamper with a public water supply,

PART E:

(e) **Section 1445(c)**: The statutory maximum penalty is $25,000 in a civil judicial action for failing or refusing to keep appropriate records, make reports or conduct monitoring, or allow the Agency or the Comptroller General (or his or her representatives) to conduct any audits or inspections to assist in the development of regulations.

III. PENALTY CALCULATION

Development of a settlement penalty amount under this policy is a two-step process. First, the calculation includes computation of an economic benefit component and a gravity component, which incorporates the concepts of seriousness of the violation and population at risk. Then, this figure is adjusted using other components, such as degree of willfulness and/or negligence, history of noncompliance, litigation considerations, and ability to pay.

The result of these adjustments, within the constraints of the policy, is the lowest penalty figure which the Federal government is generally willing to accept in settlement, or in other words, the "bottom-line" penalty amount. In accordance with the Agency's Policy on Civil Penalties (#GM-21), this represents the penalty figure that is the minimum acceptable settlement in civil judicial actions and administrative penalty actions. As new or better information is obtained in the course of litigation or settlement negotiations, or if protracted litigation or settlement negotiations unduly extend the expected duration of the violation, this "bottom-line" penalty amount shall be adjusted further, either upward or downward, consistent with the various policy factors, and subject to concurrence by Headquarters.

The overall equation for the settlement penalty calculation under this policy is generally:

Penalty = economic benefit + (gravity x degree of negligence/willfulness x history of noncompliance) - litigation considerations = ability to pay.

Attachment I contains a worksheet to be used to calculate the settlement penalty.

As a general goal, the Agency should always seek a penalty that, at a minimum, recovers the economic benefit of noncompliance, plus some amount reflective of the gravity or seriousness of the violation. Legitimate litigation considerations or ability-to-pay considerations, however, may preclude that goal in some specific instances. However, regardless of calculations, as a matter of policy, in no instances shall the "bottom-line" settlement penalty be less than $1,000 in administrative cases and $5,000 in civil judicial cases.

If the calculated "bottom-line" settlement penalty amount exceeds the maximum penalty that can be obtained administratively, the Agency shall instead proceed judicially. In rare circumstances, the calculated "bottom-line" settlement penalty in civil judicial cases may exceed the statutory maximum; in such circumstances, the statutory maximum penalty will serve as the new "bottom-line" penalty.

A. Economic Benefit

PWSs that violate the SDWA are likely to have obtained an economic benefit or savings as a result of expenditures that were delayed or completely avoided during the period of noncompliance. In calculating economic benefit in a PWSS Program case, one must consider the amount of money saved by avoiding or delaying expenditures such as, but not limited to:

- Sampling and analysis (including laboratory, fees. cost of mailing samples, and the cost of the operator's time to take the samples);
- Capital equipment improvements or repairs, including engineering design, purchase, installation, and replacement;
- Public notifications, including printing and mailing;
- Operation and maintenance expenses and other annual expenses;
- One-time acquisitions (such as land purchase); and
- Development and implementation of a source water protection program.

The Agency's standard method for calculating the economic benefit of delayed and avoided pollution control expenditures is through the use of the Agency's BEN model. Please refer to the "BEN User's Manual (Office of Enforcement, December 1993, or any subsequent revision) for specific information on the operation of BEN. In some circumstances, it may be

necessary to perform a series of BEN runs in order to better account for different types of violations involving different avoided costs occurring over different periods of noncompliance.

The standard BEN model may not be appropriate in situations in which the violator is a privately-owned regulated utility. The Agency is exploring the possibility of developing a. separate benefit model to estimate the savings that a regulated utility may have obtained by delaying compliance expenditures. In the interim, a privately-owned regulated utility's economic benefit may be computed through a profit analysis specific to the particular utility. A profit analysis can be performed by financial consultants available to the Agency.

