

NEW MEXICO ENVIRONMENT DEPARTMENT
GROUND WATER QUALITY BUREAU
CIVIL PENALTY ASSESSMENT POLICY

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I. INTRODUCTION

This document sets forth the New Mexico Environment Department ("Department") Ground Water Quality Bureau's ("GWQB") policy for determining penalty amounts which (1) should be sought in compliance orders issued under the Water Quality Act ("WQA"), and (2) would be acceptable in settlement of both administrative and judicial civil enforcement actions under the WQA or the Water Quality Control Commission ("WQCC") Regulations.

The purposes of the policy are to ensure that 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 the WQA or WQCC Regulations are eliminated; that penalties are sufficient to deter persons from committing WQA and WQCC Regulation violations; and that compliance is expeditiously achieved and maintained.

Section 74-6-10.A of the WQA provides that if any person has violated or is violating a requirement, regulation, or water quality standard adopted pursuant to the WQA or a condition of a permit issued pursuant to that Act, the Secretary may, among other options, issue a compliance order assessing a civil penalty. Section 74-6-10.D provides that any order assessing a penalty shall take into account:

- The seriousness of the violation;
- Any good faith efforts to comply with the applicable requirements; and
- Other relevant factors.

The penalty calculation system established through this Civil Penalty Policy consists of (1) determining a gravity-based penalty for a particular violation, (2) from a penalty assessment matrix, (3) adding a "multi-day" component, as appropriate, to account for a violation's duration, (4) adjusting the sum of the gravity-based and multi-day components, up or down, for case specific circumstances, and (5) adding to this amount any economic benefit gained through noncompliance. More specifically, this Civil Penalty Policy establishes the following penalty calculation methodology:

$$\text{penalty amount} = \text{gravity-based component} + \text{multi-day component} \pm \text{adjustments} + \text{economic benefit}$$

This Civil Penalty Policy is immediately applicable and should be used to calculate penalties sought in all WQA compliance orders issued under the statute after the date of the policy or penalties in settlement of both administrative and judicial civil enforcement actions accepted after the date of the policy, regardless of the date of the violation¹.

This policy is intended solely for the guidance of Department staff. It is not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the Department or the State. The Department reserves the right to vary from this policy in its discretion and to change the policy at any time without public notice.

¹ This policy is not intended to limit the penalty amounts sought in civil actions. In civil judicial actions brought pursuant to the WQA, the Department will, at its discretion, file complaints requesting up to the statutory maximum civil penalty amount and to litigate for the maximum amount justifiable based on the facts of the case.

II. DOCUMENTATION AND RELEASE OF INFORMATION

A. DOCUMENTATION FOR PENALTY SOUGHT IN COMPLIANCE ORDER

In order to support the penalty proposed in a compliance order, staff must include in the case file an explanation of how the proposed penalty amount was calculated. As a sound case management practice, a case file should document or reference factual information on which the Department will need to rely to support the penalty amount sought in the compliance order. Documentation of the reasons and rationale for the penalty amount is important to expeditious, successful administrative enforcement of WQA, WQCC Regulations, and permit requirements. The documentation should include relevant information and documents which served as the basis for the penalty amount and were relied upon by the Department decision-maker. In general, only final documents, not preliminary documents, such as drafts and internal memoranda reflecting earlier deliberations, should be included in the case file. Documentation supporting the penalty calculation should be in the case file at the time the compliance order is issued. In general, the record supporting the penalty amount specified in the compliance order should include a penalty computation worksheet which explains the potential for harm, extent of deviation from statutory or regulatory requirements, economic benefit of noncompliance, and any adjustment factors applied (e.g., good faith efforts). Also the record should include any inspection reports and other documents relating to the penalty calculation. The documentation should be supplemented to include a justification for any adjustments to the penalty amount in the compliance order made after initial issuance of the compliance order, if such adjustments are necessary.

B. DOCUMENTATION OF PENALTY SETTLEMENT AMOUNT

Until settlement discussions or pre-hearing information exchanges are held with the respondent, mitigating and equitable factors and overall strength of the Department's enforcement case may be difficult to assess. Accordingly, preparation of a penalty calculation worksheet for purposes of establishing the Department's settlement position on penalty amount may not be feasible prior to the time that negotiations with the violator commence. Once the violator has presented the Department with its arguments relative to penalty mitigation the Department may, at its discretion, complete a penalty calculation worksheet to establish a settlement position. However, at a minimum, prior to final approval of any settlement, whether administrative or judicial, staff should complete a final worksheet and narrative explanation which provides the rationale for the final settlement amount to be included in the case file for internal management use and oversight purposes only. Staff may, in arriving at a penalty settlement amount, deviate significantly from the penalty amount sought in a compliance order provided such discretion is exercised in accordance with the provisions of this policy.

C. RELEASE OF INFORMATION

Release of information to the public concerning GWQB enforcement actions is governed primarily by the Inspection of Public Records Act ("IPRA"), Sections 14-2-1 to 14-2-12, NMSA 1978. While the Department maintains a policy of openness with respect to disclosure of public records, there are a number of exemptions under the IPRA as well as statutory exceptions to the IPRA that may apply to documents in enforcement actions, including penalty calculations. These exemptions and exceptions include, but are not limited to, the attorney-client privilege, the attorney work product privilege and the countervailing public policy exception established through New Mexico case law. The attorney-client privilege protects documents in which legal advice is sought or given; the attorney work product privilege protects documents prepared in anticipation of litigation and the countervailing public policy exception protects documents where the state's interest in non-disclosure of documents outweighs the public's interest in disclosure. Pre-decisional deliberative documents may be protected under countervailing public policy exception in order to encourage honest and frank discussions within the Department.

The process of developing penalty calculations may fall within the parameters of the attorney work product, attorney-client privilege, or countervailing public policy exemptions. Thus, withholding penalty calculations may be appropriate. The protective scope does not end when the enforcement process is completed. Thus, penalty calculations may be protected from disclosure at any time.

The Department may waive the protections afforded and release exempt documents in its discretion in appropriate cases, without jeopardizing future non-disclosure in another case. Such discretionary waivers should be made on a case-by-case basis, balancing the public interest served by allowing the release and the Department's policy of openness against the harm to the Department caused by release. Generally, such releases should only be made when settlement will be facilitated.

Because of the sensitive nature of enforcement actions and because legal analysis may be involved, Department staff should consult with the Department's Office of General Counsel when a request for information from the public related to an enforcement action is received.

