APPENDIX D: VOLUNTARY ENVIRONMENTAL SELF-EVALUATION POLICY

A. **PURPOSE.** This policy sets forth internal guidelines designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of state environmental laws. This policy restates the New Mexico Environment Department's (NMED) long-standing practice of not requesting voluntary self audit reports to trigger enforcement investigations. This policy amends, but does not supersede, NMED's penalty policies to assist NMED personnel in proposing appropriate penalties or negotiating settlements in administrative and judicial enforcement actions involving voluntary self-evaluation, disclosure, correction and prevention.

B. **APPLICABILITY.** This policy is applicable to all NMED programs that utilize a penalty policy to serve NMED personnel in proposing penalties and negotiating settlements in administrative and judicial enforcement actions, with the exception of the Occupational Health and Safety Bureau. This policy may be applied at NMED's discretion to the settlement of administrative and judicial enforcement actions instituted prior to, but not yet resolved, as of the effective date of this policy. This policy is not a final agency action, and is intended as guidance. It does not create any rights, duties or obligations, or defenses, implied or otherwise, in any third parties.

C. **DEFINITIONS.**
For purposes of this policy, the following definitions apply:

I. **Environmental audit** means a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.

2. **Due diligence** means the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

a. Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;

b. Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;

c. Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to be effective to detect and correct violations, periodic evaluation of the

overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

d. Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

e. Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards, including consistent enforcement through appropriate disciplinary mechanisms; and

f. Procedures for the prompt and appropriate corrections of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

3. **Regulated entity** means any entity, including a federal, state, and municipal facility, regulated under state environmental laws.

4. **Violation** means noncompliance with a requirement of a statute, regulation or permit including a reportable discharge.

5. **Voluntary** means an act or action not required by statute, regulation, permit, order or agreement.

D. **CONDITIONS**. The conditions for reducing civil penalties and not making criminal referrals in accordance with Sections E and F of this policy are as follows:

1. **Systematic Discovery**. The violation was discovered through an environmental audit or a systematic procedure or practice that reflects the regulated entity's due diligence in preventing, detecting, and correcting violations;

2. **Voluntary Discovery** .The violation was identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement;

3. **Prompt Disclosure**. The regulated entity voluntarily and fully discloses a specific violation within ten (10) days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to NMED and all appropriate federal, state and local agencies, and prior to (a) the commencement of a federal, state or local agency inspection, investigation or information request; (b) notice of a citizen suit; (c) the filing of a complaint by a third party; or (d) the regulated entity's knowledge that the discovery of the violation by NMED or a third person or entity was imminent;

4. **Prompt Correction and Remediation**. The regulated entity corrects the violation

expeditiously and in no event later than within sixty (60) days, certifies in writing that violations have been corrected, and takes appropriate prompt measures as determined by NMED to remedy any environmental or human harm due to the violation. If more than sixty (60) days will be needed to correct the violation(s), the regulated entity must notify NMED in writing before the 60-day period has passed;

5. **Remediation of Imminent and Substantial Endangerment.** The regulated entity immediately remedies any condition that has created or may create an imminent and substantial endangerment to human health or the environment;

6. **Prevention of Recurrence**. The regulated entity implements appropriate measures to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts. The implementation of measures should be completed within a reasonable amount of time given the nature of the violation and type of measure;

7. **No Repeat Violations**. The specific violation, by type not location, has not occurred previously within the past three years at the same facility or is not part of a series of federal, state or local violations by the facility's parent organization, which have occurred within the past five years. For purposes of this section, a "violation" includes:

(a) any violation of a federal, state or local environmental law identified in a civil or administrative order, consent agreement, stipulated final order, conviction or plea agreement, except for violations which are determined to be without basis by a court or administrative entity with competent jurisdiction; or

(b) any act or omission for which the regulated entity has previously received penalty mitigation from the EPA or NMED;

8. **Cooperation**. The regulated entity cooperates and provides such information as is reasonably necessary and required by NMED to determine the applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in any further investigations into the violation and other related compliance problems of the regulated entity;

9. **Written Agreement**. "Where appropriate, NMED may require that to satisfy any of these conditions, a regulated entity must enter into a written agreement, stipulated final order, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required; and

10. **Excluded Violations**. The violation is not one which (i) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to human health or the environment, or (ii) violates the specific terms of any judicial or

administrative order, or consent agreement.

E. **REDUCTION OF CIVIL PENALTIES**. Regulated entities will be eligible for the following reductions in civil penalties:

1. **Elimination of Gravitv-Based Penalties**. If a regulated entity satisfies all of the conditions of Section D, NMED will eliminate the gravity component from the penalty policy.

2. **Reduction of Gravitv-Based Penalties**. NMED may reduce by 75% of the gravity-based component of the penalty in cases in which all of the conditions in Section D 2 through 10 are met.

F. **NO CRIMINAL RECOMMENDATIONS**.
1. NMED may not recommend to the Attorney General or USEPA that criminal charges be brought against a regulated entity where NMED determines that Conditions I through 9 in Section D above for reduction of civil penalties are met, and the violation does not demonstrate or involve:

a. a prevalent management philosophy or practice that concealed or condoned environmental violations; or

b. high-level officials' or managers' conscious involvement in or willful blindness to the violation.

2. This policy does not apply to criminal acts of individual officials, managers or employees.

3. Where NMED determines pursuant to this Section that criminal referral to the Attorney General or the United States Protection Agency is unwarranted, NMED may nonetheless proceed with civil enforcement in accordance with Section D of this policy or other applicable enforcement response and penalty policies.

G. **ECONOMIC BENEFIT.** NMED retains its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage through noncompliance.

H. **NO ROUTINE REQUESTS FOR AUDITS**.
1. NMED will not request a voluntary environmental audit report to trigger a civil or criminal investigation. For example, NMED will not request an audit in routine inspections. If NMED has independent reason to believe a violation has occurred, NMED may seek any information relevant to identifying violations or determining liability or extent of harm including any existing audits.

2. With respect to federal, state or municipal facilities, although governmental facility environmental audit reports may be accessible to the public under the federal Freedom of Information Act (FOIA) or the state Inspection of Public Records Act in certain circumstances, NMED will not utilize FOIA or the State Inspection of Public Records Act to request information from governmental agencies. NMED will apply this policy on requests for audit reports to federal, state and municipal facilities the same as it does for other regulated entities.

I. PUBLIC PROCESS.

NMED recognizes that achieving compliance also requires the cooperation of regulated entities subject to environmental requirements. This policy incorporates public comment received by NMED and may, at the Secretary's discretion, be reviewed three years from the effective date of the policy.