

NEW MEXICO ENVIRONMENT DEPARTMENT
SOLID WASTE CIVIL PENALTY ASSESSMENT POLICY

November, 1994

NMED SOLID WASTE CIVIL PENALTY POLICY

TABLE OF CONTENTS

I.	<u>SUMMARY OF THE POLICY</u>	1
II.	<u>INTRODUCTION</u>	3
III.	<u>PURPOSE OF DEPARTMENT PENALTY POLICY</u>	4
IV.	<u>DOCUMENTATION AND RELEASE OF INFORMATION</u>	5
A.	DOCUMENTATION FOR PENALTY SOUGHT IN ADMINISTRATIVE COMPLAINT/LITIGATION	5
B.	DOCUMENTATION OF PENALTY SETTLEMENT AMOUNT	6
C.	RELEASE OF INFORMATION	6
V.	<u>RELATIONSHIP BETWEEN PENALTY AMOUNT SOUGHT IN AN ADMINISTRATIVE COMPLAINT AND ACCEPTED IN SETTLEMENT</u>	8
VI.	<u>DETERMINATION OF GRAVITY-BASED PENALTY AMOUNT</u>	9
A.	POTENTIAL FOR HARM	9
B.	EXTENT OF DEVIATION FROM REQUIREMENT	13
C.	PENALTY ASSESSMENT MATRIX	14
VII.	<u>MULTIPLE AND MULTI-DAY PENALTIES</u>	15
A.	PENALTIES FOR MULTIPLE VIOLATIONS	15
B.	PENALTIES FOR MULTI-DAY VIOLATIONS	17
C.	CALCULATION OF THE MULTI-DAY PENALTY	18
VIII.	<u>EFFECT OF ECONOMIC BENEFIT OF NONCOMPLIANCE</u>	20
A.	ECONOMIC BENEFIT OF DELAYED COSTS AND AVOIDED COSTS	21
B.	CALCULATION OF ECONOMIC BENEFIT	21
IX.	<u>ADJUSTMENT FACTORS AND EFFECT OF SETTLEMENT</u>	24
A.	ADJUSTMENT FACTORS	24
B.	EFFECT OF SETTLEMENT	32
X.	<u>EXPEDITED ENFORCEMENT</u>	32
XI.	<u>EXPEDITED ENFORCEMENT IMPLEMENTATION</u>	33
XII.	<u>APPENDIX</u>	35
	PENALTY COMPUTATION WORKSHEET	35

SETTLEMENT COMPUTATION WORKSHEET	36
NARRATIVE EXPLANATION	37
BEN WORKSHEET	39
FIELD COMPLIANCE ORDER	40
OPERATOR CERTIFICATION OF COMPLIANCE	41

NMED SOLID WASTE CIVIL PENALTY POLICY

I. SUMMARY OF THE POLICY

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

$$\text{Penalty Amount} = \begin{array}{ccccccc} \text{gravity-based} & + & \text{multi-day} & \pm & \text{adjust} & + & \text{economic} \\ \text{component} & & \text{component} & & \text{-ments} & & \text{benefit} \end{array}$$

In administrative civil penalty cases, two separate calculations will be made under this policy: (1) to determine an appropriate amount to seek in the administrative complaint, and (2) to explain and document the process by which the Department arrived at the penalty figure it has agreed to accept in settlement. The methodology for these two calculations will differ only in that no downward adjustments (other than those reflecting a violator's good faith efforts to comply with applicable requirements) will usually be included in the calculation of the proposed penalty for the administrative complaint. In those instances where the respondent or reliable information demonstrates prior to the issuance of the complaint that applying further downward adjustment factors (over and above those reflecting a violator's good faith efforts to comply) is appropriate, enforcement personnel may in their discretion (but are not required to) make such further downward adjustments in the amount of the penalty proposed in the complaint.

In determining the amount of the penalty to be included in the complaint, enforcement personnel should consider all possible ramifications posed by the violation and resolve any doubts (e.g., as to the application of adjustment factors or the assumptions underlying the amount of the economic benefit enjoyed by the violator) in a manner consistent with the facts and findings so as to preserve the Department's ability to litigate for the strongest penalty possible. It should be noted that assumptions underlying any upward adjustments or refusal to apply downward adjustments in the penalty amount are subject to revision later as new information becomes available.

In civil judicial cases, NMED will use the narrative penalty assessment criteria set forth in the policy to argue for as high a penalty as the facts of a case justify should the case go to trial, and will prepare a calculation which applies this policy to lay out the rationale behind any penalty amount the Department agrees to accept in settlement.

Two factors are considered in determining the gravity-based penalty component:

-potential for harm; and

-extent of deviation from a statutory or regulatory requirement.

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

GRAVITY-BASED PENALTY MATRIX:

Extent of Deviation from Requirement

	MAJOR	MODERATE	MINOR
SEVERE	5,000	4,000	3,000
SIGNIFICANT	3,000	2,000	1,000
MINIMAL	1,000	500	100

This policy also explains how to factor into the calculation of the gravity component the presence of multiple and multi-day (continuing) violations. The policy provides that for days 2 through 60 of multi-day violations, multi-day penalties are mandatory, presumed, or discretionary, depending on the "potential for harm" and "extent of deviation" of the violations. For each day for which multi-day penalties are sought, the penalty amounts must be determined using the multi-day penalty matrix. The penalty amounts in the multi-day penalty matrix range from 20% to 50% (with a minimum of \$50 per day) of the penalty amounts in the corresponding gravity-based matrix cells.