III. RELATIONSHIP BETWEEN PENALTY AMOUNT SOUGHT IN A COMPLIANCE ORDER AND ACCEPTED IN SETTLEMENT

This penalty policy not only facilitates compliance with the cited regulations by requiring that staff calculate a proposed penalty (and include this amount and the underlying rationale for adopting it ~ the compliance order), but also establishes a methodology for calculating penalty amounts which would be acceptable to the Department in settlement of administrative and judicial enforcement actions. The Department expects that the dollar amount of the proposed penalty included in the compliance order may exceed the amount of the penalty the Department would accept in settlement. This may be so for several reasons.

First, at the time the compliance order is issued, the Department may not be aware of mitigating factors by which the penalty may be adjusted downward. Second, it is appropriate that the Department have the enforcement discretion to accept in settlement a lower penalty than it has sought in its compliance order, because in settling a case, the Department is able to avoid the costs and risks of litigation. Moreover, respondents must perceive that they face some significant risks of higher penalties through litigation to have incentives to agree to penalty amounts acceptable to the Department in settlement.

Therefore, Department staff should, as necessary, prepare two separate penalty calculations for each administrative proceeding -- one to support the initial proposed penalty included in the compliance order and the other to be placed in the administrative file as support for the final penalty amount the Department accepts in settlement.² In calculating the amount of the proposed penalty to be included in the compliance order, Department personnel should total (1) the gravity-based penalty amount, including any multi-day component and (2) an amount reflecting upward adjustments of the penalty and subtract from this sum an amount reflecting any downward adjustments in the penalty based solely on respondent's good faith efforts to comply with applicable requirements of which the Department is aware³. This total should then be added to the amount of any economic benefits accruing to the violator. The result will be the proposed penalty the Department will seek in its compliance order.

The methodology for determining and documenting the penalty figure the Department accepts in settlement should be basically identical to that employed in calculating the proposed penalty included in the compliance order, but should also include consideration of (1) any new and relevant information obtained from the violator or elsewhere and (2) all other downward adjustment factors, in addition to the "good faith efforts" factor weighed in calculating the proposed penalty appearing in the compliance order.

² In judicial actions it will generally only be necessary to calculate a penalty amount to support any penalty the Department is to accept in settlement. The Department is, of course, free (but not bound) to argue to the court in judicial actions that the penalty figure it seeks is consistent with the rationale underlying the penalty policy.

³ Since Section 74-6-10.D of the WQA requires that a violator's "good faith efforts to comply with applicable requirements" be considered by the Department in assessing any penalty, it is appropriate that this factor be weighed in calculating the proposed penalty based on information available to the Department. While Section 74-6-10.D also requires that the Department weigh the seriousness of the violation in assessing a penalty, this requirement is satisfied by including a gravity-based component which reflects the seriousness of the violation (i.e., the potential for harm and extent of deviation from applicable requirements). As noted above, staff may at their discretion further adjust the amount of the proposed penalty downward where the violator or information obtained from other sources has convincingly demonstrated prior to the time the Department files the compliance order that application of additional downward adjustment factors is warranted.

IV. DETERMINATION OF GRAVITY-BASED PENALTY AMOUNT

Section 74-6-10.D of the WQA states that the seriousness of a violation must be taken into account in assessing a penalty for the violation. The gravity-based component is a measure of the seriousness of a violation. The gravity-based penalty amount should be determined by examining two factors:

- Potential for harm; and
- Extent of deviation from a statutory or regulatory requirement.

A. POTENTIAL FOR HARM

Section 74-6-4 of the WQA requires the WQCC to adopt water quality standards to protect public health and welfare and to consider the use and value of the water for water supplies, propagation of fish and wildlife, and recreational, agricultural, industrial and other purposes. Section 74-6-4 of the WQA also requires the WQCC to consider the character and degree of injury to or interference with health, welfare, environment and property, and the public interest when promulgating regulations. Non-compliance with any requirement of the WQA, WQCC Regulations or permit issued pursuant to the regulations can create a potential for harm to public health, welfare, environment or property, including threat to water quality standards, threat to attaining designated uses, and threat of direct exposure to water contaminants. Even violations such as record keeping violations create a risk of harm to public health, welfare, environment or property by jeopardizing the integrity of the water quality protection regulatory program. Accordingly, the assessment of the potential for harm resulting from a violation should be based on two factors:

- The risk to public health, welfare, environment or property including threat to water quality standards, threat to attaining designated uses, and threat of direct exposure to water contaminants, that may be posed by noncompliance; and
- The adverse effect noncompliance may have on statutory or regulatory purposes or procedures for implementing the water quality protection program.

1. Risk to public health, welfare, environment or property

The risk to public health, welfare, environment or property presented by a given violation depends on the likelihood that water quality standards or designated uses will not be attained and the likelihood that human or other environmental receptors may be exposed to water contaminants and the degree of such potential exposure. In considering the risk to public health, welfare, environment or property, the emphasis is placed on the potential for 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 with lower penalties simply because the violations happened not to have resulted in actual harm. Evaluating the risk to public health, welfare, environment or property requires staff to consider the probability of a discharge of water contaminants and the seriousness of the water contaminants potentially found in the discharge.

a. Probability of discharge

The penalty should reflect the likelihood that the violation could have resulted in, or has resulted in, a discharge of water contaminants, or has created the potential threat of exposure to water contaminants. The determination of the probability of a discharge should usually be based on whether the integrity and/or stability of the discharge system, including monitoring devices, is

likely to have been compromised.

Some factors that may be considered in making this determination would be:

- Evidence of discharge (e.g., existing soil or groundwater contamination);
- Evidence of discharge system mismanagement (e.g., cracked or torn lagoon liners); and
- Adequacy of provisions for detecting and preventing a discharge (e.g., monitoring equipment and maintenance procedures).

A larger penalty is presumptively appropriate where the violation significantly impairs the ability of the discharge system to prevent or detect releases of water contaminants. Likewise, contamination of a public or private water supply well at concentrations which exceed WQCC standards should generally receive a major rating.

b. Potential seriousness of contamination

The water contaminants potentially found in the discharge must be evaluated to determine whether they have the potential to threaten public health, welfare, environment or property. In distinguishing whether a violation poses a major or moderate potential for harm, staff should consider whether the violation is of a human health standard, a standard for domestic water supply, an irrigation standard, or other designated water uses.