B. Gravity Component

The gravity component includes two factors which are quantified and then multiplied together for each type of violation: 1) a factor related to the seriousness of the violation, in terms of actual or potential harm to human health; and 2) a factor related to population exposure, which reflects the extent of time that the service population was subjected to actual or potential risk due to noncompliance. The gravity component must be at least $1,000 for all PWSS, in order for the penalty to have some deterrence value in addition to just recapturing economic benefit.[1]

The gravity factor related to the seriousness of the violation is selected separately for each type of violation. In Attachment 2, violations by type are listed in priority order (from highest, with a corresponding factor of 2.5, to lowest, with a corresponding factor of 1. 1) based on actual or potential impact on human health. The current significant noncompliance (SNC) definition is incorporated into these types. If the maximum contaminant level (MCL) and the SNC level are the same numerical values for a particular contaminant, the gravity factor chosen shall correspond to the higher violation level, based on Attachment 2.

These gravity seriousness factors represent only the minimum factors that should be used; the Agency may choose to use higher factors in some circumstances. For example, if the violator has monitoring or reporting (M/R) violations and has a past history of MCL violations for those same contaminants, those M/R violations are considered as if they were MCL

[1] EPA should be particularly firm in calculating the gravity component for violations of orders issued under, or civil cases filed under §1431 of the SDWA (e.g., the emergency provisions). Because §1431 actions address “imminent and substantial endangerment” to human health, EPA should respond swiftly and severely. In civil judicial cases where the water system owner/operator violated a §1431 order, the gravity shall reflect the seriousness of the violation. The maximum statutory penalty is $5,000 in a civil judicial action for violation of the emergency order itself. If, however, the §1431 order was issued in response to violations of the NPDWRS, and if the Region determines that a higher penalty is more appropriate, then the Region could choose to prove these underlying violations and could assess a penalty of up to $25,000 per day per violation in a civil judicial action taken under §1414 and/or §1431. For guidance on using §1431 authorities, please refer to the "Final Guidance on Emergency Authority under Section 1431 of the Safe Drinking Water Act, dated September 27, 1991 (PWSS Water Supply guidance # 87).

violations for the purposes of this settlement penalty calculation. If the violator has not sampled for those contaminants as required, and therefore does not have a demonstrated history of compliance for those contaminants, these M/R violations should be considered more serious and should be considered as MCL violations, for the purposes of this penalty calculation. (Note that continued M/R violations would generally make the. violator an M/R significant noncomplier (SNC) by definition, increasing the associated gravity seriousness factor, as shown in Attachment 2.)

In calculating the gravity factor related to the population exposure, the number of years in violation (computed separately for each type of violation as the number of months divided by twelve) is multiplied by the population served by the water system in violation.[2] For example, for a water system in violation of one requirement for one contaminant for 18 months and serving 5000 people, the gravity component related to population exposure would be $7,500 (i.e., [5,000](18/12]). (For the purposes of this part of the calculation only, the Agency may choose to use the population served at the time of the violation, rather than the current population served.) The gravity factor related to the seriousness of the violation is then multiplied by the gravity factor related to population exposure to determine the actual total gravity portion of the penalty for each type of violation. The gravity components for each type of violation are then added to determine the total gravity portion of the penalty.

C. Adjustment Components

After the economic benefit and gravity components are calculated, these amounts may be modified according to several adjustment components. Adjustment components address the following four concerns: degree of willfulness and/or negligence, history of noncompliance, litigation considerations, and ability to pay. Adjustment components for the degree of willfulness and/or negligence and for history of noncompliance are applied only to the gravity component; adjustment components for litigation considerations and for ability to pay are applied to the entire penalty amount, In general, adjustment components can either increase or decrease the penalty. The penalty calculation worksheet in Attachment I incorporates the range of possible values for each of these adjustment components, as discussed below.

1. Degree of Willfulness and/or Negligence: Ignorance of the law or regulation is not a reason to reduce a penalty. Therefore, the "sophistication" of the violator would only serve to increase the penalty. Given the relatively ample resources and personnel of the larger water systems, this adjustment component should be frequently applied to large water systems, but it could well apply to smaller systems too.

[2] In computing the duration of noncompliance for M/R violations, for the settlement penalty calculation, estimate the length of time that monitoring has been and will be delayed or avoided, starting from the last day of the compliance period, or, if applicable, from the date specified in an order or consent decree.