Where a facility has derived significant savings or profits by its failure to comply with the Solid Waste Act or Solid Waste Management Regulations requirements, the amount of economic benefit from noncompliance gained by the violator will be calculated and added to the gravity-based penalty amount except when the total penalty is \$5,000 per day per violation. The Department may utilize a computer model that can quickly and accurately calculate economic benefit.

After the appropriate gravity-based penalty amount (including the multi-day component) has been determined, it may be adjusted upward or downward to reflect particular circumstances surrounding the violation, but may not exceed \$5,000 per day per violation. Except in the unusual circumstances outlined in Section VIII the amount of any economic

benefit enjoyed by the violator is not subject to adjustment. When adjusting the gravity-based penalty amount the following factors should be considered:

- good faith efforts to comply/lack of good faith (upward or downward adjustment);
- degree of willfulness and/or negligence (upward or downward adjustment);
- history of noncompliance (upward adjustment);
- ability to pay (downward adjustment);
- environmental projects to be undertaken by the violator (downward adjustment); and
- other unique factors, including but not limited to the risk and cost of litigation (upward or downward adjustment).

These factors (with the exception of (i) upward adjustment factors such as history of noncompliance, and (ii) the statutory downward adjustment factor reflecting a violator's good faith efforts to comply) should usually be considered during the settlement stage to provide downward adjustment to the original penalty.

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

II. INTRODUCTION

NMSA 1978, Section 74-9-36 provides that if any person has violated or is in violation of a requirement of the Solid Waste Act, any regulation promulgated pursuant to that Act or any condition of a permit issued under that Act, the Secretary may, among other options, issue an order assessing a civil penalty of up to \$5,000 per day for each violation. Section 74-9-36.B., 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 requirement; and
- other relevant factors.

NMSA 1978, Section 74-9-38 applies to civil enforcement actions with civil penalties of up to \$5,000 per day for each violation of the Act or Regulations. If the responsible party does not properly remediate, according to NMSA 1978, Section 74-9-34 they may be liable

for up to three times the amount of the costs incurred.

This document sets forth the Department's policy and internal guidelines for determining penalty amounts which (1) should be sought in administrative complaints filed under the Solid Waste Act¹, and (2) would be acceptable in settlement of administrative and judicial enforcement actions under the Act or Regulations.

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

This document does not address whether assessment of a civil penalty is the correct enforcement response to a particular violation. Rather, this document focuses on determining the proper civil penalty amount that the Department should obtain once a decision has been made that a civil penalty is the proper enforcement remedy to pursue.

This Civil Penalty Policy is immediately applicable and should be used to calculate penalties sought in all solid waste administrative complaints or accepted in settlement of both administrative and judicial civil enforcement actions brought under the statute after the date of the policy, regardless of the date of the violation. To the maximum extent practicable, the policy shall also apply to the settlement of administrative and judicial enforcement actions instituted prior to but not yet resolved as of the date the policy is issued.

The procedures set out in this document are intended solely for the guidance of Department personnel. They are 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 be at variance with this policy and to change it at any time without public notice.

III. PURPOSE OF DEPARTMENT PENALTY POLICY

This Civil Penalty Policy sets forth certain goals. These goals consist of:

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

¹ This policy is in no way intended to limit the penalty amounts sought in civil actions. In civil judicial actions brought pursuant to the Act, the Department will, at its discretion, continue to file complaints requesting up to the statutory maximum civil penalty amount and to litigate for the maximum amount justifiable on the facts of the case.

This penalty policy also sets the framework for assessing civil penalties by:

-Calculating a preliminary deterrence amount consisting of a gravity component and a component reflecting a violator's economic benefit of noncompliance; and

-Applying adjustment factors to account for differences between cases.

IV. DOCUMENTATION AND RELEASE OF INFORMATION

A. DOCUMENTATION FOR PENALTY SOUGHT IN ADMINISTRATIVE COMPLAINT/LITIGATION

In order to support the penalty proposed in the complaint, enforcement personnel must include in the case file an explanation of how the proposed penalty amount was calculated. As a sound case management practice in administrative cases, a case "record" file should document or reference all factual information on which the Department will need to rely to support the penalty amount sought in the complaint. Full documentation of the reasons and rationale for the penalty complaint amount is important to expeditious, successful administrative enforcement of solid waste statutory or regulatory requirements. The documentation should include all relevant information and documents which served as the basis for the penalty complaint amount and were relied upon by the Department decision-maker. In general, only final documents, but not preliminary documents, such as drafts and internal memoranda reflecting earlier deliberations, should be included in the record file. All documentation supporting the penalty calculation should be in the record file at the time the complaint is issued. The documentation should be supplemented to include a justification for any adjustments to the penalty amount in the complaint made after initial issuance of the complaint, if such adjustments are necessary.

To ensure that administrative complaints comply with the statute and the rules, as long as sufficient facts are alleged in the complaint, enforcement personnel may plead the following:

Based upon the facts alleged in this Complaint and upon those factors which the Complainant must consider pursuant to Sections 74-9-34, 74-9-36 and 74-9-38 of NMSA 1978, including the seriousness of the violations, any good faith efforts by the respondent to comply with applicable requirements, and any economic benefit accruing to the respondent, as well as such other matters as justice may require, the Complainant proposes that the Respondent be assessed the following civil penalty for the violations alleged in this Complaint.

Count 1.....	\$25,000
Count 2.....	\$80,000

Enforcement personnel may use the above general language in the complaint, but must be prepared to present at the pre-hearing conference or evidentiary hearing more detailed information reflecting the specific factors weighed in calculating the penalty proposed in the complaint. For example, evidence of specific instances where the violation actually did, could have, or still might result in harm could be presented to the trier of fact to illustrate the potential for harm factor of the penalty. Experience also suggests that the Department may be called upon, before the hearing, to present to the trier of fact and the respondent the penalty computation worksheet supporting the proposed penalty amount sought in the complaint.