When protectable ground water is threatened by a discharge of water contaminants that have the potential to exceed WQCC standards, the harm to the resource is generally considered major to moderate. Likewise, a discharge of water contaminants that has the potential to impair a designated water use should generally receive a major to moderate rating. Any violation that has the potential to exceed a health-based standard or threaten public health by direct exposure should generally receive a major rating. When calculating risk of discharge, staff should weigh the harm which would result if water contaminants were in fact released to the environment.

Some factors that may be considered in making this determination would be:

- Whether the water contaminants in the discharge have the potential to violate a human health standard, a standard for domestic water supply, or an irrigation standard or the presence of a toxic pollutant;
- Volume of the discharge; and
- Existence, size, and proximity of receptor populations (e.g., public use, fish, and wildlife).

2. Harm to the water quality protection program

There are some requirements of the WQA which, if violated, may not be likely to give rise directly or immediately to a significant risk of discharge. Nonetheless, all regulatory requirements are fundamental to the continued integrity of the regulatory program. Violations of such requirements may have serious implications and merit substantial penalties where the violation undermines the statutory or regulatory purposes or procedures for implementing the WQA. Some examples of this type of regulatory harm include but are not limited to:

- Failure to comply with financial assurance requirements;
- Failure to submit a timely permit application;

- Failure to respond to a formal information request from the Department;
- Operating without a permit;
- Failure to prepare or maintain a manifest; and
- Failure to conduct adequate ground water monitoring or other monitoring requirements.

3. General

a. Evaluating the potential for harm

Staff 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) the violation poses or may pose a substantial risk to public health, welfare, environment or property; and/or (2) the actions have or may have a substantial adverse effect on the water quality protection program's ability to implement the WQA and WQCC Regulations.

MODERATE (1) the violation poses or may pose a moderate risk to public health, welfare, environment or property; and/or (2) the actions have or may have a moderate adverse effect on the water quality protection program's ability to implement the WQA and WQCC Regulations.

MINOR (1) the violation poses or may pose a low risk to public health, welfare, environment or property; or (2) the actions have or may have a minimal adverse effect on the water quality protection program's ability to implement the WQA and WQCC Regulations.

The examples which follow illustrate the differences between major, moderate, and minor potential for harm. Just as important as the violation involved are the case specific factors surrounding the violation. Staff should avoid automatic classification of particular violations.

b. Examples

Major potential for harm

Section 74-6-5.A of the WQA requires persons to obtain from the agency a permit for the discharge of any water contaminant or for the disposal or reuse of septage or sludge. Failure to obtain a permit for a facility that discharges water contaminants that exceed health based ground water quality standards would pose a substantial risk to public health, welfare, environment or property based upon the seriousness of the contaminants and the higher probability of exposure from an unpermitted discharge. In addition, the primary mechanism for the Department to protect ground water quality under the WQA is through issuance of discharge permits. Failure to comply with the basic requirement of the WQA poses substantial harm to the program. This violation would therefore generally be assigned to the major potential for harm category.

Closure plans are required by 20.6.2.3107.A.II NMAC to prevent exceedance of water quality standards and may include financial responsibility for corrective action to ensure that funds will be available for proper closure of facilities. An aberration in the language of a financial assurance instrument could change the legal effect of that instrument so that it would no longer satisfy the intent of the WQCC Regulations thereby preventing the funds from being available for closure. Such a facility could potentially become an abandoned site and the financial burden for

closure would shift to the tax payers. When the language of the instrument differs from the requirements such that funds would not be available to close the facility properly, the lack of appropriate wording would have a substantial adverse effect on the regulatory scheme (and, to the extent the closure process is adversely affected, could pose a substantial risk to public health, welfare, environment or property). This violation would therefore be assigned to the major potential for harm category.

A person disposes of several large drums containing water contaminants below the ground surface without a permit and the water contaminants leak into ground water in sufficient volume that pools are floating on the water table. The discharge of water contaminants violated 20.6.2.1201 NMAC because the responsible person failed to file a Notice of Intent to Discharge with the Department. The failure to notify the Department of the discharge resulted in the improper disposal of the drums and increased the probability for a discharge to occur. The water contaminants have the potential to result in the exceedance of a health-based ground water standard. This violation would therefore be assigned to the major potential for harm category.

Moderate potential for harm

Permittees are required by 20.6.2.3107.A.2 NMAC to perform monitoring of the ground water most likely to be affected by the discharge. For example, for a facility that discharges water contaminants that have the potential to exceed standards for domestic water supply (other than health-based standards), monitoring is required to ensure that those standards are not exceeded. If the permittee fails to conduct the monitoring, there are no assurances that the discharge system is effective and there is a higher probability that an uncontrolled discharge of water contaminants, such as a leak, will occur and continue until discovered. However, the water contaminants do not have health-based standards and are not considered a serious threat to public health. In addition, the monitoring conditions in a discharge permit are a critical program tool for ensuring that the discharge system is protective of water quality standards and failure to perform and report monitoring results in significant harm to the program. The moderate potential for harm category would be appropriate in this case.

Minor potential for harm

Permittees are required by 20.6.2.3114 NMAC to pay fees related to the issuance of the discharge permit. If a facility refuses to pay the fee but otherwise complies with the regulatory and permit requirements, there is no risk to public health, welfare, environment or property due to a discharge of water contaminants. There is harm to the water protection program by not receiving revenue for services provided, but the harm has a minor affect on the integrity of the water quality protection program. The minor potential for harm category could be appropriate for such a situation.

B. EXTENT OF DEVIATION FROM REQUIREMENT

The extent of deviation from the WQA, WQCC Regulations and permit requirements relates to the degree to which the violation renders inoperative the requirement violated. For any violation, 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. With all other factors being equal, the less significant noncompliance should draw a smaller penalty assessment. In determining the extent of the deviation, the following categories should be used:

MAJOR: the violator deviates from requirements of the regulation or statute to such an extent that most or important aspects of the requirements are not met resulting in 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 or all important aspects of the requirements are met.

The following examples will help demonstrate how a given violation is to be placed in the proper category:

Example 1 - Closure Plan

A closure plan is required by 20.6.2.3107.A.11 NMAC to prevent exceedance of water quality standards. This plan must identify the steps necessary to close the facility at any point during its intended operating life. Possible violations of the requirements of this regulation range from having no closure plan, a major violation, to having a plan which is inadequate (e.g., it omits one step in the procedures while complying with other requirements), a minor violation.

Example 2 - Monitoring and Reporting

Permittees are required by 20.6.2.3107.A NMAC to perform monitoring and reporting to verify that the discharge system is effective in protecting ground water quality. The range of potential noncompliance with these requirements is quite broad. Total noncompliance with regulatory requirements such as these would result in classification into the major category. In contrast, the violation may consist of a minor violation such as failing to measure depth to ground water in monitoring wells, where the degree of noncompliance is less significant.

