



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

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OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: New Clean Water Act Civil Penalty Policy

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TO: General Counsel
Regional Administrators
Regional Counsels
Regional Water Management Division Directors

Attached is the Agency's new Clean Water Act civil penalty policy to be used by EPA in calculating the penalty that the Federal government will seek in settlement of judicial actions brought under Section 309 of the CWA. This policy supersedes the CWA Civil Penalty Policy issued on July 8, 1980 and represents the Office of Water's guidance in response to EPA's Policy on Civil Penalties (GM-21) and A Framework for Statute-Specific Approaches to Penalty Assessments (GM-22) issued on February 16, 1984. This policy is effective as of the date of this memorandum and shall be applied to future enforcement actions and to pending enforcement actions in which the government has not transmitted to the defendant a proposed settlement penalty.

The attached document consists of the following three parts: (1) the CWA Penalty Policy; (2) the policy "methodology", which is a one-page description of each of the steps to be taken in a penalty calculation, along with one page of footnotes; and (3) the "worksheet", a proposed model sheet to be used to record the different numerical components of the final penalty.

This penalty policy is designed to promote a more consistent, Agency-wide approach to the assessment of civil penalties while allowing substantial flexibility for individual cases within certain guidelines. We believe that this penalty policy, when effectively applied, will promote the goals of increasing

recovery of economic benefit of non-compliance, providing substantial deterrence to noncompliance, providing a more fair and equitable treatment of the regulated community, and achieving a more swift resolution of environmental problems and of enforcement actions. In order to support the goals of this policy and EPA's enforcement efforts generally, application of this policy may result in EPA seeking higher civil penalties than it has in the past.

This CWA penalty policy tracks the basic concepts and procedures embodied in the general penalty policy and Framework. For example, the CWA policy directs the Regions to calculate the economic benefit of noncompliance, calculate the "gravity" (or seriousness) component, and then calculate adjustments to consider ability to pay, litigation factors, and other factors.

This policy includes the following minor deviations from the general penalty policy and the Framework which we believe, based upon our past experience with Clean Water Act enforcement, are reasonable:

(1) The first adjustment factor is "History of Recalcitrance." We believe that this factor should only result in an increase in the proposed penalty amount;

(2) The remaining two adjustment factors ("Ability to Pay" and "Litigation Considerations") should only be used to reduce the proposed penalty;

(3) A proposed section on "mitigation projects" has been included, although the Department of Justice and the Agency may make some additional refinements on this issue in the near future; and

(4) The economic benefit component will not be deleted merely because the component involves an "insignificant amount."

Substantial thanks are due to the Clean Water Act Penalty Policy Work Group for an excellent job in developing an initial draft, collecting comments, carefully considering all comments, and reconciling and balancing often disparate viewpoints regarding penalty assessment. Thanks also to staff in the Regional Offices and in a number of Headquarters offices and the Department of Justice for considerable assistance in providing review and comment on drafts.

During the upcoming months, we will carefully analyze and evaluate the application and effectiveness of this penalty policy. After that, we will issue appropriate refinements to the policy.

In the near future, we will publish the policy in the Federal Register. In addition, we will soon distribute some example calculations and hold training workshops to provide further guidance on the application of this policy.

If you have any questions or comments on this policy, please contact Anne Lassiter, at 475-8307, or Jack Winder, at 382-2879.

Attachment

cc: Clean Water Act Penalty Policy Work Group
Associate Enforcement Counsel for Water
OECM Office Directors
OW Office Directors
Department of Justice, Environmental Enforcement



CLEAN WATER ACT

PENALTY POLICY FOR CIVIL SETTLEMENT NEGOTIATIONS

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

EFFECTIVE DATE: 2-11-86



Clean Water Act
Penalty Policy for Civil Settlement Negotiations

I. Introduction

Under Section 309 of the Clean water Act (CWA), the Administrator is authorized to bring civil actions to enforce certain requirements of the Act and related regulations. In such actions, the Administrator may seek a civil penalty not to exceed \$10,000 "per day of such violation." The Agency will vigorously pursue penalty assessments in judicial actions to ensure deterrence and to recover appropriate penalties.

In order to guide settlement negotiations on the penalty issue in actions under Section 309 of the CWA and Section 113 of the Clean Air Act for failure to meet statutory deadlines, the Agency issued a Civil Penalty Policy on July 8, 1980. During the next few years, the Agency identified the following four goals for improving its civil penalty assessment practices: (1) penalties should, at a minimum, recover the economic benefit of noncompliance; (2) penalties should be large enough to deter noncompliance; (3) penalties should be more consistent throughout the country in an effort to provide fair and equitable treatment to the regulated community; and (4) there should be a logical basis for the calculation of civil penalties for all types of violations, industrial and municipal, to promote a more swift resolution of environmental problems and of enforcement actions.