Usually the record supporting the penalty amount specified in the complaint 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 to comply). Also the record should include any inspection reports and other documents relating to the penalty calculation.

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 best arguments relative to penalty mitigation the Department may, at its discretion, complete a penalty calculation worksheet to establish its initial "bottom line" settlement position. However, at a minimum, prior to final approval of any settlement, whether administrative or judicial, enforcement personnel 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. As noted above, enforcement personnel may, in arriving at a penalty settlement amount, deviate significantly from the penalty amount sought in an administrative complaint provided such discretion is exercised in accordance with the provisions of this policy.

C. RELEASE OF INFORMATION

Release of information to members of the public relating to the use of the Solid Waste Civil Penalty Policy in enforcement cases is governed by the NM Rules of Evidence, NM Public Records Act, and the Internal NMED Policy On Public Information Requests implementing that Act. Freedom of information, as implemented through Department policy, sets forth procedural and substantive requirements governing the disclosure of information by State agencies. While the Department maintains a policy of openness and freely discloses much of what is requested by the public, there are a number of privileges/exemptions in the NM Rules of Evidence, NM Public Records Act, and Policy which allow the Department to withhold and protect from disclosure certain documents and information in appropriate

circumstances.

In ongoing enforcement cases, documents and other material that deal with establishing the appropriate amount of a civil penalty (particularly penalty computation worksheets) may be covered by two different exemptions. Documents that support or relate to the amount of the civil penalty the Department would be willing to accept in settlement are likely to fall within the scope of these exemptions and in many cases can be withheld. Documents that support or relate to the amount of a penalty the Department has proposed in an administrative complaint may also qualify for protection under the exemptions.

Documents shall be withheld if release could reasonably be expected to interfere with an enforcement proceeding. This exemption extends to all stages of law enforcement activities, from initial investigation to completion. Once the enforcement action has been completed, however, this exemption can no longer be used to withhold information.

Department documents and information that are classified as attorney work product, as well as pre-decisional deliberative documents shall be withheld. The attorney work product privilege protects sensitive decisions and recommendations made in analyzing and choosing appropriate enforcement options, and planning legal strategy, in response to violations of legal requirements. Such documents must be prepared in anticipation of litigation by, or at the direction of, an attorney. The purpose of the deliberative process privilege is to preserve the quality of Department decisions by encouraging honest and frank discussion within the Department. The process of developing penalty calculations may fall within the parameters of both attorney work product and deliberative process; thus, withholding may be appropriate.

An important distinction between the two exemptions discussed is that 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 nondisclosure 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 issues relating to privilege, NM Public Records Act, and Policy and application of its exemptions require special attention, the Department's Office of General Counsel should be consulted whenever any request is made by a member of the public relating to the application of the Solid Waste Penalty Policy in general or in a specific enforcement action.

The penalty computation worksheet to be included in the case file is attached. (See: Section XI, Appendix.).

V. RELATIONSHIP BETWEEN PENALTY AMOUNT SOUGHT IN AN ADMINISTRATIVE COMPLAINT AND ACCEPTED IN SETTLEMENT

This penalty policy not only facilitates compliance with the cited regulations by requiring that enforcement personnel calculate a proposed penalty (and include this amount and the underlying rationale for adopting it in the complaint), 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 administrative complaint will often exceed the amount of the penalty the Department would accept in settlement. This may be so for several reasons.

First, at the time the complaint is filed, the Department will often not be aware of mitigating factors (then known only to the respondent) on the basis of 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 complaint, 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 appropriate incentives to agree to penalty amounts acceptable to the Department in settlement.

Therefore, Department enforcement personnel should as necessary, prepare two separate penalty calculations for each administrative proceeding -- one to support the initial proposed penalty included in the complaint 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 administrative complaint, Department personnel should total (1) the gravity-based penalty amount (including any multi-day component) and (2) an amount reflecting upward adjustments³ of the penalty and subtract from this sum an amount reflecting any downward adjustments in the penalty based solely on respondent's "good faith efforts⁴ to comply with applicable requirements" about which the

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 to argue to the court in judicial actions that the penalty figure it seeks is consistent with the rationale underlying the penalty policy.

³ While the Department may at this early juncture have limited knowledge of the facts necessary to calculate any upward adjustments in the penalty, it should be remembered that amendments to the complaint (including the amount of the proposed penalty) may be made after an answer is filed only with the leave of the presiding officer.

⁴ Since NMSA 1978, Section 74-9-36.B. 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 74-9-36.B. also requires that the Department weigh the seriousness of the violation in assessing a penalty, this requirements is satisfied by including a gravity-based component which reflects the seriousness (i.e., the potential for harm and extent of deviation from applicable requirements) of the violation. As noted above, enforcement

Department is aware. 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 complaint.

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 complaint, 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 complaint).

It may be noted here that the Solid Waste Penalty Policy serves as guidance not only to Department personnel charged with responsibility for calculating appropriate penalty amounts but also to hearing officers presiding over administrative proceedings under Rules Governing Appeals from Compliance Orders Under the Solid Waste Act at which proper penalty amounts for violations redressable under NMSA 1978, Section 74-9-36 are at issue. Such hearing officers thus have discretion to apply most of the upward or downward adjustment factors described in this policy in determining what penalty should be imposed on a violator. However, judgements as to whether a penalty should be reduced in settlement because (1) the violator is willing to undertake an environmental project in settlement of a penalty claim, or (2) the Department faces certain litigative risks in proceeding to hearing or trial, are decisions involving matters of policy and prosecutorial discretion which by their nature are only appropriate to apply in the context of settling a penalty claim. It is therefore contemplated that decision makers in administrative proceedings would not adjust penalty amounts downward.