C. PENALTY ASSESSMENT MATRICES

Section 74-6-10.D of the WQA requires the Department to take into consideration the seriousness of the violation when assessing a penalty. The seriousness is determined using a gravity-based penalty matrix that has potential for harm as the vertical axis and extent of deviation from a requirement is the horizontal axis. Each matrix has nine cells, each containing a penalty amount. The specific cell is chosen after determining which category is appropriate for the potential for harm factor, and which category is appropriate for the extent of deviation factor. Section 74-6-10.1 of the WQA provides for two categories of violations each subject to different maximum penalties. The two penalty matrices are defined and presented below.

GRAVITY-BASED PENALTY MATRICES:

Section 74-6-10.1.A of the WQA states that any person who does not comply with the provisions of Section 74-6-5 of the WQA, or any regulation adopted pursuant to that section, or any permit issued pursuant to that section, shall be assessed a civil penalty up to \$15,000 per day of noncompliance for each violation. Sections 20.6.2.3100 through 3114 NMAC and Sections 20.6.2.5100 through 5300 NMAC were promulgated by the WQCC pursuant to Section 74-6-5 of the WQA (with the exception of 20.6.2.3103 NMAC, which was promulgated pursuant to Section 74-6-4.C). Therefore, the penalty provisions in Section 74-6-10.1.A of the WQA apply at least to violations of these specific sections of the WQCC Regulation and to any violation of any term or condition of a permit issued by the Department pursuant to the WQA. Such violations include but are not limited to, failure to obtain a discharge permit when required; and failure to comply with any term or condition of a permit including violation of any water quality standard or abatement plan that is a term or condition of a permit.

Extent of Deviation from Requirement

Potential for Harm		MAJOR	MODERATE	MINOR
	MAJOR	\$15,000	\$9,000	\$4,500
	MODERATE	\$9,000	\$6,000	\$3,000
	MINOR	\$4,500	\$3,000	\$1,500

Section 74-6-10.1.B of the WQA states that any person who violates any provision of the WQA other than Section 74-6-5 of the WQA or any person who violates any regulation, water quality standard, or compliance order adopted pursuant to the WQA shall be assessed civil penalties up to the amount of \$10,000 per day for each violation. Sections 20.6.2.1200 through 1220 NMAC, Section 20.6.2.3103 NMAC, and Sections 20.6.2.4100 through 4115 NMAC were promulgated by the WQCC pursuant to Section 74-6-4. Therefore, the penalty provisions in Section 74-6-10.1.B of the WQA apply to violations of these specific sections of the WQCC Regulation.

Extent of Deviation from Requirement

Potential for Harm		MAJOR	MODERATE	MINOR
	MAJOR	\$10,000	\$6,000	\$3,000
	MODERATE	\$6,000	\$4,000	\$2,000
	MINOR	\$3,000	\$2,000	\$1,000

V. MULTIPLE AND MULTI-DAY PENALTIES

A. PENALTIES FOR MULTIPLE VIOLATIONS

In certain situations, the Department may find that a particular facility has violated several different WQA requirements. Each of the violations should be assessed separately and the amounts added to determine a total penalty to pursue in a compliance order or to pursue in settlement. A separate penalty should be sought for each violation that results from an independent act or failure to act by the violator and is distinguishable from any other charge in the compliance order for which a penalty is to be assessed. A given charge is independent of, and 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 distinguishable violations.

Section 74-6-10.E of the WQA, however, provides that a single operational event that leads to simultaneous violations of more than one water quality standard shall be treated as a single violation. Therefore, for example, if a single discharge causes both lead and arsenic standards to be exceeded on a given day, the penalty should be calculated based on a single water quality standard violation. In such a case, the penalty should be calculated based on the threat of the most serious water contaminant.

Penalties for multiple violations also should be sought in a compliance order or in settlement where one facility has violated the same requirement in different locations. In these situations the separate locations present separate and distinct risks to public health, welfare, environment or property. Thus, separate penalty assessments are justified.

Similarly, penalties for multiple violations are appropriate when a facility violates the same requirement on separate occasions. An example would be where a facility fails to take required periodic groundwater monitoring samples on separate occasions.

In general, penalties for multiple violations may be inappropriate where the violations are not independent or distinguishable. Where a charge arises from or merely restates the elements of another charge, a separate penalty may not be warranted. For example, a septage disposal facility fails to record the type and volume of septage received in its daily record keeping. As a result the omitted information fails to be recorded in the facility's annual report. The Department has the discretion to view the violations resulting from the same factual event, failure to report type and volume of septage received in a daily report and failure to record the above in an annual report, as posing one legal risk. In this situation, both sections violated should be cited in the compliance order, but one penalty, rather than two, may be appropriate to pursue in litigation or obtain in settlement, depending upon the facts of a case. The fact that two separate sections are violated may be taken into account in choosing higher potential for harm and extent of deviation categories on the penalty matrix.

There are instances where a facility operator's failure to satisfy one statutory or regulatory requirement leads to the violation of numerous other independent regulatory requirements. Examples are the case where (1) a facility fails to obtain a permit as required by Section 74-6-5.A of the WQA and as a consequence runs afoul of the numerous other requirements imposed on it, or (2) a facility fails to install groundwater monitoring equipment as required and therefore does not comply with operational, record keeping, closure, remedial action, and contingency requirements. In cases such as these where multiple violations result from a single initial transgression, assessment of a separate penalty for each distinguishable violation may produce a total penalty which is disproportionately high. Accordingly, staff have discretion to forego separate penalties for certain distinguishable violations, so long as the total penalty for all related violations is appropriate considering the gravity of the offense and sufficient to deter similar future

behavior and recoup economic benefit. At a minimum, except in rare circumstances, a penalty should be assessed for the initial failure to obtain a permit for a discharge that has the potential to affect ground water; penalties for additional violations that result from the initial failure may be assessed at the staff's discretion. .

B. PENALTIES FOR MULTI-DAY VIOLATIONS

The WQA provides the Department with the authority to assess in administrative actions or seek in court civil penalties based on the number of days during which a single violation occurred (Sections 74-6-10.C and D and 74-6-10.1 of the WQA). This language explicitly authorizes the Department to consider the duration of each violation as a factor in determining an appropriate total penalty amount. Accordingly, any penalty assessed should consist of a gravity based component, an economic benefit component and, to the extent that violations can be shown or presumed to have continued for more than one day, an appropriate multi-day component. The multi-day component should reflect the duration of the violation at issue, subject to the guidelines set forth in Section V.C, below.