In an effort to address these and related penalty issues, on February 16, 1984, the EPA Office of Enforcement and Compliance Monitoring (OECM) issued the following two civil penalty guidance documents: The Policy on Civil Penalties (# GM-21), and the companion document entitled A Framework for Statute-Specific Approaches to Penalty Assessments, (# GM-22), as general guidance for settlements for violations of all statutes which EPA enforces. Although the 1984 penalty policy documents do provide basic conceptual guidance for penalty calculations, they were designed to be implemented further through medium-specific penalty guidance. The "Policy" document states in part, as follows:

Each EPA program office, in a joint effort with [OECM], will revise existing policies, or write new policies as needed. These policies will guide the assessment of penalties under each statute in a manner consistent with this document and, to the extent reasonable, the accompanying Framework. [Policy, at 1, 2]

II. Purpose

This penalty policy and attached methodology is the water-specific penalty guidance for certain CWA violations. This policy follows the major principles set out in the general penalty policy documents and also reflects considerations unique to CWA enforcement.

As the Framework directs, this CWA Penalty Policy provides "a system for quantifying the gravity of violations of the laws and regulations" Moreover, this policy provides a logical structure and a number of different ways (number of violations, duration, etc.) to quantify the severity of a defendant's noncompliance with the CWA. The policy also provides a number of ranges of weighting factors in order to allow the Regions flexibility in exercising their experienced judgment.

The calculated penalty figure should represent a reasonable and defensible penalty which the Agency believes it can and should obtain in a settlement in compromise of its claim for the statutory maximum penalty. This figure, and a discussion of the basis of calculation, must be included in all litigation reports. After referral, as more information becomes available, the penalty calculation should be modified to reflect relevant, new information. In those cases which proceed to trial, the government should seek a penalty higher than that for which the government was willing to settle, reflecting considerations such as continuing noncompliance and the extra burden placed on the government by protracted litigation.

III. Applicability

This penalty policy applies to Federal CWA civil judicial enforcement actions commenced after the effective date of this policy and to pending judicial enforcement cases in which the government has not transmitted to the defendant an approved oral or written proposed penalty. The policy applies to civil penalties sought under CWA Section 309 for violations including the following: violations of NPDES permits by industrial and municipal facilities; discharges without an NPDES permit; violations of general and categorical pretreatment requirements and local limits; monitoring and reporting violations; violations of Section 405 sludge use or disposal requirements; etc. The policy also applies to violations of Section 308 information requests and to violations of Section 309 administrative orders. This policy shall not be applied to CWA civil enforcement actions brought exclusively under §311 ("hazardous substance spills") or for violations related to requirements in §404 (disposal of "dredged or fill" material). The CWA and implementing regulations provide unique enforcement procedures and penalty provisions for §311 and §404 violations which are currently being followed in pursuing these types of cases.

IV. Penalty Calculation Methodology

The initial calculation shall be an estimate of the statutory maximum penalty in order, for comparison purposes, to determine the potential maximum penalty liability of the defendant. The penalty which the government seeks in settlement may not exceed this statutory maximum amount.

The Regional office shall then calculate a civil penalty figure for settlement purposes based upon the following formula: "Civil Penalty = (Economic Benefit Component) + (Gravity Component) +/- (Adjustments)."

The civil penalty settlement calculation involves the following four consecutive steps: (1) calculate the "Economic Benefit" of noncompliance; (2) calculate the monthly and total "Gravity Components"; (3) calculate the "Adjustment Factors"; and (4) calculate the total penalty.

(1) Economic Benefit. Consistent with the Agency-wide "Policy and Framework", every reasonable effort shall be made to calculate and recover the economic benefit of noncompliance. Note that the economic benefit should be calculated from the start of noncompliance up to the point when the facility was or will be in compliance. In a limited number of cases, based upon a defendant's inability to pay or "litigation practicalities", application of the "adjustment factors" may justify recovery of less than the calculated economic benefit. The economic benefit component shall be calculated by using the EPA computer program -- "BEN." This program produces an estimate of the economic benefit of delayed compliance, which is calculated to be the sum of the net present value of: delayed capital investment, one-time, non-depreciable expenditures, and avoided operating and maintenance expenses. (See "BEN Users Manual," OPPE/OECM, January 1985.)

(2) Gravity Component. The gravity calculation methodology is based upon a logical scheme and criteria which relate the gravity of the violations to the Clean Water Act and its regulatory scheme. Every reasonable effort should be made to calculate and recover a "gravity component" in addition to the economic benefit component. As the penalty Policy states:

The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if [he] had obeyed the law. [Policy, at 3]

The following four gravity weighting factors should be considered for each month during which there was one or more violations and assigned values according to the attached "CWA Penalty Policy Calculation Methodology":

"A" -- "Significance of Violation." This factor is to reflect the degree of the exceedance of the most significant effluent limitation violation each month, and is weighted more heavily for exceedances of toxic effluent limitations. The attached outline contains a table indicating the range of "significance of violation" factor values for exceedances of effluent limitations (% over permit effluent limitation). Note that all exceedances, and all other violations of permit conditions in a given month, should be accounted for under gravity weighting factor "C" - "Number of Violations."

"B" -- "Health and Environmental Harm." A value between 1 and a value that results in the statutory maximum penalty may be applied to each month in which one or more violations present actual or potential harm to human health or to the environment.

"C" -- "Number of Violations." This factor allows consideration of the total number of violations each month, including all violations of permit effluent limitations, monitoring and reporting requirements, and standard and special conditions. It is important to account for each violation in assessing the significance of a defendant's violations, and this factor allows for flexibility in assessing penalties for multiple violations. Violation of a monthly average effluent limitation should be counted as 30 violations, a weekly average effluent limitation violation should be counted as 7 violations, violations of different parameters at the same outfall are to be counted separately, and violations at different outfalls are to be counted separately. The attached outline contains a range of weighting factor values between 0 and 5 to account for the total number of violations. In addition, this "number of violations" factor may be weighted more heavily to account for serious or significant violations other than the most significant effluent limit violation which was accounted for under factor "A."

"D" -- "Duration of Noncompliance." This factor allows consideration of continuing, long-term violations of an effluent limitation or other permit condition, and for extended periods of discharge without a permit. The attached outline contains a range of values between 0 and 5 for the "Duration of Noncompliance" factor which should be applied to each month of continuing violation of the same requirement. Generally, "long-term" violations are those which continue for three or more consecutive months.

The gravity component should be calculated from the date on which the violations at issue began up to the date when the violations ceased or the date of anticipated filing of the enforcement action. The monthly gravity component is the sum of the gravity weighting factors, plus one, multiplied by \$1,000. The total gravity component is the sum of all monthly gravity components.

(3) Adjustment Factors. After the economic benefit component is added to the sum of all the "monthly gravity components," this total may be modified by the application of "adjustment factors." The consideration of "history of recalcitrance" may only result in an increased penalty. In addition, in some cases and when justified in writing, the following two factors may be applied for a penalty reduction: ability to pay and litigation considerations.

(A) History of recalcitrance (to increase penalty). The "recalcitrance" factor will allow for higher penalties for bad faith, unjustified delay in preventing, correcting or mitigating violations, violations of prior administrative orders or consent decrees, failure to provide timely and full information, etc. This factor should also be used to account for the relationship of the violations to the regulatory scheme, i.e. the significance of the recalcitrance. For example, higher values for this factor may be used to account for municipal violations which continue beyond July 1, 1988. This factor is to be applied one time, by multiplying a percentage (0 to 150%) times the sum of the "total gravity component" plus the economic benefit calculation and then adding this figure to the benefit and gravity total. The resulting figure is the "preliminary total," which shall not exceed the statutory maximum. The application of the recalcitrance factor to the total figure allows for a more logical relationship between recalcitrance and the actual significance of the violations. The recalcitrance factor may also be increased during negotiations if defendant continues to be recalcitrant with the remedy or with settlement efforts.

(B) Ability to pay (to decrease penalty). The Regional office should evaluate the ability of the defendant to pay the proposed civil penalty and to pay for the proposed injunctive relief. The government should carefully analyze this factor where it appears that the defendant can convincingly demonstrate an inability to pay a given penalty. The defendant has the principal burden of establishing a claim of inability to pay. The government typically should seek to settle for as high an amount which the government believes defendant can afford without seriously jeopardizing defendant's ability to continue operations and still achieve compliance, unless the defendant's behavior has been exceptionally culpable, recalci-

trant, or threatening to human health or the environment. The government should carefully assess the accuracy of the actual or anticipated claim. Evaluation by an outside expert consultant may be necessary to rebut the inability to pay claim. If securing an outside expert is impractical or impossible, the Region shall make its best estimate of ability to pay.

Many factors often have a significant impact on ability to pay and may justify a reduction of a penalty. For example, the Region may consider high user fees, high percentage of local funds spent on a POTW, low bond rating, low per capita income, low total of population served by the POTW, bankruptcy, etc., in evaluating an "inability to pay" claim.

(C) Litigation considerations (to decrease penalty). 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 Region should take into account the inherent strength of the case, considering for example, the probability of proving questionable violations, the probability of acceptance of an untested legal construction, the potential effectiveness of the government's witnesses, and the potential strength of the defendant's equitable defenses. (Also see GM-22, pp. 12 - 13; discussion of "compelling public concerns".)

Examples of equitable considerations which may lead to adjustment of the penalty amount include the following: whether the defendant reasonably, conclusively, and detrimentally relied on EPA's or state or local agency's representations or actions; whether the defendant has requested modification of its final effluent limits (related to, for example, pending §301(h) decisions, pending industrial variance decisions, or new wasteload allocations); whether the defendant's violations are clearly attributable to accepting new discharges from nearby, noncomplying jurisdictions; and whether the defendant's compliance has been delayed in an unusual or unreasonable manner by other Federal requirements through no fault of the defendant.

These equitable considerations will justify mitigation only to the extent that they directly caused or contributed to the defendant's violations. The government may reduce the amount of the civil penalty it will accept at settlement to reflect these considerations where the facts demonstrate a substantial likelihood that the government will not achieve a higher penalty at trial.

V. Mitigation Projects

In the past, in a few cases the Agency has accepted consent decree provisions which allow the reduction of a civil penalty assessment in recognition of the defendant's undertaking an environmentally beneficial "mitigation project."

The following criteria are provided to guide the use of mitigation projects in settlements.

(1) The activity must be initiated in addition to all regulatory compliance obligations.

The project may not be an activity which is otherwise required by law. The project may not be a substitute for full compliance -- it must be designed to provide an environmental benefit beyond the benefits of full compliance.

(2) The activity is most likely to be an acceptable basis for mitigating penalties if it closely addresses the environmental effects of the defendant's violation.

Preferably, the project will address the risk or harm caused by the violations at issue. In general, qualifying activities must provide a discernible response to the perceptible risk or harm caused by defendant's violations which are the focus of the government's enforcement action.

(3) The defendant's cost of undertaking the activity, taking into account the tax benefits that accrue, must be commensurate with the degree of mitigation.

In order to attain the deterrent objectives of the civil penalty policy, the amount of the penalty mitigation must reflect the actual cost to the defendant. With consideration of tax benefits, the actual cost of the project may exceed the value of the mitigation.

(4) The activity must demonstrate a good-faith commitment to statutory compliance.

One test of good faith is the degree to which the defendant takes the initiative to identify and commence specific, potential mitigation projects. In addition, the project must be primarily designed to benefit the environment rather than to benefit the defendant.

(5) Mitigation based on the defendant's activity must not detract significantly from the general deterrent effect of the settlement as a whole.

The government should continue to consider mitigation projects as the exception rather than the rule. Efforts should be made to eliminate any potential perception by the regulated community that the government lacks the resolve to impose significant penalties for substantial violations. The government should seek penalties in conjunction with mitigation activities which deter both the specific defendant and also the entire regulated community. Accordingly, every settlement should include a substantial monetary penalty component.

(6) Judicially-enforceable consent decrees must meet the statutory and public interest criteria for consent decrees and cannot contain provisions which would be beyond the power of the court to order.

A proposed consent decree should not include provisions which would be beyond the power of the court to order under the particular statute which had been violated. Additional guidance on the appropriate scope of relief might be found in the statute, the legislative history or the implementing regulations.

The Agency should exercise case-by-case judgment in deciding whether to accept a mitigation project based upon the above criteria and, in addition, based upon consideration of the difficulty of monitoring the implementation of the proposed project in light of the anticipated benefits of the project.

VI. Intent of Policy; and Information Requests for Penalty Calculations

The policies and 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 any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice. When the Regions deviate from this policy they shall include in the litigation report a brief description of the nature of and justification for the deviation. In addition, any penalty calculations under this policy made in anticipation of litigation are likely to be exempt from disclosure under the Freedom of Information Act. As a matter of public interest, the Agency may release this information in some cases.

Clean Water Act Penalty Policy: Calculation Methodology

$$\text{SETTLEMENT PENALTY}^{1,2} = (\text{ECONOMIC BENEFIT}) + (\text{GRAVITY COMPONENT}) \\ \pm (\text{ADJUSTMENTS})$$

Step 1: Calculate the Statutory Maximum Penalty

Step 2: Calculate the Economic Benefit Using "BEN"^{3,4}

Step 3: Calculate the Total Gravity Component⁵

- Monthly Gravity Component = (\$1,000) x (1+A+B+C+D)

- Total = Sum of Monthly Gravity Components

GRAVITY CRITERIA

ADDITIVE FACTORS

A. Significance of Violation⁶

<u>% Exceedence Monthly Avg.</u>	<u>% Exceedence 7-Day Avg.</u>	<u>% Exceedence Daily Max.</u>	<u>Toxic</u>	<u>Conventional Non-Toxic</u>
0 - 20	0 - 30	0 - 50	0 - 3	0 - 2
21 - 40	31 - 60	51 - 100	1 - 4	1 - 3
41 - 100	61 - 150	101 - 200	3 - 7	2 - 5
101 - 300	151 - 450	201 - 600	5 - 15	3 - 6
301 - >	451 - >	601 - >	10 - 20	5 - 15

B. Health and Environmental Harm⁷

- (i) Impact on Human Health; or
- (ii) Impact on Aquatic Environment

10 - Stat. Ma
1 - 10

C. Number of Violations⁸

0 - 5

D. Duration of Noncompliance⁹

0 - 5

Step 4: Include Adjustment Factors

A. History of Recalcitrance¹⁰ (Addition)

- Penalty may be increased by up to 150 percent based upon the past and present recalcitrance of the defendant.

B. Ability to Pay (Subtraction)

- Penalty may be adjusted downward to represent the defendant's ability to pay.

C. Litigation Considerations (Subtraction)¹¹

- Penalty may be adjusted downward to reflect the maximum amount which the court might assess if the case proceeds to trial.

WATER CIVIL PENALTY POLICY CALCULATION METHODOLOGY: FOOTNOTES

1. In general, the Settlement Penalty amount shall be at least the Economic Benefit of Noncompliance plus a gravity component.
2. The maximum Settlement Penalty shall not exceed the amount provided by Section 309 d), \$10,000 per day of such violation.
3. Calculate all economic benefits using BEN. There is no minimum amount triggering the use of BEN.
4. Economic benefit is to be calculated as the estimated savings accrued to the facility; i.e., it is to be based upon the total amount which should have been spent by the facility. (All capital and expense costs, direct and indirect, are to be considered.)
5. The Total Gravity Component equals the sum of each Monthly Gravity Component for a month in which a violation has occurred.
6. The Significance of Violation is assigned a factor based on the percent by which the pollutant exceeds the monthly or 7-day average or daily maximum permit limitation and whether the pollutant is classified as toxic, non-toxic or conventional.
7. Where evidence of actual or potential harm to human health exists, a factor from "10" to a value which results in the statutory maximum penalty should be assessed. Where the identified impact relates only to the aquatic environment, a factor from "1" to "10" should be used.
8. The Region has the flexibility to assign a high penalty factor where an excessive number of violations occur in any month (effluent limit, reporting, schedule, unauthorized discharge, bypass, etc.).
9. The Duration of Noncompliance factor allows the Region to increase the monthly gravity component for continuing, long-term violations of the same parameter(s) or requirement(s). Generally, a "long-term" violation is one which continues for three or more consecutive months.
10. A factor ranging from "0" (good compliance record, cooperation in remedying the violation) to 150 percent of the total of the Economic Benefit and Gravity Component may be added based upon the history of recalcitrance exhibited by the violator.
11. In addition, the penalty should be reduced by any amount which defendant paid as a penalty to a State or local agency on the same violations.

CWA Penalty Summary Worksheet

- (1) No. of Violations = _____
x \$10,000 = stat. max. = \$ _____
- (2) Economic Benefit ("BEN")
(period covered/
months) = _____ \$ _____
- (3) Total of Monthly Gravity
Components \$ _____
- (4) Benefit + Gravity TOTAL \$ _____
- (5) Recalcitrance Factor _____ %
(0-150%) x Total (Line 4) = \$ _____
- (6) Preliminary TOTAL (Line 4 + Line 5) \$ _____

ADJUSTMENTS

- (7) Litigation Considerations
(Amount of reduction) \$ _____
- (8) Ability to Pay
(Amount of reduction) \$ _____
- (9) SETTLEMENT PENALTY TOTAL \$ _____

Name and Location _____
of Facility _____

Date of Calculation _____