VI. DETERMINATION OF GRAVITY-BASED PENALTY AMOUNT

NMSA 1978, Section 74-9-36.B. 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

Solid Waste statutory and regulatory requirements were promulgated in order to

personnel 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 administrative complaint that application of additional downward adjustment factors is warranted.

prevent harm to human health and the environment. Thus, noncompliance with any solid waste requirement can result in a situation where there is a potential for harm to human health or the environment. Even violations such as recordkeeping violations create a risk of harm to the environment or human health by jeopardizing the integrity of the solid waste regulatory program. Accordingly, the assessment of the potential for harm resulting from a violation should be based on two factors:

- the risk of human or environmental exposure to hazardous waste and/or hazardous constituents that may be posed by noncompliance, and

- the adverse effect noncompliance may have on statutory or regulatory purposes or procedures for implementing the solid waste program.

1. Risk of Exposure

The risk of exposure presented by a given violation depends on both the likelihood that human or other environmental receptors may be exposed to toxic constituents and the degree of such potential exposure. Evaluating the risk of exposure may be simplified by considering the factors which follow below.

a. Probability of Exposure

Where a violation involves the actual management of waste, a penalty should reflect the probability that the violation could have resulted in, or has resulted in a release of solid waste or constituents, or hazardous conditions creating a threat of exposure to solid waste or waste constituents. The determination of the likelihood of a release should be based on whether the integrity and/or stability of the waste management unit is likely to have been compromised.

Some factors to consider in making this determination would be:

- evidence of release (e.g., existing soil or groundwater contamination);

- evidence of waste mismanagement; and

- adequacy of provisions for detecting and preventing a release (e.g., monitoring equipment and inspection procedures).

A larger penalty is presumptively appropriate where the violation significantly impairs the ability of the solid waste management system to prevent or detect releases of contaminants and constituents.

b. Potential Seriousness of Contamination

When calculating risk of exposure, enforcement personnel should weigh the harm which would result if contaminants or constituents were in fact released to the environment.

Some factors to consider in making this determination would be:

- quantity and toxicity of wastes (potentially released);
- likelihood or fact of transport by way of environmental media (e.g., air and groundwater); and
- existence, size, and proximity of receptor populations (e.g., local residents, fish, and wildlife, including threatened or endangered species) and sensitive environmental media (e.g., surface waters and aquifers).

In considering the risk of exposure, 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.

2. Harm to the NM Solid Waste Bureau

There are some requirements of the solid waste program which, if violated, may not be likely to give rise directly or immediately to a significant risk of contamination. Nonetheless, all regulatory requirements are fundamental to the continued integrity of the solid waste 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 solid waste program. Some examples of this kind of regulatory harm include:

- failure to comply with financial assurance requirements
- failure to submit a timely permit application
- failure to respond to a formal information request
- operating without a permit
- failure to prepare or maintain a manifest
- failure to install or conduct adequate groundwater monitoring.

3. General

a. Evaluating the Potential for Harm

Enforcement personnel should evaluate whether the potential for harm is severe, significant, or minimal in a particular situation. The degree of potential harm represented by each category is defined as:

SEVERE (1) the violation poses or may pose a substantial risk of exposure of humans or other environmental receptors to solid waste or constituents; and/or

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

SIGNIFICANT (1) the violation poses or may pose a significant risk of exposure of humans or other environmental receptors to solid waste or constituents; and/or

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

MINIMAL (1) the violation poses or may pose a relatively low risk of exposure of humans or other environmental receptors to solid waste or constituents; or

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

The examples which follow illustrate the differences between severe, significant, and minimal potential for harm. Just as important as the violation involved are the case specific factors surrounding the violation. Enforcement personnel should avoid automatic classification of particular violations.

b. Examples

1. Severe Potential for Harm

NMSA 1978, Section 74-9-35 requires that owners or operators of solid waste facilities establish financial assurance 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 Regulations thereby preventing the funds from being available for closure. Such a facility could potentially become an abandoned solid waste site. When the language of the agreement 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 of exposure). This violation would therefore be assigned to the severe potential for harm category.

2. Significant Potential for Harm

Under the Solid Waste Act and specified in the Regulations, certain operational requirements must be met by solid waste facilities. For example, the Regulations require landfill operators involved in Recycling to either remove all recyclables from the landfill daily or store them properly on site. In a situation where a landfill is improperly storing or is stockpiling recyclables on site there is a potential to create a nuisance, harbor vectors, or pose a public health hazard. The significant potential for harm category would be appropriate in this case.

3. Minimal Potential for Harm

Operators of all solid waste facilities are required by regulation to post signs indicating the location of the site, hours of operation, emergency telephone numbers, disposal instructions, and prohibition of fires or scavenging. If a facility, for example, fails to post signs indicating the hours of operation, there is a potential for dumping outside of the premises by people coming to the site after operating hours. The likelihood of exposures and adverse effect may be relatively low. The minimal potential for harm category could be appropriate for such a situation.

B. EXTENT OF DEVIATION FROM REQUIREMENT

The "extent of deviation" from the Act and the Regulation requirements relates to the degree to which the violation renders inoperative the requirement violated. In any violative situation, 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). 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.