After it has been determined that any of the violations alleged has continued for more than one day, the next step is to determine the length of time each violation continued and whether a multi-day penalty is mandatory, presumed, or discretionary. The Department may seek to obtain multi-day penalties for the number of days it can document that the violation in question persisted or in circumstances where reasonable assumptions as to the duration of a violation can be made.

For example, in the case where an inspection reveals that a facility has no ground water monitoring wells in place, it can be assumed, in the absence of evidence to the contrary, that the facility has never had any wells. Here the violation can be treated as having commenced on the day following the well installation completion date required in the permit. A multi-day penalty could then be calculated for the entire period from the date the facility was required to have wells in place until the date of the inspection showing it did not.⁴

Conversely, in cases where there is no statutory or regulatory deadline from which it may be assumed compliance obligations began to run, a multi-day penalty should account only for each day for which information provides a reasonable basis for concluding that a violation has occurred. For example, if an inspection revealed that a wastewater lagoon was overflowing onto adjacent lands, staff should allege in the compliance order and present evidence as to the number of days each violation lasted. Documentation in a case such as this might consist of an admission from a facility employee that the lagoon had been overflowing for a certain number of days. In such a case, a multi-day penalty would then be calculated for the number of days stated.

C. CALCULATION OF THE MULTI-DAY PENALTY

After the duration of the violation has been determined, the multi-day component of the total penalty is calculated, pursuant to the multi-day matrix as follows:

- (1) Determine the gravity-based designations for the violation, e.g., major-major, moderate-moderate, or minor-minor.
- (2) Determine, for the specific violation, whether multi-day penalties are mandatory, presumed, or discretionary as follows:

⁴ Where the Department determines that a violation persists, staff may calculate the penalty for a period ending on the date of compliance or the date the compliance order is filed, provided documentation or a reasonable assumption to support such a finding is available.

Mandatory multi-day penalties: Multi-day penalties are mandatory for days 2-60 of all violations with the following gravity-based designations: major-major, major-moderate, moderate-major. The only exception is when they have been waived, in highly unusual cases. Multi-day penalties for days 61+ are discretionary

Presumption in favor of multi-day penalties: Multi-day penalties are presumed appropriate for days 2-60 of violations with the following gravity-based designations: major-minor, moderate-moderate, minor-major. Therefore, multi-day penalties must be sought, unless case-specific facts overcoming the presumption for a particular violation are documented carefully in the case files. The presumption may be overcome for one or more days. Multi-day penalties for days 61+ are discretionary.

Discretionary multi-day penalties: Generally, multi-day penalties are discretionary for all days of all violations with the following gravity-based designations: moderate-minor, minor-moderate, minor-minor. In these cases, multi-day penalties should be sought where case specific facts support such an assessment. Discretionary multi-day penalties may be imposed for some or all days. The bases for decisions to impose or not impose any discretionary multi-day penalties must be documented in the case files.

- (3) Locate the corresponding cell in the following multi-day matrix. Multiply a dollar amount selected from the appropriate cell in the multi-day matrix by the number of days the violation lasted. The duration used in the multi-day calculation is the length of the violations minus one day, to account for the first day of violation at the gravity-based penalty rate.

MULTI-DAY PENALTY MATRICES:

For violations of the provisions of Section 74-6-5 of the WQA including any regulation adopted pursuant to that section, or any permit issued pursuant to that section:

Extent of Deviation from Requirement

Potential for Harm		MAJOR	MODERATE	MINOR
	MAJOR	\$7,500 - 3,750	\$4,500 - 2,250	\$2,250 - 1,125
	MODERATE	\$4,500 - 2,250	\$3,000 - 1,500	\$1,500 - 750
	MINOR	\$2,250 - 1,125	\$1,500 - 750	\$300 - 150

For violations of any provision of the WQA other than Section 74-6-5 of the WQA or any regulation, water quality standard, or compliance order adopted pursuant to that Act:

Extent of Deviation from Requirement

	MAJOR	MODERATE	MINOR
Potential for Harm	MAJOR	\$5,000 - 2,500	\$3,000 - 1,500
	MODERATE	\$3,000 - 1,500	\$2,000 - 1,000
	MINOR	\$1,500 - 750	\$1,000 - 500

In determining whether to assess multi-day penalties for (1) days 2-60 of violations for which multi-day penalties are presumed appropriate or are discretionary, and (2) for days 61+ of all violations, the Department must analyze carefully the specific facts of the case to determine that the penalties selected are appropriate. This analysis should be conducted in the context of the penalty policy's broad goals of (1) ensuring fair and consistent penalties which reflect the seriousness (gravity) of violations, (2) promoting prompt and continuing compliance, and (3) deterring future non-compliance.

While this policy provides general guidance on the use of multi-day penalties, nothing in this policy precludes or should be construed to preclude the assessment of penalties of up to the maximum, \$15,000 or \$10,000 depending on the nature of the violation, for each day after the first day of any given violation. Particularly in circumstances where significant harm has in fact occurred and immediate compliance is required to avert a continuing threat to public health, welfare, environment or property, it may be appropriate to demand the statutory maximum.

VI. EFFECT OF ECONOMIC BENEFIT OF NONCOMPLIANCE

The GWQB Civil Penalty Policy mandates the recapture of any economic benefit of noncompliance that accrues to a violator that is more than insignificant. Staff should evaluate the economic benefit of noncompliance when penalties are calculated. A fundamental premise of the policy is that economic incentives for noncompliance are to be eliminated. If violators are allowed to profit by violating the law, there is little incentive to comply. Therefore, it is incumbent on all staff to calculate economic benefit. An economic benefit component should be calculated and added to the gravity-based penalty component when a violation results in economic benefit to the violator that is more than insignificant, as defined below.

The following are examples of regulatory areas for which violations are particularly likely to present economic benefits: groundwater monitoring, financial assurance, closure, improper discharge, and abatement.

For certain requirements the economic benefit of noncompliance may be insignificant (e.g., failure to submit a routine report on time). In the interest of simplifying and expediting an enforcement action, staff may forego calculating the benefit component where it appears that the amount of the component is likely to be less than \$500 for all violations alleged in the compliance order. However, this decision should be documented on the Penalty Computation Worksheet.