In assessing the degree of willfulness and/or negligence of the water system operator/owner, all persons are expected to comply completely with applicable requirements. If a violator has shown disregard for regulations and has been uncooperative with the Agency and/or the State in its efforts to return the system to compliance, the Agency uses this component to increase the penalty by up to 100% of the gravity component. However, if the violator has been only mildly uncooperative, the penalty will be increased by a smaller amount, reflecting the degree of cooperation. Therefore, this factor, if appropriate, could increase the gravity component by 1% to 100%, by multiplying the gravity by a factor between 1.01 and 2.00. Otherwise, this factor remains at 1.00.

2. History of Noncompliance: The history of noncompliance of the violator must be considered in setting a penalty. The Agency must consider whether any enforcement actions had previously been taken by the Agency or by the State against the water system for violations within the past five years, and whether the violator returned to compliance in. response to those enforcement actions. Other considerations could include similarity of current violations to previous violation(s), how recent any previous violations were, the number of previous violations, and the violators responsiveness to addressing these violations.

This factor increases the total gravity by between 10% and 30% for <u>each</u> enforcement action against this violator as follows:

10% for each notice of violation or equivalent action;
20% for each administrative order or equivalent action; and
30% for each emergency order, complaint for penalties, or equivalent action.

Further, if the violator has a history of previous violations and an absence of ensuing enforcement actions, this factor is set at 20%. Even if the enforcement actions address the same violations, this factor is still applied for each enforcement action. This factor is applied regardless of whether enforcement actions are taken by States or by EPA, and regardless of distinctions among types of administrative orders (e.g., "boil-water" orders or consent orders).

As an example of the correct application of factors for history of noncompliance, consider a system which has been issued a notice of violation and two administrative orders in the past five years. The adjustment to the gravity component of the penalty for history of noncompliance equals: 1. 10 (for the notice of violation) x 1.20 x 1.20 (for the two administrative orders). In this example, the gravity component would be multiplied by this total adjustment or l.58 (1.10 x 1.20 x 1.20) for history of noncompliance, and also multiplied by the adjustment factor for degree of willfulness/negligence in order to obtain the adjusted gravity component.

3. Litigation Considerations: Some enforcement cases may have weaknesses or equitable problems that may persuade a court to assess a penalty less than the statutory maximum amount The simple existence of weaknesses in a case, however, should not automatically result in a litigation consideration reduction of the preliminary penalty amount (i.e., economic benefit + gravity + adjustments for willfulness and history of noncompliance). The government should evaluate every penalty with a view toward the potential for protracted litigation and attempt to

ascertain the maximum civil penalty the court is likely to award if the case proceeds to trial. The basic rule for litigation considerations is that the government may reduce the amount of the civil penalty it will accept at settlement to reflect these considerations (i.e., weaknesses or equitable issues) where the facts demonstrate a substantial likelihood that the government will not achieve a higher penalty at trial.

Because the settlement penalty is meant to represent a reasonable compromise of EPAs claim for the statutory maximum, before making a settlement offer, EPA must determine the statutory maximum penalty and estimate how large a penalty the government might obtain if the case were to proceed to trial. Given the limited number of judicial opinions on the issue of penalties in cases involving PWSS, Agency legal staff must use their best professional judgment in determining what penalty a court might assess in the case at hand. Any adjustments for litigation considerations must be taken on a factual basis specific to the case.

Although there is no universal list of litigation considerations, there is a list of factors that should be considered in evaluating whether the preliminary settlement penalty exceeds the penalty the Agency would likely obtain at trial. Potential litigation considerations could include:

a. Known problems with the government's evidence proving liability or supporting a civil penalty;

b. The credibility, reliability, and availability of witnesses;[3]

c. The informed, expressed opinion of the judge assigned to the case (or person appointed by the judge to mediate the dispute), after evaluating the merits of the case.[4]

d. The record of the judge in any case presenting similar environmental issues. (In contrast, the reputation of the judge, or the judge's general demeanor, without a specific penalty or legal statement on a similar case, is rarely sufficient as a litigation consideration.)