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

Example 1 - Closure Plan

Part V of the Regulations requires that owners or operators of landfill have a written

closure plan. This plan must identify the steps necessary to completely or partially close the facility at any point during its intended operating life. Possible violations of the requirements of this regulation range from having no closure plan at all to having a plan which is somewhat inadequate (e.g., it omits one minor step in the procedures for cleaning and decontaminating the equipment while complying with the other requirements). Such violations should be assigned to the "major" and "minor" categories respectively. A violation between these extremes might involve failure to modify a plan for increased decontamination activities as a result of a spill on-site and would be assigned to the moderate category.

Example 2 - Failure to Maintain Adequate Security

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

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

C. PENALTY ASSESSMENT MATRIX

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

GRAVITY-BASED PENALTY MATRIX:

Extent of Deviation from Requirement

	MAJOR	MODERATE	MINOR
SEVERE	5,000	4,000	3,000
SIGNIFICANT	3,000	2,000	1,000
MINIMAL	1,000	500	100

The lowest cell (minimal potential for harm/minor extent of deviation) contains a penalty of \$100. The highest cell (severe potential for harm/major extent of deviation) is limited by the maximum statutory penalty allowance of \$5,000 per day for each violation.

The selection of the exact penalty amount within each cell is left to the discretion of enforcement personnel in any given case. The range of numbers provided in the matrix cells serves as a "fine tuning" device to allow enforcement personnel to better adapt the penalty amount to the gravity of the violation and its surrounding circumstances. In selecting a dollar figure it is appropriate to consider such factors as the seriousness of the violation (relative to other violations falling within the same matrix cell), efforts at remediation or the degree of cooperation evidenced by the facility (to the extent this factor is not to be accounted for in subsequent adjustments to the penalty amount), the size and sophistication of the violator, the number of days of violation, and other relevant matters. For guidance on recalculation of the gravity-based penalty based on new information see Section IX A.2.

VII. 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 solid waste requirements. A separate penalty should be sought in a complaint and obtained in settlement or litigation for each separate violation that results from an independent act (or failure to act) by the violator and is substantially distinguishable from any other charge in the complaint for which a penalty is to be assessed. A given charge is independent of, and substantially distinguishable from, any other charge when it requires an element of proof not needed by the others. In many cases, violations of different sections of the regulations constitute independent and substantially distinguishable violations. For example, failure to implement a groundwater monitoring program, and failure to have a

written closure plan, are violations which can be proven only if the Department substantiates different sets of factual allegations. In the case of a facility which has violated both of these sections of the regulations, a separate count should be charged for each violation. For litigation or settlement purposes, each of the violations should be assessed separately and the amounts added to determine a total penalty to pursue.

It is also possible that different violations of the same section of the regulations could constitute independent and substantially distinguishable violations. For example, if a processing facility which generates special waste places such containers in an unmarked area and also stores special waste containers with other wastes, there are two independent violations. While the violations are both from the same regulatory section, each requires distinct elements of proof. In this situation, two counts with two separate penalties would be appropriate. For penalty purposes, each of the violations should be assessed separately and the amounts totalled.

Penalties for multiple violations also should be sought in litigation or obtained in settlement where one facility has violated the same requirement in substantially different locations. In these situations the separate locations present separate and distinct risks to public health and the environment. 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 a case where a facility fails to take required periodic groundwater monitoring samples.

In general, penalties for multiple violations may be inappropriate where the violations are not independent or substantially distinguishable. Where a charge derives from or merely restates another charge, a separate penalty may not be warranted. For example, a solid waste facility fails to record the type and weight or volume of solid waste received in its daily recordkeeping. 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 weight or volume of solid waste 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 complaint, 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 through ignorance of the law fails to obtain a permit as required by NMSA 1978, Section 74-9-3 and as a consequence runs afoul of the numerous other (regulatory) requirements imposed on it, or (2) a facility fails to install groundwater monitoring equipment as required and is thus unable to comply with operational,

recordkeeping, closure, post-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, enforcement personnel 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.

B. PENALTIES FOR MULTI-DAY VIOLATIONS

The Solid Waste Act provides the Department with the authority to assess in administrative actions or seek in court civil penalties of up to \$5,000 per day of non-compliance for each violation of a requirement of the Act (or the regulations which implement the Act). 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, 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 VII 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. In most instances, the Department should only seek to obtain multi-day penalties for the number of days it can document that the violation in question persisted. However, in some circumstances reasonable assumptions as to the duration of a violation can be made. In the case where an inspection reveals that a facility has no groundwater 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 that waste management operations began or the effective date of the regulations, whichever is later. 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 they did not.⁵

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 unlabeled containers of special waste were being stored by a generator for more than 45 days in violation of Part VII of the Regulations, enforcement personnel should allege in the complaint and present evidence

⁵ Where the Department determines that a violation persists, enforcement personnel may calculate the penalty for a period ending on the date of compliance or the date the complaint is filed, provided documentation (or a reasonable assumption) to support such a finding is available.

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 containers were stored improperly 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., severe-major, significant-moderate, or minimal-minor.
- (2) Determine, for the specific violation, whether multi-day penalties are mandatory, presumed, or discretionary, as follows:

Mandatory multi-day penalties: Multi-day penalties are mandatory for days 2-60 of all violations with the following gravity-based designations: severe-major, severe-moderate, significant-major. The only exception is when they have been waived, in "highly unusual cases" with prior Department consultation, as described below. 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: severe-minor, significant-moderate, minimal-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: Multi-day penalties are discretionary, generally, for all days of all violations with the following gravity-based designations: significant-minor, minimal-moderate, minimal-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 (or, where appropriate, a larger dollar amount not to exceed \$5,000) by the number of days the violation lasted. (Note: 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 MATRIX

Extent of Deviation from Requirement

	MAJOR	MODERATE	MINOR
SEVERE	\$1,000	\$800	\$700
SIGNIFICANT	\$600	\$500	\$400
MINIMAL	\$300	\$200	\$50

The dollar figure to be multiplied by the number of days of violation will generally be selected from the range provided in the appropriate multi-day cell. The figure selected should not be less than the lowest number in the range provided. Selections of a dollar figure from the range of penalty amounts can be made at the Department's discretion based on an assessment of case-specific factors, including those discussed below.