Generally the Department should not settle cases for an amount less than the economic benefit of noncompliance. However, in four categories of cases, settling the total penalty amount for less than the economic benefit may be appropriate. The four exceptions are:

- The economic benefit component for all violations consists of an insignificant amount (i.e., less than \$500);
- There are compelling public concerns that would not be served by taking a case to hearing;
- It is unlikely, based on the facts of the particular case as a whole, that the Department will be able to recover the economic benefit at hearing; or
- The facility 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 on the Penalty Computation Worksheet included in Section VIII under the heading "Economic Benefit."

A. ECONOMIC BENEFIT OF DELAYED COSTS AND AVOIDED COSTS

Staff 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 functional equivalent of capital costs. Examples of violations which result in savings from delayed costs are:

- Failure to install in a timely fashion ground-water monitoring equipment; and
- Failure to submit in a timely fashion a permit application.

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

- Failure to perform ground water monitoring sampling and analysis; or
- Failure to have effluent tested for water contaminants prior to accepting effluent for disposal.

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 requirements, adjusted to reflect anticipated rate of return and income tax effects on the facility. 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, staff should calculate the economic benefit of both the delayed and avoided costs for each year. The GWQB may use the EPA BEN Model, as appropriate.

If a respondent believes that the economic benefit derived from noncompliance differs from the estimated amount, the respondent should present all relevant information documenting the respondent's actual savings to staff at the settlement stage.

VII. ADJUSTMENT FACTORS AND EFFECT OF SETTLEMENT

A. ADJUSTMENT FACTORS

1. Background

As mentioned in Section VI of this document, the seriousness of the violation is considered in determining the gravity-based penalty component. 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 cell from the matrix. However, any system for calculating penalties must have enough flexibility to make adjustments that reflect legitimate differences between separate violations of the same provision. Section 74-5-10.D of the WQA states that in assessing penalties, the Department must take into account any good faith efforts to comply with the applicable requirements. Under this policy, several other adjustment factors should be considered, including the degree of willfulness and/or negligence, history of noncompliance, ability to pay, and other unique factors. This GWQB Civil Penalty Policy also includes an additional adjustment factor for environmental projects undertaken by the respondent.

2. Recalculation of Penalty Amount

Before the Department considers mitigating the penalty contained in the compliance order and applies the adjustment factors, it may be necessary, under certain circumstances, for staff to recalculate the gravity-based or economic benefit component of the penalty figure. If new information becomes available after the issuance of the compliance order which makes it clear that the initial calculation of the penalty contained in the compliance order is in error, staff should adjust this figure. Staff should document on the Penalty Computation Worksheet the basis for recalculating the gravity-based or economic benefit component of the penalty sought in a compliance order or obtained in settlement.

For example, if after the issuance of the compliance order, information is presented which indicates that a lesser volume of water contaminants was illegally discharged than was believed when the compliance order was issued, it may be appropriate to recalculate the gravity-based penalty component. Thus, if staff had originally believed that the violator had illegally discharged 40,000 gallons but it was later determined that only 2,000 gallons had been discharged, it may be appropriate to recalculate the potential for harm component of the gravity-based penalty from major to moderate or minor.

On the other hand, if staff initially believed a violator had fully complied with a specified requirement but subsequently determined that this is not the case, it would be appropriate to amend the compliance order as necessary to add a new count, and revise the total penalty amount upward to account for this previously undiscovered violation. Likewise, if new information shows that a previously known violation is more serious than initially thought, an upward revision of the penalty amount may be required.

Furthermore, if the violator presented new information which established that the work performed was technically inadequate or useless (e.g., the violator drilled wells in the wrong spot or did not dig deep enough), it may be more appropriate to keep the gravity-based penalty as originally calculated and evaluate whether it would be appropriate to mitigate the penalty based on the good faith efforts adjustment factor.

When information is presented which makes it clear that the gravity-based or economic benefit penalty component is in error, staff may formally amend the compliance order to correct the original penalty component or may use the information informally in settlement negotiation.

In any event, staff should carefully document the basis for the recalculation on the Penalty Computation Worksheet in the enforcement file.

3. Application of Adjustment Factors

The adjustment factors can increase, decrease or have no effect on the penalty amount obtained from the violator. In no case can the adjustment result in a penalty amount per day that exceeds the maximum penalty per day allowed by the WQA. Adjustments should generally be applied to the sum of the gravity-based and multi-day components of the penalty for a given violation. All supportable upward adjustments of the penalty amount of which the Department is aware ordinarily should be made prior to issuance of the compliance order, while downward adjustments (with the exception of those reflecting good faith efforts to comply) should generally not be made until after the compliance order has been issued, at which time the burden of persuasion that downward adjustment is proper should be placed on respondent. Staff should use whatever reliable information on the violator and violation is readily available at the time of assessment.

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 gravity-based and multi-day matrices is \$15,000, and upward adjustments of 10% were made for both history of noncompliance and degree of willfulness and/or negligence, the total adjustment penalty would be \$18,000 (\$15,000 + 10% + 10%).

For any given factor (except ability to pay and litigation risk) staff can, assuming proper documentation, adjust the sum of the gravity-based and multi-day penalty components for any given violation up or down (1) by as much as 25% of that sum in ordinary circumstances or (2) from 25% to 40% of that sum in unusual circumstances. Downward adjustments based on inability to pay or litigation risk will vary in amount depending on the individual facts present in a given case and in certain limited circumstances may be applied to the economic benefit component.

However, if a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. For these reasons, the Department should at a minimum recover any significant economic benefits resulting from failure to comply with the law. If violators are allowed to settle for a penalty less than their economic benefit of noncompliance, the goal of deterrence is undermined. Except in extraordinary circumstances, which include cases where there are demonstrated limitations on a respondent's ability to pay or very significant litigative risks, the final adjusted penalty should also include a significant gravity-based component beyond the economic benefit component.

Finally, as noted above, it is intended that only Department personnel will consider adjusting the amount of a penalty downward based on the litigation risks confronting the Department or the willingness of a violator to undertake an environmental project in settlement of a penalty claim. This is because these factors are only relevant in the settlement context.

The following is a discussion of the adjustment factors to consider.

a. Good faith efforts to comply/lack of good faith

Under Section 74-5-10.D of the WQA, good faith efforts to comply with applicable requirements must be considered in assessing a penalty. The violator can manifest good faith by

promptly identifying and reporting noncompliance or instituting measures to remedy the violation immediately upon detection by the violator. Assuming self-reporting is not required by law and the violations are expeditiously corrected, a violator's admission or correction of a violation prior to detection may be cause for mitigation of the penalty, particularly where the violator institutes significant new measures to prevent recurrence. Lack of good faith, on the other hand, can result in a penalty increase.

No downward adjustment should be made because the respondent lacks knowledge concerning either applicable requirements or violations committed by respondent. The Department will also refrain from downward adjustment for a respondent's efforts to comply or otherwise correct violations after the Department's detection of violations (failure to undertake such measures may be cause for upward adjustment as well as multi-day penalties), since the amount set in the gravity-based penalty component matrix assumes good faith efforts by a respondent to comply after the Department's discovery of a violation.

If a respondent reasonably relies on written statements by the Department that an activity will satisfy Water Quality Act requirements and it is later determined that the activity does not comply, a downward adjustment or suspension of the penalty may be warranted, if the respondent relied on those assurances in good faith. Such claims of reliance should be substantiated by sworn affidavit or some other form of affirmation. On the other hand, claims by a respondent such as "it was not told" by the Department that it was out of compliance should not be cause for any downward adjustment of the penalty.

b. Degree of willfulness and/or negligence

While knowing violations of the WQA and WQCC Regulations may support criminal penalties pursuant to Section 74-5-10.2 of the WQA, there may be instances of heightened culpability which do not meet the criteria for criminal action. In cases where civil penalties are sought for actions of this type, the penalty may be adjusted upward for willfulness and/or negligence. Conversely, 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 appropriate:

- How much control the violator had over the events constituting the violation;
- The foreseeability 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; and
- Whether the violator knew or should have known 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 or her control and that of his or her agents, the penalty may be reduced.

c. History of noncompliance (upward adjustment only)

Where a party previously violated Water Quality Act requirements 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 current or 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 that staff should consider are:

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

A violation generally should be considered similar if the Department's previous enforcement response should have alerted the party to a particular type of compliance problem. A prior violation of the same requirements would constitute a similar violation. Nonetheless, a history of noncompliance can be established even in the absence of similar violations where there has been a disregard of environmental requirements contained in the WQA and WQCC Regulations.

For purposes of this section, a prior violation includes any act or omission for which an enforcement response has occurred (e.g., Department notice of violation, compliance order, consent agreement, final order, consent decree, or civil complaint).

It also includes any act or omission for which the violator has previously been given written notification, however informal, that the Department believes a violation exists (e.g., Department notice of noncompliance).

In general, staff should begin with the assumption that if the same corporation was involved, the adjustments for history of noncompliance should apply. In addition, staff 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 Department may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance should apply unless the violator can demonstrate that the other violating corporate facilities are independent.

d. Ability to pay (downward adjustment only)

The Department generally will not assess penalties that are clearly beyond the means of the violator. Therefore, the Department 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. The Department reserves the option, in appropriate circumstances, to seek penalties that might put a facility out of

business. It is unlikely, for example, that the Department 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 facility'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 fully provide sufficient information, including without limitation tax returns and financial statements, then staff should disregard this factor in adjusting the penalty.

When the Department determines that a violator cannot afford the penalty prescribed by this policy, or that payment of the penalty will preclude the violator from achieving compliance or from carrying out remedial measures which the Department deems to be more important than the deterrence effect of the penalty (e.g., payment of penalty would preclude source control or proper closure), the following options should be considered in the order presented:

- Consider an installment payment with interest.
- Consider a delayed payment schedule with interest. Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business.
- Consider straight penalty reductions as a last recourse.

As indicated above, the amount of any downward adjustment of the penalty is dependent on the individual facts of the case regarding the financial capability of the respondent and the nature of the violations at issue.

e. Supplemental environmental projects (downward adjustment only)

Under certain circumstances, the Department may consider adjusting the penalty amount downward in return for an agreement by the violator to undertake an appropriate environmentally beneficial project in the state of New Mexico. The agreement should not exceed 50% of the final settlement amount unless there are special circumstances which warrant further adjustments. In any event, the final amount received as a cash penalty should not be less than the value of the economic benefit gained. The following criteria are provided to determine the appropriateness of the use of environmentally beneficial mitigation projects in settlements. Supplemental environmental projects serve as an incentive to settlement and shall be allowed only in prelitigation agreements (prior to the actual hearing), except in extraordinary circumstances. The Department will consider on a case-by-case basis accepting only those projects that satisfy all the following criteria.

i. The activity must be initiated in addition to all statutory and regulatory compliance obligations and not be used for penalty mitigation in any other enforcement action. The project may not be a substitute for compliance; rather, it must be designed to provide an environmental benefit beyond the benefits of compliance and may not be part of the facility's normal business practice or a project the facility was already planning to do. The respondent should be required to document by affidavit or otherwise that the environmental project meets those criteria.

ii. In order to attain the deterrent objectives of the GWQB Civil Penalty Policy, penalty reductions shall reflect the actual cost of undertaking the activity, taking into account the tax benefits that accrue. With consideration of tax benefits, the actual cost

of the project to the respondent shall equal or exceed the value of the mitigation. If the respondent fails to complete the agreed upon project, the settlement document should provide that a commensurate amount of any previous downward adjustment of the penalty be reinstated.

iii. The activity must demonstrate a good-faith commitment to environmental improvement. One test of good faith is the degree to which the violator takes the initiative to identify and propose specific, potential environmental projects. In addition, the project must be primarily designed to benefit the environment and the general public rather than to benefit the violator or any governmental unit.

iv. Mitigation based on the respondent's activity must not detract significantly from the general deterrent effect of the settlement as a whole. In the settlement context the Department should continue to consider supplemental environmental projects as the exception rather than the rule. Efforts should be made to eliminate any potential perception by the regulated community that the Department lacks the resolve to impose significant penalties for substantial violations. The Department should seek penalties in conjunction with mitigation activities which deter both the specific violator and also the entire regulated community. Accordingly, every settlement should include a substantial monetary penalty component.

v. Judicially-enforceable consent decrees must meet the public interest criteria for consent decrees and cannot contain provisions which would be beyond the power of the court to order. Additional guidance on the appropriate scope of relief might be found in the WQA, its legislative history, or the WQCC regulations.

vi. The activity or project must require little Department oversight. The project should be designed to minimize the need for Department monitoring of implementation.

vii. Any settlement which includes an environmental project must require that any public statement by the violator regarding the environmental or general public benefits of the project must include a statement that funding for the project is in partial settlement of an enforcement case brought by the Department.

viii. Qualifying activities must provide a discernable response to the perceptible risk or harm caused by the violations which are the focus of the Department's enforcement action. The activity is most likely to be an acceptable basis for mitigating penalties if it closely addresses the environmental effects of the violations.