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[3] The credibility and reliability of witnesses relates to their demeanor, reputation, truthfulness, and impeachability. For instance, if a government witness has made statements significantly contradictory to the position he is to support at trial, his credibility may be impeached by the respondent or defendant. The availability of a witness will affect the settlement bottom-line if the witness cannot be produced at trial. The inconvenience or expense of producing the witness at trial is not a litigation consideration and therefore, should not affect the bottom-line penalty.

[4] This factor should not be applied in anticipation of arguments, or at the stage of initial referral. The Agency should not be unduly influenced by taking at face value what a judge attempting to encourage a settlement might say.

e. Statements made by Federal, State or local regulators that the respondent or defendant may credibly argue led it to believe it was complying with the Federal law under which EPA is seeking penalties.

f. The payment by the defendant of civil penalties for the same violations in a case brought by another plaintiff.[5]

g. The development of new, relevant case law.[6]

h. A blend of troublesome facts and weak legal positions such that the Agency faces a significant risk of obtaining a negative precedent at trial of national significance.

In evaluating the list of possible litigation considerations set forth above, the Region shall evaluate each consideration for the impact it is likely to have on the Agency's ability to obtain a trial penalty in excess of the "bottom-line" penalty amount. The application of litigation considerations before a complaint is filed would usually be premature, because at that time the Agency generally does not have enough information to fully evaluate litigation risk. Reductions for litigation considerations are more likely to be appropriate after the Agency obtains an informed view, through discovery and settlement activities, of the weaknesses in its case and how the specific court views penalties in the case.

The Agency recognizes that this evaluation of litigation considerations often reflects subjective legal opinions. Thus, except as discussed below in instances in which a special litigation consideration for non-profit entities may apply, a Regional office may reduce the penalty by up to one-third of the adjusted gravity amount (after adjustments for degree of willfulness and/or negligence and adjustments for history of noncompliance) for litigation considerations without Headquarters approval. Of course, this reduction must be clearly explained in the settlement case file.

In evaluating possible litigation considerations, Agency staff should recognize that litigation considerations do not include:

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[5] If the defendant has previously paid civil penalties for the same violations to another plaintiff, this factor may be used to reduce the amount of the settlement penalty by no more than the amount previously paid for the same violations. Because a violator is generally liable to more than one plaintiff, the prior payment of a civil penalty should not generally result in a dollar-for-dollar reduction of the Agency penalty settlement amount. If the previous case included other violations, only a portion of the penalty already paid should be considered in reducing the penalty in the case at hand.

[6] Between the time the Region initiates or refers a case, new case law relating to liability or penalty assessment may affect the strength of the Agency's legal arguments. In that circumstance, the Region may apply litigation considerations to adjust its initial penalty settlement figure. Of course, favorable new case law would be used to bolster the preliminary settlement amount.

a. The Region's desire to minimize the resource investment in the case.

b. A generalized goal (in opposition to established Agency policies) to avoid litigation or to avoid potential precedential areas of the law.[7]

c. A duplicative statement of elements included or assumed elsewhere in the Penalty Policy, such as inability to pay, "good faith" or a "lack of willfulness" by a respondent or defendant.

d. Off-the-record statements by the court, before it has had a chance to evaluate the specific merits of the case, that large penalties are not appropriate, are generally, by themselves, not a reason to reduce the preliminary settlement penalty amount.

e. By itself, the failure of a regulatory agency to initiate a timely enforcement action is not a litigation consideration.

Cases in which the owner of the PWS is a non-profit entity, such as a municipality, may involve special litigation considerations because of the perceived reluctance of some Federal courts to order non-profit entities to pay very large penalty amounts to the Federal Treasury. In these cases in which the penalty amount is extremely large relative to the size of the municipality, the Agency may elect to reduce the penalty, based on a "per capita" national litigation consideration. This litigation consideration, to be used only in actions involving non-profit entities, is calculated as follows:

Step 1. Calculate the product of the service population multiplied by $2 per person, times the total number of months in which any violation occurred in the past five years (without "double-counting" months, up to a maximum of 60 months), divided by 12.

Step 2. If this product is greater than the preliminary penalty amount (calculated as economic benefit + [gravity x adjustments for willfulness and history of noncompliance]) then this litigation consideration does not apply and the preliminary penalty amount remains unchanged.

Step 3. If the product calculated in step 1 (above) is less than the preliminary penalty amount (as defined in step 2 above), calculate the difference between the preliminary penalty amount and the product. Next, take 10% of that difference and add it to the product, thus computing the adjusted penalty amount.

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[7] There are times when the Agency and the Department should fully litigate a civil or criminal case as it may create a beneficial precedent for the Federal government. An example is U.S. v . Midway Heights County Water District (695 F. Supp. 1072, 1076, E.D. Cal. 1988), in which the court found that 1) the definition of human consumption extends beyond just ingestion and is broader than merely whether the service population drinks the water, and 2) the presence of organisms that were accepted indicators of the potential for the spread of serious disease presented an imminent (and substantial) endangerment, regardless of whether actual illnesses had been reported.

This calculation may be simplified and represented as:

$$A = (0.9 \times B) + (0.1 \times C)$$

where A represents the adjusted penalty (not just the deduction for litigation considerations) after applying this "per capita' national litigation consideration, B represents the product calculated in step 1, and, C represents the preliminary penalty amount (calculated as economic benefit + [gravity x adjustments for willfulness and history of noncompliance]).

This special litigation consideration may only be used for non-profit entities, and, even then, only if the preliminary penalty amount (as defined above) is more than the product calculated in step 1. This litigation consideration may be taken before the complaint is filed.[8] If this special litigation consideration is used, any additional penalty reductions must be justified by compelling and extraordinary litigation problems or demonstrated financial inability to pay and receive prior approval from Headquarters. If this special litigation consideration for non-profit entities is used, the Region may not also reduce the penalty by up to one-third of the adjusted gravity amount (including adjustments for degree of willfulness and/or negligence and adjustments for history of noncompliance) for litigation considerations without Headquarters approval. Further, supplemental environmental projects (SEPS) shall not be used to reduce the cash penalty below the amount calculated according to this special litigation consideration.

4. Ability to Pay: The Agency typically does not request penalties/settlements clearly beyond the means of the violator. The ability-to-pay adjustment component reduces the penalty to the highest penalty amount that the violator can reasonably pay and still provide safe drinking water to its customers.

An adjustment for ability-to-pay may only be made if the violator demonstrates and documents that it has and will continue to have insufficient economic resources to pay the calculated penalty. The violator must submit the necessary information demonstrating actual inability to pay as opposed to unwillingness to pay. If the violator is unwilling to cooperate in demonstrating an inability to pay the penalty, this adjustment should not be considered in the penalty calculation, because, without the cooperation of the violator, the Agency will generally not have adequate information to determine accurately the financial position of the violator.

At a minimum, the owner of a privately-owned water system should provide Federal tax returns from the previous three years and should submit a list of assets and liabilities. This list of assets and liabilities generally gives a truer picture of the violator's financial assets than do tax returns. In addition, the violator can be required to provide a certified financial statement prepared by a certified public accountant.

Municipal water systems do not submit Federal tax returns, but can submit documents pertaining to the financial health of the community, such as bond ratings, median income of residents, unemployment rate, user fees, and other socioeconomic indicators. The government

[8] This national generic litigation consideration may be removed based on changes in the Act, settlements, or case law.

should carefully assess the accuracy of the actual or anticipated claim of inability-to-pay. Evaluation by an outside expert or consultant may be necessary to fully evaluate the claim.

If the violator demonstrates an inability to pay the entire negotiated penalty in one lump sum (usually within 30 days of consent decree entry), a payment schedule should be considered. The penalty could be paid in scheduled installments with appropriate interest accruing to delayed payments. Appropriate interest for a privately-owned PWS would be at least the existing prime interest rate; for a municipal PWS, the appropriate interest rate would be at least equal to that municipality's prevailing bond rate. The period allowed for such installment payments should generally not extend beyond three years from the date of entry of the settlement or the issuance of the final complaint for penalties.

If a payment schedule will not resolve the violator's ability-to-pay issue, as a last recourse, the Agency can reduce the amount it seeks in settlement to a more appropriate amount in situations in which inability-to-pay can be clearly documented and reasonably quantified.

IV. SUPPLEMENTAL ENVIRONMENTAL PROJECTS (SEPS)

According to Agency policy,[9] where the Agency has legal authority, violators may perform environmentally beneficial projects in exchange for receiving a smaller settlement penalty. In order for a violator to receive a penalty reduction in exchange for performing such a project, the Agency's SEP Policy, requires, *inter alia* that the project constitutes actions that go beyond compliance (and which otherwise are not legally required) and, improves the injured environment or reduces the total risk posed to public health or the environment by the violations. If such projects are used, the provisions of the settlement must ensure that the project is completed as expected, and that the designated funds for the project are expended.

Any penalty action that has the total cash payment amount reduced by inclusion of such a SEP must be approved by the Office of Enforcement. The maximum penalty reduction for a SEP shall not exceed the after-tax -net present value of the SEP.

Although SEPs help to fulfill EPA's goal of protecting and restoring the environment, the existing Agency policy requires the assessment of a substantial monetary penalty in addition to any SEP. A substantial monetary penalty is one that recaptures the violator's economic benefit of noncompliance plus some appreciable (i.e., non-trivial) portion of the gravity component.

Evaluation as to whether particular types of SEPs are acceptable should be performed based on the specifics of a particular case. The following are examples of such projects:

- Pollution Prevention Projects. Pollution prevention projects would serve to greatly reduce contamination of ground or surface water supplies in the surrounding community and therefore enhance public health by improving the

[9] See EPA Policy on the Use of Supplemental Environmental Projects in Enforcement Settlements, transmitted on February 12, 1991 by the Assistant Administrator for Enforcement, or subsequent revisions.

quality of drinking water. Source water protection programs and wellhead protection programs are examples of pollution prevention projects (and are possible SEPS, if the public water system is not otherwise required to implement the protection program).

- Pollution Reduction Projects: These projects could involve enhanced treatment, or earlier or increased monitoring for certain pollutants by the violator, beyond measures required to come into compliance. For example, the. water system owner/operator could start sampling for contaminants which are either in the process of being regulated or not regulated (e.g., Phase VIb contaminants).

V. PLEADING – Other Types of Penalties

This policy only establishes how the Agency calculates the minimum penalty for which it would be willing to settle a case. The development of the penalty amount to plead in an administrative or judicial complaint is developed independent of this policy except to the extent the Agency may not seek a settlement penalty in excess of the statutory maximum penalty it is seeking in the complaint. Further, at trial the Agency will seek a penalty based on the statutory maximum and the penalty factors which the court is instructed to consider. Of course, the Agency will not use this settlement Penalty Policy in arguing for a penalty at trial or in an administrative penalty hearing. In pleading for penalties in civil or administrative complaints, please refer to guidance by the Office of Enforcement regarding the distinctions among pleading, negotiating, and litigating civil penalties for enforcement cases.[10] Although the 'aforementioned guidance was written for cases brought under the Clean Water Act, it is also useful in Safe Drinking Water Act actions.

VI. DOCUMENTATION AND RELEASE OF INFORMATION

Each component of the settlement penalty calculation (including adjustments) must be clearly documented with supporting materials and written explanations in the case file and provided to Headquarters for review and approval as required. Any subsequent

recalculations of the penalty based on new information must also be included in the file.

Documentation and explanations of a particular settlement penalty calculation constitute confidential information that is exempt from disclosure under the Freedom of Information Act, is outside the scope of discovery, and is protected by various privileges, 'including the attorney-client privilege and the attorney work-product privilege. While individual settlement penalty calculations are confidential documents, this penalty policy is a public document and may be released to anyone upon request. - Further, as part of settlement negotiations between the parties,

[10] See *Guidance on the Distinctions Among Pleading, Negotiating, and Litigating Civil Penalties for Enforcement Cases Under the Clean Water Act*, OECM/OW, January 19, 1989.

the Agency may choose to release parts of the case-specific settlement calculations. The release of such informa6on may only be used for settlement negotiations in the case at hand and, of course-, may not be admitted into evidence in a trial or hearing.

This policy is purely for the use of U.S. EPA enforcement personnel in settling cases. EPA reserves the right to change this policy at any time, without prior notice, or to act at variance to this policy. This policy does not create any rights, implied or otherwise, in any third parties.

ATTACHMENT 1
PWSS SETTLEMENT PENALTY CALCULATION WORKSHEET

INSTRUCTIONS: For each type of violation (see Attachment 2) to be alleged in the administrative or Judicial complaint calculate the statutory maximum penalty, the economic benefit and gravity and record the results in Part A of the worksheet. Complete a separate Part A worksheet for each type of violation, then complete Part B.

NAME OF CASE: _____

COMPLETED BY: _____ Date Completed: _____

PART A

IDENTIFY VIOLATION TYPE:	
1. STATUTORY MAXIMUM PENALTY FOR THIS VIOLATION TYPE	
a. Length of violation (in days)	
b. Penalty Amount (see II. Statutory Basis in text of Policy for amounts)	
c. Maximum Penalty (line 1.a x line 1.b if not administrative)	
2. ECONOMIC BENEFIT FOR THIS VIOLATION TYPE (attach BEN computer model printouts or other documentation)	
3. GRAVITY FOR THIS VIOLATION TYPE	
a. Gravity factor amount (from Attachment 2 Types of Violations)	
b. Service population	
c. Months in violation (_____) divided by 12	
d. Gravity Component: Line 3.a x line 3.b x line 3.c	
4. ECONOMIC BENEFIT + GRAVITY COMPONENT SUM (line 2 + line 3.d)	

ATTACHMENT 1
PWS PENALTY CALCULATION WORKSHEET

PART B

5. TOTAL ECONOMIC BENEFIT + GRAVITY (Sum of amounts in line 4 for each violation type from all Part A worksheets)	
6. ADJUSTMENT FACTORS	
a. Degree of Willfulness/Negligence factor (Select a factor value between 1.0 and 2.0)	
b. Willfulness/Negligence Amount (line 5 x line 6.a)	
c. History of Noncompliance factor (Select factor value between 1.0 and 2.0 based on number of prior enforcement actions)	
d. History of Noncompliance Amount (line 5 x line 6c)	
e. Total of Upward Adjustment Factors (line 6.d x line 6.b)	
7. PRELIMINARY PENALTY AMOUNT (line 5 + line 6.e)	
8. LITIGATION CONSIDERATION REDUCTION AMOUNT Attach legal explanation to justify any reduction on separate sheet.	
9. ABILITY TO PAY REDUCTION AMOUNT Attach financial analysis to justify any reduction	
10. CREDIT AMOUNT FOR ANY SEPS Amount may not exceed after-tax present value of project(s)	
11. **BOTTOM-LINE CASH SETTLEMENT PENALTY AMOUNT** Line 7 - (line 8 + line 9 + line 10)	

ATTACHMENT 2
TYPES OF VIOLATION

TYPE OF VIOLATION	GRAVITY FACTOR
Violation of section 1431 order	2.5
TCR SNC violation	2.4
Violation of section 1414 order	2.4
TCR acute MCL violation (fecal coliform present)	2.3
Nitrate MCL violation	2.2
Violation of Short Term Acceptable Risk level (e.g., chem/rad SNC)	2.1
Total coliform rule MCL (fecal coliform not present)	2.0
Turbidity MCL violation	1.9
SWTR violation	1.8
Lead/copper SNC violation	1.8
Lead/copper treatment technique violation (excluding SNC type violation)	1.7
Non-SNC MCLs (except for bacteria, turbidity, nitrate)	1.6
Monitoring or reporting SNC violations (other than total coliform rule)	2 6
Failure to do public notification for any type of violation	1.5
Monitoring or reporting violations for SWTR	1.4
Monitoring or reporting violations for total coliform rule	1.4
Monitoring or reporting violations for nitrate	1.3
Monitoring or reporting violations for other acute contaminants (other than bacteria, turbidity and nitrate)	1.2
Monitoring or reporting violations for “chronic” contaminants	1.1