In determining whether to assess multi-day penalties for days 2-60 of violations for which multi-day penalties are presumed appropriate or are discretionary, as well as for days 61+ of all violations, as well as in selecting the appropriate dollar figure from the range of penalty amounts in the multi-day matrix, 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.

Additional factors which may be relevant in analyzing these factors in the context of a specific case include the seriousness of the violation relative to other violations falling within the same matrix cell, efforts at remediation or the promptness and degree of cooperation evidenced by the facility (to the extent not otherwise accounted for in the proposed penalty or settlement amount), the size and sophistication of the violator, the total number of days of violation, and other relevant considerations. All of these factors must be analyzed in light of the overriding goals of the penalty policy to determine the appropriate penalties in a specific case.

As discussed above, this penalty policy permits the Department to waive multi-day penalties in a "highly unusual case." Such a waiver may be exercised only with prior Department consultation. Because the Department has determined that almost all continuing "major" violations warrant multi-day penalties, it is anticipated that such waivers will be

sought very infrequently.

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 \$5,000 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 human health or the environment, it may be appropriate to demand the statutory maximum.

VIII. EFFECT OF ECONOMIC BENEFIT OF NONCOMPLIANCE

The Department civil penalty mandates the recapture of any significant economic benefit of noncompliance that accrues to a violator. Enforcement personnel shall 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 enforcement personnel to calculate economic benefit. An economic benefit component should be calculated and added to the gravity-based penalty component when a violation results in "significant" economic benefit to the violator, as defined below.

The following are examples of regulatory areas for which violations are particularly likely to present significant economic benefits: groundwater monitoring, financial requirements, closure/post-closure, improper disposal of special waste, and remediation.

For certain requirements the economic benefit of noncompliance may be relatively insignificant (e.g., failure to submit a report on time). In the interest of simplifying and expediting an enforcement action, enforcement personnel may forego calculating the benefit component where it appears that the amount of the component is likely to be less than \$1,000 for all violations alleged in the complaint. However, this decision should be documented on the Penalty Computation Worksheet.

It is generally the Department's policy not to settle cases (i.e., the penalty amount) for an amount less than the economic benefit of noncompliance. However, the Department civil penalty policy explicitly sets out four general areas where settling the total penalty amount for less than the economic benefit may be appropriate. The four exceptions are:

- the economic benefit component consists of an insignificant amount (i.e., less than \$1,000);
- there are compelling public concerns that would not be served by taking a case to trial;
- 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 in litigation;

-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 in Section X, under the heading, "Economic Benefit."

A. ECONOMIC BENEFIT OF DELAYED COSTS AND AVOIDED COSTS

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

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

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

- failure to install 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 annual and semi-annual ground-water monitoring sampling and analysis; or
- failure to use registered infectious waste transporters.

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, compliance/enforcement personnel

should calculate the economic benefit of both the delayed and avoided costs for each year.

The Department may use the BEN computer model to calculate the economic benefit of noncompliance. The model can perform a calculation of economic benefit based on delayed/avoided costs with as few as only seven data inputs (see first seven below). The rest of the data inputs consist of optional data items and standard values already contained in the program (see Ben Worksheet in Section X). The following is a list and short explanation of each input.

INPUTS

1. CASE NAME - Self explanatory.
- ** 2. INITIAL CAPITAL INVESTMENT - This is essentially a depreciable investment such as the initial cost of equipment.
- ** 3. ONE-TIME NONDEPRECIABLE EXPENDITURE - This is an expense that will only be incurred once and does not involve capital investments. It may or may not be tax deductible, but it is not depreciable. Some examples are reporting requirements, purchase of land, or permit application costs and fees.
- ** 4. ANNUAL OPERATION AND MAINTENANCE - This expense category is for routine annual expenses such as the costs of operating equipment, cost of leasing equipment, or cost of annual insurance premiums.
- * 5. FIRST MONTH OF NONCOMPLIANCE - Self explanatory.
- * 6. COMPLIANCE DATE - This could be off in the future. The key is to make a reasonable estimate.
- * 7. PENALTY PAYMENT DATE - Again, this may be in the future. Enforcement personnel should make a reasonable estimate for date of payment.
- + 8. USEFUL LIFE OF EQUIPMENT - Here the model accounts for the fact that the equipment purchased in input two has a useful life of limited duration. The model assumes it will last 15 years, then it must be replaced, however the model is being adjusted to address this matter.
- + 9. MARGINAL INCOME TAX REBATE - This is the rate at which the last dollar of earnings was taxed. It almost always will be the highest tax rate, as most businesses meet the maximum rate quickly.
- + 10. ANNUAL INFLATION RATE - Self explanatory.