Other Considerations:

The Department should exercise case-by-case judgment in deciding whether to accept an environmental project based upon the above criteria and should consider the difficulty of monitoring the implementation of the proposed project in light of the anticipated benefits of the project. The Department may also choose to combine enforcement actions in areas such as air quality, hazardous waste, solid waste, and occupational health and safety. The Department may refer to the Environmental Protection Agency's Supplemental Environmental Projects Policy (April 10, 1998), as it may be revised, for further guidance.

f. Other unique factors

This policy allows an adjustment for factors which may arise on a case-by-case basis. When developing its settlement position, the Department should evaluate every penalty with a

view toward the potential for protracted litigation and attempt to ascertain the maximum civil penalty the WQCC or court is likely to award if the case proceeds to hearing or trial. The Department should take into account, among other things, the inherent strength of the case, considering, for example, the probability of proving violations, the probability that the Department's legal arguments will be accepted, the opportunities which exist to establish a useful precedent or send a signal to the regulated community, the availability and potential effectiveness of the Department's evidence, including witnesses, and the potential strength of the violator's equitable and legal defenses. Where the Department determines that significant litigation risks exist, it may also take into account any disproportionate resource outlay involved in litigating a case that it might avoid by entering into a settlement. Downward adjustments of the proposed penalty for settlement purposes may be warranted depending on the Department's assessment of these litigation considerations. The extent of the adjustments will depend, of course, on the specific litigation considerations presented in any particular case.

However, where the magnitude of the resource outlay necessary to litigate is the only significant litigation consideration dictating downward adjustment in the penalty amount, the Department should still obtain a penalty which not only recoups the economic benefit the violator has enjoyed, but includes an additional amount sufficient to create a strong economic disincentive against violating applicable WQA requirements.

If lengthy settlement negotiations cause the violation(s) to continue significantly longer than initially anticipated, the initial proposed penalty amount should be increased, as appropriate, with a corresponding amendment of the compliance order. The revised figure would be calculated in accordance with this policy, and account for the increasing economic benefit and protracted noncompliance.

B. EFFECT OF SETTLEMENT

This Civil Penalty Policy encourages settlement of a proceeding at any time as long as the settlement is consistent with the provisions and objectives of the WQA and WQCC Regulations. If the respondent believes that it is not liable or that the circumstances of its case justify mitigation of the penalty proposed in the compliance order, the Policy allows the respondent to request a settlement conference.

In many cases, the fact of a violation will be less of an issue than the amount of the proposed penalty. Once the Department has established a *prima facie* case, the burden is always on the violator to justify any reduction of the proposed penalty. The reduction, if any, of the penalty proposed in the compliance order should follow the guidelines in the Adjustment Factors section of this document.

Approved:


Marcy Leavitt

Date:

6/6/01

Chief
Ground Water Quality Bureau

VIII. APPENDIX - PENALTY AND SETTLEMENT COMPUTATION WORKSHEETS

PENALTY COMPUTATION WORKSHEET

Facility Name: _____
Discharge Permit: _____
Address: _____

Violation _____
Dates of Violations _____

Penalty Amount for Compliance order

1. Gravity-based penalty from matrix: _____
 - a. Potential for harm. _____
 - b. Extent of deviation. _____

2. Multiple/Multi-Day:
 - a. If multiple, number of separate violations. _____
 - b. If multi-day, select amount from multi-day matrix. _____
 - c. Multiply line 2.b by number of days of violation minus 1 day. _____

3. If multiple, multiply line I by line 2.1.
If multi-day, add line I and line 2. _____

4. Adjustment Factors:
 - a. Percent increase (+%) / decrease (-%) for good faith. _____
 - b. Percent increase (+%) for willfulness/negligence. _____
 - c. Percent increase (+%) for history of noncompliance. _____
 - d. Percent increase (+%) / decrease (-%) for other unique factors. _____
 - e. Add lines 4 a, b, c, and 4 d. _____

5. Multiply line 3 by line 4e. _____

6. Calculate economic benefit (attach calculations). _____

7. Add lines 3, 5 and 6 for penalty amount to be inserted
in the compliance order. _____

SETTLEMENT COMPUTATION WORKSHEET

Facility Name: _____
Discharge Permit: _____
Address: _____

Violation _____
Dates of Violations _____

Settlement Penalty Amount

1. Gravity-based penalty from matrix: _____
 - a. Potential for harm. _____
 - b. Extent of deviation. _____

2. Multiple/Multi-Day:
 - a. If multiple, number of separate violations. _____
 - b. If multi-day, select amount from multi-day matrix. _____
 - c. Multiply line 2.b by number of days of violation minus 1 day. _____

3. If multiple, multiply line 1 by line 2.1.
If multi-day, add line 1 and line 2. _____

4. Adjustment Factors:
 - a. Percent increase (+%) / decrease (-%) for good faith. _____
 - b. Percent increase (+%) for willfulness/negligence. _____
 - c. Percent increase (+%) for history of noncompliance. _____
 - d. Percent increase (+%) / decrease (-%) for other unique factors. _____
 - e. Add lines 4 a, b, c, and 4 d. _____

5. Multiply line 3 by line 4e. _____

6. Calculate economic benefit (attach calculations). _____

7. Add lines 3, 5 and 6 for penalty amount to be inserted
in the compliance order. _____

8. Adjustment amount for environmental project (-). _____

9. Adjustment amount for ability-to-pay (-). _____

10. Adjustment amount for litigation risk (-). _____

11. Add lines 8, 9 and 10. _____

12. Subtract line 11 from line 7 for final settlement amount. _____

NARRATIVE EXPLANATION

VIOLATION #:

1. Gravity-Based Penalty

- (a) Potential for Harm:
(Describe the rationale for selecting the potential for harm)
 - (b) Extent of Deviation
(Describe the rationale for-selecting the extent of deviation)
 - (c) Multiple/Multi-Day
(Describe the basis for the multiple/multi-day penalty - dates of violations)
- #### 2. Adjustment Factors (Good Faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applied.)
- (a) Good Faith
 - (b) Willfulness/Negligence
 - (c) History of Compliance
 - (d) Ability to pay
 - (e) Environmental Project
 - (f) Other Unique Factors
- #### 3. Economic Benefit (Provide basis for economic benefit calculation including information sources of costs)
- #### 4. Recalculation of Penalty Based on New Information