- + 11. DISCOUNT RATE - This is the rate of return the violator expects to obtain on its investment. The money needed for pollution control was invested in something else and we assume the rate of return was the discount rate.
- + 12. AMOUNTS OF LOW INTEREST FINANCING - This is the amount of subsidized financing for pollution control equipment. This almost always is 0.
- * Required Input
- ** Required if Applicable
- + Standard Values Available

As noted above, the BEN model may be used to calculate only the economic benefit accruing to a violator through delay or avoidance of the costs of complying with applicable requirements of Solid Waste Act and its implementing regulations. There are instances in which the BEN methodology either cannot compute or will fail to capture the actual economic benefit of noncompliance. In those instances, it will be appropriate for the Department to include in its penalty analysis a calculation of economic benefits in a manner other than those provided for in the BEN methodology. An example is the case where an entity unlawfully operated a landfill without a permit or other approval and thus has reaped profits as a result of the violation which are greater than the costs the defendant would have incurred by taking the further actions needed for approval. In such a case, the economic benefit component of the penalty calculation would include the profits proximately attributable to the violation.⁶ In contrast, consider a large facility which, but for the storage of a few containers of special wastes over 45 days, is otherwise in compliance with the Act or Regulations. The facility's profits, earned almost entirely as a result of lawful activity, would not be considered properly attributable to the facility's noncompliance. Thus, care must be taken to insure that any calculation of profits included in an alternative economic benefit component of the penalty calculation does not include profits attributable to lawful operations of the facility or delayed or avoided costs already accounted for in the BEN calculation.

Enforcement personnel should have a copy of the revised BEN User's Manual (May 1987). The manual describes how to use BEN, a computer program that calculates the economic benefit for any type of entity. BEN's User's Manual is designed to aid enforcement personnel with procedures for entering data in BEN, and to explain the program's results.⁷ BEN supersedes previous methodologies used to calculate the economic benefit for civil

⁶ Of course, penalties may not exceed the statutory maximum of \$5,000 per day of noncompliance.

⁷ Enforcement personnel are encouraged to use whatever cost documentation is available to calculate compliance costs (e.g., contractors and commercial brochures). If the program's results are disputed, the burden will then shift to the respondent to represent cost documentation to the contrary to be entered and run in BEN. Data provided by the respondent relating to economic benefit should not be run in BEN unless its accuracy and legitimacy have been verified by the Department. Additionally, EPA's Guidance Manual: Cost Estimates for Closure and Post-Closure Plans, November, 1986, provides information regarding cost estimates for input data for BEN.

penalties.

The economic benefit formula provides a reasonable estimate of the economic benefit of noncompliance. 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 enforcement personnel at the settlement stage.

IX. 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. NMSA 1978, Section 74-9-36 states that in assessing penalties, the Department must take into account any good faith efforts to comply with the applicable requirements. The Department civil penalty policy sets out several other adjustment factors to consider. These include the degree of willfulness and/or negligence, history of noncompliance, ability to pay, and other unique factors. This Solid Waste 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 complaint and applies the adjustment factors, it may be necessary, under certain circumstances, for enforcement personnel to recalculate the gravity-based or economic benefit component of the penalty figure. If new information becomes available after the issuance of the complaint which makes it clear that the initial calculation of the penalty contained in the complaint is in error, enforcement personnel should adjust this figure. Enforcement personnel should document on the Penalty Computation Worksheet the basis for recalculating the gravity-based or economic benefit component of the penalty sought in litigation or obtained in settlement.

For example, if after the issuance of the complaint, information is presented which indicates that much less waste is involved than was believed when the complaint was issued, it may be appropriate to recalculate the gravity-based penalty component. Thus, if enforcement personnel had originally believed that the violator had improperly stored ten barrels of special wastes but it was later determined that only a single container of special waste was improperly stored, it may be appropriate to recalculate the "potential for harm"

component of the gravity-based penalty from "severe" to "significant" or "minimal."

On the other hand, if enforcement personnel 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 complaint 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, enforcement personnel may, of course, choose to formally amend the complaint to correct the original penalty component, as well as 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. Adjustments should generally be applied to the sum of the gravity-based and multi-day components of the penalty for a given violation. Note, however, that after all adjustment factors have been applied the resulting penalty shall not exceed the statutory maximum of \$5,000 per day of violation. As indicated previously all supportable upward adjustments of the penalty amount of which the Department is aware ordinarily should be made prior to issuance of the complaint, while downward adjustments (with the exception of those reflecting good faith efforts to comply) should generally not be made until after the complaint has been issued, at which time the burden of persuasion that downward adjustment is proper should be placed on respondent. Enforcement personnel 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 \$25,000, 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 \$30,000 ($\$25,000 + 20\%$).

For any given factor (except ability to pay and litigative risk) enforcement personnel 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 litigative risk will vary in amount depending on the individual facts present in a given case and in certain 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, absent the special circumstances enumerated in section VIII, 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 litigative 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 NMSA 1978, Section 74-9-36, 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 before the Department detects the violation. 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 Solid Waste requirements and it later is 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 that "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 Act and Regulations will support criminal penalties pursuant to Section 74-9-37, 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 solid waste 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 enforcement personnel 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 is a pattern of disregard of environmental requirements contained in the Act & Regulations.

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

It also includes any act or omission for which the violator has previously been given written notification, however informal, that the Department believes a violation exists.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, enforcement personnel should attempt to ascertain who in the organization had control and oversight responsibility for compliance with the Act and Regulations of other environmental laws. The violation will be considered part of the compliance history of any regulated party whose officers had control or oversight responsibility.

In general, enforcement personnel should begin with the assumption that if the same corporation was involved, the adjustments for history of noncompliance should apply. In addition, enforcement personnel should be wary of a party changing operators or shifting responsibility for compliance to different persons or entities as a way of avoiding increased

penalties. The 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, then compliance/enforcement personnel 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 proper closure/post-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 defendant/respondent and the nature of the violations at issue.

(e) 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 75% of the final settlement amount unless there are special circumstances which warrant further adjustments. The following criteria are provided to determine the appropriateness of the use of environmentally beneficial mitigation projects in settlements. Mitigation 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 full compliance; rather, it must be designed to provide an environmental benefit beyond the benefits of full compliance and may not be part of the facility's normal business practice or a project the facility was already planning to do.

(ii) In order to attain the deterrent objectives of the 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 statutory compliance and environmental improvement. One test of good faith is the degree to which the violator takes the initiative to identify and propose specific, potential mitigation 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 defendant'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 mitigation 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 statutory and public interest criteria for consent decrees and cannot contain 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.

(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 a mitigation project shall 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 judgement in deciding whether to accept a mitigation 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 such as Air Quality, Water Quality, and OHSA.

(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 court or administrative law judge 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 litigative 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 Solid Waste 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 complaint. 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 Solid Waste Act and 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 complaint, 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 complaint should follow the guidelines in the Adjustment Factors section of this document.

X. EXPEDITED ENFORCEMENT

Solid Waste Bureau Management and Field Compliance Officers have the authority to issue citations. If the Field Compliance Officer detects a violation of the Solid Waste Regulations while conducting an inspection of a Solid Waste Facility, a compliance order ("citation") may be immediately issued to the owner or operator of the solid waste facility, pursuant to NMSA 1978, Section 74-9-36.

A prelitigation penalty may be assessed at the time the citation is issued or sent by certified mail immediately following the inspection. Upon receipt of the citation, the person named must 1) pay the penalty if any within 30 days, correct the violation and certify compliance by the date agreed upon by the Field Compliance Officer and the person named; or 2) appeal the citation.

The agreed date of compliance may range from 1-30 calendar days from the issuance of the citation, but may not exceed 30 days. For most violations, especially those with an immediate threat to public health and/or the environment, compliance shall be commenced within 24 hours of receipt of a citation. Compliance must be reached and certified when the Field Compliance Officer returns on the agreed date of compliance for follow up inspection. If compliance is not reached by the agreed date the Field Compliance Officer must assess the violator with a multi-day fine of the same severity of "potential for harm" and "extent of

deviation from the requirement" as the gravity-based fine. The gravity-based fine and multi-day fine must than be combined for a new citation total.

The person named in the citation may pay the fine within 30 calendar days, comply with the regulation and certify that he has done so by the agreed date. The penalty assessed and collected shall be deposited in the Solid Waste Facility Grant Fund.

Alternatively, the citation shall become final unless, no later than thirty (30) days after the order is served, the person named in the citation submits a written request to the director for a public hearing in accordance with the Rules Governing Appeals From Compliance Orders. Additionally, the person may contact the Compliance Section Program Manager of the Solid Waste Bureau to make an appointment to discuss a hearing settlement. The person should note that at this stage there is a possibility, that if evidence allows, for adjustments factors to be raised as well as lowered according to policy guidelines. The percentage increase/decrease may not exceed the percentage amount listed on page 26 of this civil penalty policy.

The person may obtain further informal review by submitting a written request for review to the Solid Waste Bureau Chief. This request must be requested within ten (10) days after the prehearing settlement meeting with the Program Manager. This request does not replace or stay the request for public hearing. Every request for informal review shall be in writing and shall specify the grounds upon which the petitioner objects to the decision to be reviewed.

The Bureau shall afford prompt opportunity for an informal conference at which the petitioner may present his views on the issues raised in the request for review and offer any supporting documentation or testimony. The Bureau shall notify the petitioner of the time, date and place of the informal conference. After considering all written and oral views presented, the Bureau Chief shall affirm or settle the original decision.

XI. EXPEDITED ENFORCEMENT IMPLEMENTATION

The Solid Waste Bureau's Expedited Enforcement consists issuance of Field Compliance Orders issued on site for violations in the "significant-minor", "minimal-major", "minimal-moderate", and "minimal-minor" categories. Gravity-based fines will be assessed. Multi-day fines will not be calculated on the Field Compliance Order. However, this does not prevent the Department from seeking multi-day fines if the party in question refuses to comply and an additional administrative compliance order or civil action results.

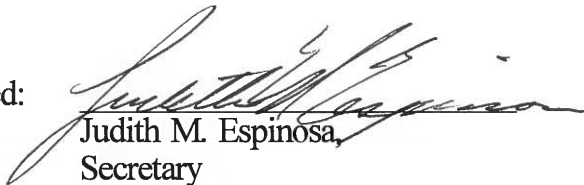
The Bureau will begin issuing Field Compliance Orders with suspended penalties from 11/1/94 to 12/31/95. During this time the parties in question will be expected to comply by the date of compliance listed on the Field Compliance Order. This first phase will be a preparatory period in which Field Compliance Officers will instruct solid waste facility operators or owners, and the public on the implementation of expedited enforcement. A

separate form will be attached to the Field Compliance Order showing the fine amounts for the years 1995 through 1999.

Field Compliance Order fines determined by the Civil Penalty Policy Gravity-Based matrix will be assessed in full with a portion (percentage) suspended during the implementation period. The following schedule provides implementation time frame and percentage of penalty due.

<u>Time Frame</u>	<u>Penalty Due</u>	<u>Comments</u>
1994 & 1995	25%	(Fines will be suspended unless compliance is not achieved within the time period specified on the Field Compliance Order.)
1996	50%	(25% increase from 1995)
1997	75%	(25% increase from 1996)
1998	100%	(25% increase from 1997)

Approved:


Judith M. Espinosa,
Secretary

Date:

