



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

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Issuance of Revised CWA Section 404 Settlement Penalty Policy

FROM: *[Signature]*
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Acting Assistant Administrator

TO: Water Protection/Management Division Directors,
Regions I-X
Director, Office of Environmental Stewardship, Region I
Director, Division of Environmental Protection and
Planning, Region II
Enforcement and Compliance Assistance Directors,
Regions II, VI, and VIII
Water, Wetlands, and Pesticides Division Director,
Region VII
Regional Counsels, Regions I-X

Attached is the Agency's new Clean Water Act Section 404 Settlement Penalty Policy. This Policy is intended to be used by EPA in calculating the penalty that the Federal government will generally seek in settlement of judicial and administrative actions for Section 404 violations (i.e., violations resulting from the discharge of dredged or fill material into wetlands or other waters of the United States without Section 404 permit authorization, or in violation of a Section 404 permit.) This policy establishes a framework which EPA expects to use in exercising its enforcement discretion in determining appropriate settlement amounts for such cases.

This guidance is intended to promote a more consistent national approach to assessing settlement penalty amounts in CWA Section 404 enforcement actions, while allowing EPA staff flexibility in arriving at specific penalty settlement amounts in

a given case. This policy is effective immediately and supersedes the December 14, 1990 Guidance, "Clean Water Act Section 404 Civil Administrative Penalty Actions: Guidance on Calculating Settlement Amounts." This policy applies to all CWA Section 404 civil judicial and administrative actions filed after this date, and to all pending cases in which the government has not yet transmitted to the defendant or respondent a proposed settlement penalty amount. This policy may be applied in pending cases in which penalty negotiations have commenced, if application of this Policy would not be disruptive to the negotiations.

We would like to take this opportunity to thank all those in the Regions, the Office of General Counsel, and Department of Justice who commented on drafts of this policy. Your comments were very helpful in making this a more complete and useful document.

If you have questions or comments with respect to this Policy please contact Joe Theis in the Water Enforcement Division at (202)564-0024.

Attachment

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CLEAN WATER ACT SECTION 404
SETTLEMENT PENALTY POLICY

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CLEAN WATER ACT SECTION 404 **SETTLEMENT PENALTY POLICY**

I. INTRODUCTION

This document sets forth the policy of the U.S. Environmental Protection Agency (“EPA” or “Agency”) for establishing appropriate penalties in settlement of an administrative or civil judicial penalty proceeding against a person who has violated Sections 301 and 404 of the Clean Water Act (“CWA” or “Act”)¹ by discharging dredged or fill material into wetlands or other waters of the United States without Section 404 permit authorization, or in violation of a Section 404 permit.² This policy implements the Agency’s *Policy on Civil Penalties* and the companion document, *A Framework for Statute Specific Approaches to Penalty Assessments*, both issued on February 16, 1984, with respect to these types of violations. This settlement penalty policy should be read in conjunction with other applicable policies, such as the *Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act* (SBREFA Policy) (May 28, 1996), *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations* (EPA Audit Policy) (April 11, 2000), and the *EPA Supplemental Environmental Projects Policy* (SEP Policy) (May 1, 1998).

EPA brings enforcement actions to require alleged violators to promptly correct their violations and to remedy any harm caused by those violations.³ As part of an enforcement action, EPA also seeks substantial monetary penalties, that recover the economic benefit of the violations plus an appropriate gravity amount that will deter future violations by the same violator and by other members of the regulated community. Penalties help to ensure a level playing field within the regulated community

¹ 33 U.S.C. § 1311(a), 33 U.S.C. § 1344.

² EPA may currently seek civil penalties up to \$27,500 per day per violation in the federal district courts under Section 309(d), or may seek an administrative assessment of \$11,000 per day of violation up to \$137,500 before an Agency administrative law judge under Section 309(g) for the unauthorized discharge of dredged or fill material into waters of the United States, or violation of a Section 404 permit. 33 U.S.C. § 1319(d) and (g). These figures reflect a 10% increase from the amounts set forth in the CWA as provided for under the Civil Monetary Penalties Adjustment Rule. The Agency is preparing to issue a revision to the Civil Monetary Penalties Adjustment Rule in the near future. See footnote 10 below for further discussion.

³ For a discussion of the policy and procedures regarding EPA and Army Corps of Engineers (“Corps”) implementation of Section 404 enforcement responsibilities see “Memorandum of Agreement Between the Department of the Army/Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act” (January 19, 1989). This document is available on the Internet at: <http://www.epa.gov/OWOW/wetlands/regs/enfmoa.html>.

by ensuring that violators do not obtain an unfair economic advantage over competitors who have complied with the Act. At the same time, EPA's policies provide for adjustments based on a violator's good faith efforts to comply (or lack thereof) and inability to pay a penalty.

The need to deter violations and remedy any harm caused by such violations is especially evident with respect to the discharge of dredged and/or fill material into waters of the U.S., particularly wetlands and other special aquatic sites.⁴ Wetlands are a vital yet increasingly threatened natural resource.⁵ Wetlands act as natural sponges, providing flood protection and storm damage control and facilitating groundwater recharge. They furnish habitat for myriad plants and animals, including many endangered species, and provide billions of dollars to the national economy each year from fisheries and recreational activities such as hunting and bird watching.⁶ Wetlands also perform a vital role in maintaining water quality by trapping sediments and other pollutants before they reach streams, rivers, and other open-water bodies.⁷ Other special aquatic sites, such as mud flats and vegetated shallows, as well as open bodies of waters such as rivers, lakes, and streams also provide important functions and values. Discharges of dredged or fill material into waters of the U.S. may result in destruction of, or serious degradation to such waters. Given the significant values provided by such waters, it is all the more important to assess adequate penalties to deter future Section 404 violations and thereby help to achieve the goal of the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁸

This policy sets forth how the Agency generally expects to determine an appropriate settlement penalty in CWA Section 404 cases. In some cases, the calculation methodology set forth here may not be appropriate, in whole or in part. In such cases, with the advance approval of the Office of Enforcement and Compliance Assurance ("OECA"), an alternative or modified approach may be used.

A. Purpose

This policy is intended to provide guidance to EPA staff in calculating an appropriate penalty amount in settlement of civil judicial and administrative actions involving Section 404 violations and

⁴ See 40 C.F.R. 230.2(q-1) (Special aquatic sites include sanctuaries and refuges, wetlands, mudflats, vegetative shallows, coral reefs and riffle and pool complexes).

⁵ See e.g., U.S. Fish and Wildlife Service: Report to Congress: Wetlands Losses in the United States 1780's to 1980's (1990).

⁶ See e.g., U.S. Fish and Wildlife Service: Wetlands of the United States: Current Status and Recent Trends (1984).

⁷ See e.g., U.S. v. Deaton, 209 F.3d 331 (4th Cir. 2000).

⁸ 33 U.S.C. § 1251(a).

related violations (e.g., failure to comply with a Section 308 request or a Section 309(a) order with respect to such a violation). The guidance is designed to promote a more consistent national approach to assessing settlement penalty amounts, while allowing EPA staff flexibility in arriving at specific penalty settlement amounts in a given case. Subject to the circumstances of a particular case, this policy provides the lowest penalty figure that the Federal Government should accept in settlement. The Federal Government reserves the right to seek any amount up to the statutory maximum where settlement is not possible, as well as where circumstances warrant application of a higher penalty than what would be provided for under this settlement policy.

This policy is meant to accomplish the following four objectives in the assessment of penalties for Section 404 violations. First, penalties should be large enough to deter noncompliance, both by the violator and others similarly situated. Second, the penalties should help ensure a level playing field by making certain that violators do not obtain an economic advantage over others who have complied in a timely fashion. Third, penalties should generally be consistent across the country to promote fair and equitable treatment of the regulated community. Finally, settlement penalties should be based on a fair and logical calculation methodology to promote expeditious resolution of Section 404 enforcement actions and their underlying violations.

B. Applicability

This policy applies to all CWA Section 404 civil judicial and administrative actions filed after the signature date of the policy, and to all such pending cases in which the government has not yet transmitted to the defendant or respondent a proposed settlement penalty amount. This policy revises and hereby supersedes the December 14, 1990 Guidance, "Clean Water Act Section 404 Civil Administrative Penalty Actions: Guidance on Calculating Settlement Amounts." Except as provided in Section II below, this policy is not intended for use by EPA, violators, administrative judges or courts in determining penalties at hearing or trial. This policy does not affect the discretion of Agency enforcement staff to request any amount up to the statutory maximum allowed by law.⁹ Finally, this policy does not apply to criminal cases that may be brought for the unauthorized discharge of dredged or fill material in violation of the CWA.

⁹ Because of the requirements of 40 C.F.R. §22.14(a) (4), administrative complaints filed under Part 22 must have either the amount of the civil penalty that the Agency is proposing to assess, and a brief explanation of the proposed penalty, or where a specific penalty demand is not made, a brief explanation of the severity of each violation alleged and a citation to the statutory penalty authority in Section 309(g)(3) applicable for each violation alleged in the complaint. Regional enforcement staff should follow the guidance provided on this subject in "Guidance on the Distinctions Among Pleading, Negotiating and Litigating Civil Penalties for Enforcement Cases Under the Clean Water Act," issued January 19, 1989, and in "Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act," issued May 28, 1996.

C. Statutory Authorities

The Clean Water Act provides EPA with various enforcement mechanisms for responding to violations of Sections 301(a) and 404 for discharging without, or in violation of, a Section 404 permit. Under Section 309(a), the Agency is authorized to issue an administrative compliance order (AO) requiring a violator to cease an ongoing unauthorized discharge, to refrain from future illegal discharge activity, and to remove unauthorized fill and/or otherwise restore the site. Section 309(g) of the Act authorizes EPA to assess administrative penalties for, among other things, discharging dredged or fill material into waters of the United States without a Section 404 permit or in violation of a Section 404 permit. Section 309(g) establishes two classes of administrative penalties, which differ with respect to procedure and maximum assessment, for such violations. A Class I penalty, provided for under Section 309(g)(2)(A), may not exceed \$11,000 per violation, or a maximum amount of \$27,500. A Class II penalty under Section 309(g)(2)(B) may not exceed \$11,000 per day for each day during which the violation continues, or a maximum amount of \$137,500.¹⁰

EPA may also seek injunctive relief, criminal penalties (fines and/or imprisonment), and civil penalties through judicial action under CWA Sections 309(b), (c) and (d), respectively. Under these provisions, the Agency may refer cases to the Department of Justice (DOJ) for civil and/or criminal enforcement. Under Section 309(d), EPA may seek civil penalties of up to \$27,500 per day per violation in the federal district courts, for CWA violations including the unauthorized discharge of dredged or fill material into waters of the United States, violation of a Section 404 permit, or violation of a Section 309(a) administrative compliance order.

For purposes of calculating a penalty under Sections 309(d) or (g), a violation begins when dredged or fill material is discharged into waters of the United States without a Section 404 permit and continues to occur each day that the illegal discharge remains in place. With respect to a violation of a Section 309(a) compliance order, a violation begins when the order is violated and continues each day until the order is complied with.

¹⁰ The Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, issued pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410, enacted October 5, 1990; 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3701 note; Public Law 104-134, enacted April 26, 1996; 110 Stat.1321), mandates that EPA adjust its civil monetary penalties for inflation every four years. Thus, the maximum penalty figures cited in this guidance reflect the initial ten percent increase from the amounts set forth in the Act. For violations occurring before January 30, 1997, the maximum penalty amounts the Agency may seek are those specified in the Act. The Agency is preparing to issue a revision to the Civil Monetary Adjustment Rule in the near future. After the effective date of the rule, the maximum penalties available are expected to be as follows: for civil judicial penalties under 309(d) - \$30,500 per day per violation, for Class I administrative penalties - \$12,000 per day per violation, \$30,000 maximum; for Class II penalties - \$12,000 per violation, \$152,500 maximum.

D. Statutory and Settlement Penalty Factors

Section 309(d) of the CWA sets forth the following penalty factors that district court judges are to use when determining an appropriate civil penalty: "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. Section 1319(d).

Section 309(g)(3) addresses the factors to be considered when determining an appropriate administrative penalty amount. It states that the Agency "shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require," 33 U.S.C. Section 1319(g)(3).

The penalty assessment factors in Sections 309(d) and 309(g) are substantively the same, and not in conflict. The references in Section 309(d) to "good faith efforts" and in Section 309(g)(3) to "culpability," for example, although oriented to different types of behavior, both measure the non-compliant conduct of the violator. Other factors, such as economic benefit, history of violations, and such other matters as justice may require, are essentially identical, and the remaining factors are just restatements of each other. Consequently, the penalty calculation methodology drawn from the statutory factors and set forth below can be applied to both administrative and judicial civil enforcement cases.

E. Choice of Forum

The application of this penalty settlement policy, through the calculation of an appropriate bottom-line penalty amount, is one factor for Agency personnel to consider when choosing an appropriate forum.¹¹ The case development team¹² should apply this policy to help determine whether to seek a penalty administratively or judicially. If the bottom-line penalty calculated under this policy exceeds the maximum penalty that can be achieved in an administrative proceeding, EPA should refer the matter to the Department of Justice for judicial enforcement.¹³ Cases should also be referred to

¹¹ OECA intends to issue additional guidance in the near future on determining the appropriate response for Section 404 violations.

¹² For purposes of this guidance, the case development team refers to the Agency 404 technical and legal staff responsible for developing and pursuing a particular administrative or judicial enforcement action.

¹³ For further guidance on choosing between administrative and judicial enforcement options, see "Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies," (August 28, 1987), which was attachment 2 to the August 28, 1987 "Guidance Documents and Delegations for

DOJ where court ordered injunctive relief is necessary to remedy a violation, or where the violator has failed to comply with an administrative compliance order or consent order.

II. ADMINISTRATIVE PENALTY PLEADING GUIDANCE

In complaints filed in civil judicial cases, the United States' general practice is not to request a specific proposed penalty, but instead to paraphrase the Clean Water Act in reciting a request for a penalty "up to" the statutory maximum. This is sometimes referred to as "notice pleading" for penalties. In contrast, in administrative complaints the Agency may use either a form of notice pleading or make a specific penalty request. See 40 C.F.R. 22.14(a)(4) (64 Fed. Reg. 40138, 40181 (July 23, 1999)). When including a specific penalty request in an administrative complaint, the Agency litigation team may elect to adapt the settlement methodology in Part III of this policy (Minimum Settlement Penalty Calculation) to establish a definitive penalty request in an administrative complaint.¹⁴

In using Part III of this policy to establish a specific penalty request in an administrative complaint, the litigation team should, after reasonable examination of the relevant facts and circumstances of the case (including any known defenses), make the most favorable factual assumptions, legal arguments, and judgments possible on behalf of the Agency. Because the specific penalty amount proposed in an administrative complaint will, for all practical purposes, be the most the Agency will be able to seek at a hearing (unless the complaint is subsequently amended) and will provide a starting point for settlement negotiations, such an administrative penalty request should be higher than the bottom-line settlement penalty amount calculated under Part III of this policy. Although appropriate for settlement calculations, the Adjustments in Part III.C. should not be applied to reduce the specific penalty amount requested in an administrative complaint.

The proposed administrative penalty amount should be consistent with the statutory factors identified in Section 309(g), because those factors would ultimately provide the basis for the penalty assessment of the presiding officer or administrative law judge.¹⁵ In any Class II administrative complaint under Section 309(g)(2)(B), the Agency litigation team should take into account the requirements of the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), P.L. 104-121 (1996), if the respondent qualifies as a small business under that statute. SBREFA by its terms does

Implementation of Administrative Penalty Authorities Contained in 1987 Clean Water Act Amendments."

¹⁴ Although this policy provides general guidelines on how EPA may select an appropriate penalty amount in an administrative complaint, it does not direct when an Agency litigation team should use penalty notice pleading and when it should plead for a sum certain.

¹⁵ In administrative cases under Part 22, the Agency is required to provide "[t]he amount of the civil penalty which is proposed and a brief explanation of the proposed penalty." 40 C.F.R. §22.14(a)(4)(i). In contrast, a settlement figure calculated under this policy and its supporting documentation are not subject to such disclosure requirements.

not apply to non-Administrative Procedures Act (“non-APA”) cases, and thus would not apply to Class I cases brought under Section 309(g)(2)(B).¹⁶

III. MINIMUM SETTLEMENT PENALTY CALCULATION

The case development team shall calculate the minimum settlement penalty for a Section 404 enforcement action consistent with the following formula (set forth in more detail in Attachment 1), and the factors described in this section:

$$\text{Penalty} = \text{Economic Benefit} + (\text{Preliminary Gravity Amount} \pm \text{Gravity Adjustment Factors}) - \text{Litigation Considerations} - \text{Ability to Pay} - \text{Mitigation Credit for SEPs}$$

The result of this calculation will be the minimum penalty amount that the government will accept in settlement of the case, in other words, the “bottom-line penalty” amount. As new or better information is obtained in the course of litigation or settlement negotiations, or if protracted litigation or settlement discussions unduly extend the final compliance date and/or the penalty payment date, the “bottom-line” penalty should be adjusted, either upwards or downwards as necessary, consistent with the factors laid out in this policy, and subject to Headquarters concurrence in appropriate cases. Each component of the penalty is discussed below. The results of these calculations should be documented as dollar amounts on the "Worksheet for Calculating Section 404 Settlement Penalty," included as Appendix A. This calculation should be supported by a memorandum describing the rationale and basis for the data. As a general matter, the Agency should always seek a penalty that, at a minimum, recovers the economic benefit of noncompliance plus some amount reflecting the gravity of the violation.

A. Determining the Economic Benefit Component

Consistent with EPA’s February 1984 *Policy on Civil Penalties*, every effort should be made to calculate and recover the economic benefit of noncompliance.¹⁷ Persons who violate the CWA by discharging dredged and/or fill material without Section 404 permit authorization or in violation of a permit may have obtained an economic benefit by obtaining an illegal competitive advantage (“ICA”), or as the result of delayed or avoided costs, or by a combination of these or other factors. Taking into account ICA may be particularly appropriate in situations where on-site restoration is not feasible (e.g., where restoration would result in greater environmental damage), and a permit would not likely have been issued for the project in question. In such cases, the Agency may consider recovering the commercial gain the violator realized from illegally filling in the wetland or other water. The objective of

¹⁶ For a more extended discussion of SBREFA, see “Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act” (May 28, 1996).

¹⁷ See *Policy on Civil Penalties*, February 16, 1984, at 3.

calculating and recovering economic benefit is to place violators in no better financial position than they would have been had they complied with the law.

The BEN computer model should be used to calculate the economic benefit gained from delayed or avoided compliance costs.¹⁸ Economic benefit should be calculated from the date of the initial violation, (i.e., the date of the initial discharge of dredged or fill material). As a general rule, there should be no offset in an economic benefit calculation, in a delayed or avoided cost scenario, for costs the violator incurs as a result of undertaking the illegal activity (i.e., in the context of a 404 violation this would be the amount the violator spent to perform the original unauthorized dredging or filling activities), since, as specified in the BEN User's Manual, credit is only appropriate for cost savings that "are both documented and related to compliance."¹⁹

Because a violator may have obtained more than one type of economic benefit from its noncompliance, the case development team should ensure that the amount calculated represents the total economic benefit wrongfully obtained.²⁰ Examples of other types of economic benefit may include delayed or avoided permitting fees and associated costs (e.g., information collection and consultant fees), increased property values, profits from the temporary or permanent use of property, or other illegal competitive advantage to the extent that the gain would not have accrued but for the illegal discharge.²¹

B. Determination of the Gravity Component

¹⁸ The BEN model is found on the Agency's web site at <http://www.epa.gov/oeca/datasys/dsm2.html> along with the BEN User's Manual. EPA currently does not have an economic benefit model for calculating economic benefit from illegal competitive advantage. For further information on the use of the BEN model and guidance in its use, or for help in calculating ICA, contact the Financial Issues Helpline at (888) 326-6778. Since as a general rule all 404 civil judicial cases are deemed nationally significant, Headquarters and the Regions will consult on the appropriate determination of economic benefit in such cases. In administrative cases, when considering under what circumstances various costs may offset economic benefit, the Regions will need to consult with Headquarters.

¹⁹ BEN User's Manual, (September 1999), at 3-11.

²⁰ If an initial calculation of economic benefit yields a zero or negative result, the case development team should ensure that all possible forms of illegal competitive advantage have been analyzed and included if appropriate. (Where the economic benefit calculation yields a negative number, a zero should be entered in the minimum settlement penalty calculation for the economic benefit component.)

²¹ Additional examples include gains generated from such uses as agriculture (e.g., profits from the sale of crops), logging, aquaculture, receipt of a loan, rent or lease payments, mining of sand and gravel, or from the early use of a recreational site (e.g., golf course or ski resort), which the violator gained prior to ceasing operation or removing the unlawful discharge or otherwise restoring the property.

Removal of the economic benefit of noncompliance generally places violators in the same position they would have been in had they complied with the Act. Therefore, both deterrence and fundamental fairness are served by including an additional element to ensure that violators are adequately penalized.²² The following gravity calculation is based on a methodology that provides a logical scheme and uniform criteria to quantify the gravity component of the penalty based on the environmental and compliance significance of the violation(s) in question.

Preliminary Gravity Amount = (sum of A factors + sum of B factors) x M

M (Multiplier) = \$500 for minor violations with low overall environmental and compliance significance, \$1,500 for violations with moderate overall environmental and compliance significance, and \$3,000-\$10,000²³ for major violations with a high degree of either environmental or compliance significance. Given the highly fact specific nature of 404 cases, this policy provides broad ranges for the factors set out below to afford the case development team broad discretion to assess the appropriate penalty in a given circumstance.

“A” FACTORS: ENVIRONMENTAL SIGNIFICANCE

<u>Factors</u>	<u>Value Assigned</u>
1. <u>Harm to Human Health or Welfare</u>	0-20

The case development team should consider whether the discharge of dredged or fill material has adversely impacted drinking water supplies, has resulted in (or is expected to result in) flooding, impaired commercial or sport fisheries or shellfish beds, or otherwise has adversely affected recreational, aesthetic, and economic values. The case development team should also consider whether the discharge has otherwise endangered the health or livelihood of persons by virtue of the chemical nature of the discharge (i.e., has the discharge resulted in a violation of any applicable toxic effluent standard or prohibition under section 307 of the CWA, in the release of a hazardous substance under 40 C.F.R. 117 or Subtitle C of RCRA,²⁴ or in an imminent and substantial endangerment under Section 504 of the Safe Drinking Water Act, Section 7003 of RCRA, or Section 106 of CERCLA).²⁵

²² See *Policy on Civil Penalties*, February 16, 1984, at 3.

²³ Looking at the totality of the circumstances, the case development team should use its best professional judgment to decide what amount to use as a multiplier for a such violations. For egregious violations with extreme environmental consequences, a higher value in this range should be used as a multiplier.

²⁴ 42 U.S.C. § 6973.

²⁵ 42 U.S.C. § 9606.

The greater the actual or potential threat to human health or welfare, the higher the value the case development team should assign to this factor. If the discharge has resulted in an imminent and substantial endangerment, the highest value for this factor should be used.

2. Extent of Aquatic Environment Impacted 0 - 20

Although the size (acreage) of a violation is not dispositive of the environmental significance of the violation (i.e., a small impact to a unique or critical water may have high environmental significance), all other factors being equal, the greater the acreage of waters filled or directly impacted, the higher the value the case development team should assign to this factor. Staff should consider how large the acreage impacted is in the case under consideration compared to other violations observed within the same watershed, regionally or nationally.²⁶

3. Severity of Impacts to the Aquatic Environment 0 - 20

The case development team should consider the overall impact of a defendant's discharges to waters of the United States.²⁷ Staff should also consider as part of this factor the extent to which the discharge of dredged or fill material has caused (or has threatened to cause) adverse impacts to, or destruction of waters of the United States, including the extent to which the discharge has impaired the flow or circulation or reduced the reach of waters of the United States, or has caused or contributed to violations of any applicable water quality standard. Under this factor, the case development team should also consider whether the violation has resulted in adverse impacts to life stages of aquatic life and other wildlife dependent on aquatic ecosystems, or has adversely impacted or destroyed wildlife habitat, including aquatic vegetation, waterfowl staging or nesting areas, and fisheries. The greater the risk of harm or actual impact to aquatic ecosystems, the higher the value the case development team should assign to this factor. If a defendant's violation has resulted in harm to an endangered or threatened species, or impacted endangered species habitat, or has otherwise significantly impacted ecosystem diversity, productivity, or stability, a value in the highest end of the range should be used.

4. Uniqueness/Sensitivity of the Affected Resource 0 - 20

The case development team should consider whether the affected ecosystem is nationally or regionally limited, of a type that has become rare due to cumulative impacts (e.g., Pocosin, vernal pools), or is relatively abundant. The more scarce the impacted ecosystem, the higher the value that

²⁶ In areas where there has been a substantial historic cumulative loss of waters of the United States, or in arid areas where acreage of waters is a small portion of the natural landscape, a high value should be assigned to even small acreage fills.

²⁷ As part of this factor, the case development team should also consider the temporary loss of wetlands functions and values.

staff should assign for this factor. Moreover, if the discharge occurred into any of the following, the case development team should generally assign a higher value to this factor: a site determined to be unsuitable under 40 C.F.R. 230.80; an area identified as having a Section 404(c) prohibition or restriction; a Section 303(d) impaired water; an area within the boundary of an Advance Identification of Disposal Areas (ADID); an outstanding natural resource water under a state anti-degradation policy; areas designated as federal, state, tribal, or local protected lands; or an area established as a restored or enhanced wetland under an approved mitigation plan.

5. Secondary or Off-Site Impacts

0 - 20

The case development team should consider to what extent the discharges caused, or threatened to cause, secondary or off-site impacts such as erosion and downstream sedimentation problems, nuisance species intrusion, wildlife corridor disruption, etc. The greater the amount of secondary impacts, the higher the value that should be assigned.

6. Duration of Violation

0 - 20

The case development team should consider the duration of the violation under this factor. Consideration should be given both to the length of time that the discharge activity occurred in waters of the U.S., and the length of time that dredged or fill material has remained in place in such waters. Generally, the longer the duration of the initial discharge activity, and/or the longer dredged or fill material has remained in place compared to other violations in the same watershed, regionally or nationally, the higher the value that should be assigned to this factor.

Mitigating Factors for Environmental Significance

It is possible in some wetlands cases for a violator to undo, or largely undo, the continuing environmental harm resulting from violations -- although past loss of functions and values cannot be restored. In cases in which the original wetland or other water is restored, or will be restored under an enforceable agreement, Agency enforcement staff may reduce the amount determined from the preliminary gravity calculation for Environmental Significance (i.e., by reducing the values assigned to one or more of the Environmental Significance factors). This offset should generally not be used in cases where off-site mitigation is undertaken in lieu of on-site restoration of the violation.²⁸ Wherever possible, the case development team should seek complete on-site restoration of the aquatic areas impacted.²⁹ In determining the gravity amount for environmental significance, the case development

²⁸ Where an after-the-fact has or will be issued for the discharge, the preliminary gravity amount may be reduced where the loss of waters is fully mitigated.

²⁹ See "Injunctive Relief Requirements in 404 Enforcement Actions" (September 29, 1999) .

team should focus on the net impairment of the wetlands or other waters after remediation is completed, rather than on the costs of the remediation to the violator. In addition, even where complete restoration occurs, the temporary loss of functions and values should still be considered in determining the Environmental Significance amount, unless those temporary losses have already been fully mitigated. Staff should also consider whether there is a risk that restoration may fail or be less than fully successful over time, when considering whether a reduction should be made for this factor.

“B” FACTORS: COMPLIANCE SIGNIFICANCE

Factors

Value Assigned

1. Degree of Culpability

1 - 20

The case development team should evaluate the overall culpability of the defendant (i.e., the degree of negligence, recklessness, intent or responsibility involved in committing the violation). The greater the degree of culpability, the higher the value that should be assigned to this factor.³⁰ The principal criteria for assessing culpability are the violator's previous experience with or knowledge of the Section 404 regulatory requirements, the degree of the violator's control over the illegal conduct, and the violator's motivation for undertaking the activity resulting in the violation.

The criterion for assessing the violator's experience with or knowledge of the Section 404 program is whether the violator knew or should have known of the need to obtain a Section 404 permit or of the adverse environmental consequences of the discharge prior to proceeding with the discharge activity. The greater the violator's knowledge of, experience with, and capability to understand the Section 404 regulatory requirements, and the greater the violator's ability to avoid the illegal conduct, the greater the culpability. Examples of circumstances demonstrating greater culpability include previous receipt of a Section 404 authorization or a prior independent opinion of the need for a permit or of permit requirements. In such circumstances, a value in the highest end of the range should be used.

With regard to the violator's control over the unlawful conduct, there may be some situations where the violator bears less than full responsibility or may share the liability for the occurrence of a violation. The case development team should assess the degree of culpability of each violator with respect to the violations in question.

³⁰ The case development team should separately consider the violator's "recalcitrance" as specified in the "Additional Adjustments to Gravity" section below, and should adjust the penalty accordingly based on the level of recalcitrance present (i.e., the violator's refusal or unjustified delay in preventing, mitigating, or remedying a violation or in otherwise failing to cooperate).

Finally, the motivation for the violation may be a factor evidencing greater culpability. If the violator has sought to obtain a windfall profit by destroying waters of the U.S. (e.g., by converting wetlands to uplands) through conscious or negligent disregard of the Section 404 permitting program, culpability should be considered high even though the violator will not in fact realize those profits and may have had little previous experience with the Section 404 program.

2. Compliance History of the Violator

0 - 20

The case development team should consider whether the defendant has a history of prior Section 404 violations including unpermitted discharge violations, permit violations, or a previous violation of an EPA administrative order. The greater the number of past violations and the more significant the violations were, the higher the value that should be assigned to this factor. The earlier violations need not relate to the same site as the present action. Prior history information may be obtained not only from EPA experience with the violator, but also from appropriate Corps Districts, other federal agencies' knowledge and records, and the violator's responses to Section 308 requests for information.

3. Need for Deterrence:

0-20

The case development team should consider the need to send a specific and/or general deterrence message for the violations at issue. Staff should consider the extent to which the violator appears likely to repeat the types of violations at issue and the prevalence of this type of violation in the regulated community. The greater the apparent likelihood of the violator to repeat the violation, or the more prevalent the violation at issue in the general community, the greater the need for a strong deterrent message and the higher the value that should be assigned to this factor.

ADDITIONAL ADJUSTMENTS TO GRAVITY

After establishing the preliminary gravity amount above, the case development team may adjust this amount to reflect the recalcitrance of the violator and other relevant aspects of the case as provided for below. In addition to the gravity adjustments discussed below, there may be situations where the gravity component may also be adjusted under EPA's Audit Policy.³¹

³¹ See "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" 65 Fed. Reg. 19618 (April 11, 2000).

Recalcitrance Adjustment Factor: The “recalcitrance” adjustment factor may be used to increase³² the penalty based on a violator’s bad faith, or unjustified delay in preventing, mitigating, or remedying the violation in question. As distinguished from culpability, which relates to the violator’s level of knowledge of the regulatory program and responsibility for a given violation, recalcitrance under this policy relates to the violator’s delay or refusal to comply with the law, to cease violating, to correct violations, or to otherwise cooperate with regulators once specific notice has been given and/or a violation has occurred. If a violator is, or has been, recalcitrant, the case development team may increase the penalty settlement amount accordingly. This factor applies, for example, to a person who continues violating after having been informed of his violation, fails to provide requested information, or physically threatens government personnel. If the defendant has violated either an Army Corps of Engineers’ cease and desist order or an EPA administrative order, or failed to respond to an EPA Section 308 information request, staff may account for this violation by using this factor.³³ The more serious the bad faith demonstrated or unjustified delay engendered by the violator, the higher the recalcitrance adjustment should be. Applying the recalcitrance factor may result in a recalcitrance gravity adjustment of up to 200 percent (200%) of the preliminary gravity amount. This factor is applied by multiplying the total preliminary gravity amount by a percentage between 0 and 200.

Quick Settlement Adjustment Factor: In order to provide an extra incentive for violators who make efforts to achieve an efficient and timely resolution of violations, and in recognition of a violator’s cooperativeness, EPA may reduce the preliminary gravity amount by 10 percent (10%) in administrative enforcement actions. This factor may only be applied if the case development team expects the violator to settle promptly and if the violation(s) at issue have or will be fully remediated. As a general rule, for purposes of this penalty reduction, in Class I administrative enforcement actions, a “quick settlement” is one in which the violator signs an administrative penalty order on consent within four months of the date the complaint was issued or within four months of when the government first sent the violator a written offer of settlement, whichever is earlier. For Class II administrative cases the controlling time period is six months. If the violator does not sign the administrative consent agreement within this time period, the adjustment generally should not be made available. If this reduction has been taken but the violator fails to settle quickly, this reduction should be withdrawn and the settlement penalty increased accordingly.

³² Once a violator has been informed of a violation, a prompt return to compliance is the minimum response expected, therefore, no downward adjustment is provided for by this policy for efforts made to come into compliance after being informed of a violation. (As discussed above, a prompt restoration of the violation would be a basis for lowering the gravity amount by reducing the Environmental Significance of the violation). Where a violator has made “good faith efforts to comply with the applicable requirement” prior to being given notice of the violation by the government, see Section 309(d), this fact may be taken into account by providing a lower value for the “Degree of Culpability” factor.

³³ In the alternative, a separate gravity calculation may be performed for such violations.

Other Factors as Justice May Require: This consideration encompasses factors that operate to reduce a penalty settlement amount, as well as factors that operate to increase a penalty settlement amount. Not every relevant circumstance can be anticipated ahead of time. An example of a mitigating factor is a circumstance where a violator has already paid a civil penalty for the same violations at issue in a case brought by another plaintiff. These costs may be considered when determining the appropriate penalty settlement.³⁴ Of course, the remaining settlement figure should be of a sufficient level to promote deterrence. Litigation considerations should not be double counted here.

C. Additional Reductions for Settlements

Inability to Pay: If the violator has raised the issue of inability to pay the proposed penalty, the Region should request whatever documentation is needed to ascertain the violator's financial condition.³⁵ Any statements of financial condition should be appropriately certified.³⁶ In order to promote settlement, EPA personnel should employ the Agency's ability to pay computer programs: ABEL, INDIPAY and MUNIPAY.³⁷ ABEL analyzes ability to pay claims from corporations and partnerships; INDIPAY analyzes claims from individuals; and MUNIPAY analyzes such claims from municipalities, towns, sewer authorities and drinking water authorities. Where the violations are egregious, or the violator refuses to comply with the law, the team may consider a bottom line that could affect the economic viability of the violator.

³⁴ If the defendant has previously paid civil penalties for the same violations to another plaintiff, this factor may be used to reduce the amount of the settlement penalty by no more than the amount previously paid for the same violations.

³⁵ For a discussion of what financial documents the Agency should seek, see Guidance on Determining a Violator's Ability to Pay a Civil Penalty, December 16, 1986, codified as General Enforcement Policy Compendium document PT.2-1. For further guidance on this issue and model interrogatories, contact the Financial Issues Helpline at (888) 326-6778.

³⁶ E.g., tax returns must be signed, and as a precaution, the litigation team should have the defendant/respondent fill out IRS form 8821, which authorizes the IRS to release tax information directly to the EPA. In that way, the Agency can verify the information in the tax returns.

³⁷ These models are available on the Agency's web site at <http://www.epa.gov/oeca/datasys/dsm2.html>. Because ABEL, MUNIPAY, and INDIPAY are limited in their approach, many entities that fail the analysis may still be able to afford to achieve full compliance and pay the entire penalty. Therefore, it is essential to examine the violator's other potential resources, such as from liquidation of certificates of deposit and money market funds, before reducing a bottom line penalty for inability to pay. It is recommended that a financial analyst/economist be contacted to review financial information to determine if a violator truly has an inability to pay a penalty. For further guidance in this area, contact the Agency's Financial Issues Helpline at (888) 326-6778.

Litigation Considerations: Certain enforcement cases may have mitigating factors that could be expected to persuade a court to assess a lower penalty amount. The simple existence of weaknesses or limitations in a case, however, should not automatically result in a litigation consideration reduction of the bottom line settlement penalty amount.³⁸ EPA may reduce the amount of the civil penalty it will accept at settlement to reflect weaknesses in its case where the facts demonstrate a substantial likelihood the government will not achieve a higher penalty at trial.

Adjustments for litigation considerations may be taken on a factual basis specific to the case. Before a complaint is filed, the application of certain litigation considerations may be premature, as the Agency may not have sufficient information to fully evaluate litigation risk including evidentiary matters, witness availability, and equitable defenses. Reductions for these litigation considerations are more likely to be appropriate after the Agency obtains an informed view, through discovery and settlement negotiations, of the strengths and weaknesses in its case. Pre-filing settlement negotiations are often helpful in identifying and evaluating litigation considerations, especially regarding potential equitable defenses, and thus reductions based on such litigation considerations may be appropriately taken before the complaint is filed.

Possible Litigation Considerations: While there is no universal list of litigation considerations, the following factors may be appropriate in evaluating whether the preliminary settlement penalty exceeds the penalty the Agency would likely obtain at trial:

- Troublesome facts and/or uncertain legal arguments such that the Agency faces a significant risk of not prevailing in the case or obtaining a nationally significant negative precedent at trial;
- Known problems with the reliability or admissibility of the government's evidence proving liability or supporting a civil penalty;
- The credibility, reliability, and availability of witnesses;³⁹

³⁸ In many situations, the circumstances of a particular case are already accounted for in the penalty calculation. For example, the gravity calculation will be less in those circumstances in which the period of violation was brief, the exceedances of the limitations were small, the pollutants were not toxic, or there is no evidence of environmental harm. The economic benefit calculation will also be smaller when the violator has already returned to compliance, because the period of violation will be shorter. Such mitigating circumstances should not be double counted as reductions for litigation considerations.

³⁹ The credibility and reliability of witnesses relates to their demeanor, reputation, truthfulness, and impeachability. For instance, if a government witness has made statements significantly contradictory to the position he is to support at trial, his credibility may be impeached by the respondent or the defendant. The availability of a witness will affect the settlement bottom-line if the witness cannot be produced at trial.

- The informed, expressed opinion of the judge assigned to the case, after evaluating the merits of the case;
- The record of the judge in any other environmental enforcement case presenting similar issues;
- Statements made by federal, state or local regulators that may allow the respondent or defendant to credibly argue that it believed it was complying with federal requirements;
- The development of new, relevant case law;
- Penalties awarded in the same judicial district in other Section 404 enforcement cases.

Not Litigation Considerations: In contrast to the above potential litigation considerations, the following factors should not be considered litigation considerations:

- A generalized view to avoid litigation or to avoid potential precedential areas of the law;⁴⁰
- A duplicative use of elements included or assumed elsewhere in the penalty policy, such as inability to pay, “good faith”⁴¹, lack of recalcitrance, or a lack of demonstrated environmental harm;⁴²
- Off-the-record statements by the court, before it has had a chance to evaluate the specific merits of the case;

⁴⁰ A generalized desire to minimize litigation costs is not a litigation consideration.

⁴¹ The efforts of the violator to achieve compliance or minimize the violations after EPA or a state has initiated an enforcement action do not constitute “good faith” efforts. If such efforts are undertaken before the regulatory agency initiates an enforcement response, the settlement penalty calculation already includes such efforts. This penalty policy assumes all members of the regulated community will make good faith efforts to both achieve compliance and remedy violations when they occur. See also f.n. 32.

⁴² Courts have considered the extent of environmental harm associated with violations in determining the “seriousness of violations” pursuant to the factors in Section 309(d), and have used the absence of any demonstrated or discrete identified environmental harm to impose less than the statutory maximum penalty. Proof of environmental harm, however, is neither necessary for liability nor for the assessment of penalties.

- The fact that the water of the United States in question is already polluted or that the water can assimilate additional pollution.⁴³

⁴³ See, e.g., Natural Resources Defense Council v. Texaco Refining and Mktg., 800 F. Supp. 1, 24 (D. Del. 1992).

IV. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Supplemental Environmental Projects (“SEPs”) are defined by EPA as environmentally beneficial projects that a violator agrees to undertake as part of a settlement, but is not otherwise legally obligated to perform. Favorable penalty consideration is given because the SEP provides an environmental benefit above and beyond what is required to remedy the violation(s) at issue in the enforcement action. In determining whether a proposed SEP is acceptable under Agency policy, as well as the appropriate penalty offset for a SEP, Agency enforcement staff should refer to the “EPA Supplemental Projects Policy.”⁴⁴ Use of SEPs in a particular case is entirely within the discretion of EPA in administrative cases, and EPA and the Department of Justice in judicial cases. In determining the real cost of a SEP to a violator, the litigation team should use the PROJECT model.⁴⁵

SEPs are particularly encouraged in the Section 404 program if the SEP results in protection of a wetland resource or other special aquatic site. For example, purchase and dedicated use of buffer land around a wetland helps ensure the survival of wetland resources, and is an appropriate and valuable SEP, as is upland land acquisition lying in wetland mosaics. In addition, deeding over wetlands in perpetuity for the purpose of conservation promotes program interests and the goals of the Clean Water Act. It should be noted that restoration of any area of the violation, or any mitigation in the form of injunctive relief to remedy such violations (including mitigation for the temporal loss of wetlands functions and values), does not constitute a SEP.

V. DOCUMENTATION, APPROVALS, AND CONFIDENTIALITY

Each component of the minimum settlement penalty calculation (including all adjustments), as well as subsequent recalculations, should be clearly documented in the case file along with supporting materials and written explanations. In any case not otherwise subject to Headquarters concurrence, in which a settlement penalty in a Section 404 enforcement action may not comply with the provisions of this policy or where application of this policy appears inappropriate, the penalty must be approved in advance by Headquarters.

Except as provided in Section II, documentation and explanation of a particular penalty calculation constitute confidential information that is exempt from disclosure under the Freedom of

⁴⁴ See “Issuance of Final Supplemental Environmental Projects Policy,” Memorandum from Steven A. Herman to Regional Administrators (April 10, 1998). This policy is also available on the Internet at: <http://www.epa.gov/oeca/sep/sepfinal.html>.

⁴⁵ This model is very similar to the BEN computer model, and like the other models, it is available on the Agency’s web site at <http://www.epa.gov/oeca/datasys/dsm2.html>. For further information on the model and guidance in its use, contact the Financial Issues Helpline at (888) 326-6778.

Information Act, is outside the scope of discovery, and is protected by various privileges, including the attorney-client and attorney-work product privileges. While individual settlement penalty calculations under this policy are confidential documents, this policy is a public document that may be released to anyone upon request. In the conduct of settlement negotiations, the Agency may choose to release portions of the case-specific settlement calculations. Such information may only be used for settlement negotiations in the case at hand and may not be admitted into evidence in a trial or hearing, as provided by Rule 408 of the Federal Rules of Civil Procedure.

The policies and procedures set forth in this document and the accompanying attachment are intended for the guidance of government personnel. They are not intended, and cannot be relied on, to create any rights, defenses or claims, substantive or procedural, enforceable by any party in litigation with the United States. The policies set forth in this document do not have the force of law and are not legally binding on Agency personnel. The Agency reserves the right to act at variance with these procedures and to change them at any time without public notice.

ATTACHMENT 1 TO CWA SECTION 404 SETTLEMENT POLICY

Case Name _____

Date _____

Prepared by _____

SETTLEMENT PENALTY CALCULATION WORKSHEET

STEP	AMOUNT
1. Calculate the Economic Benefit (attach BEN printouts, and provide written explanation of calculations)	
2. Calculate the Preliminary Gravity Amount (sum of A + B factors) x M	
3. Additional Gravity Adjustments	
a. Recalcitrance (add 0 to 200% x line 2)	
b. Quick Settlement Reduction (subtract 10% x line 2)	
c. Other Factors as Justice May Require	
d. Total gravity adjustments (negative amount if net gravity reduction) (3.a + 3.b + 3.c)	
4. Preliminary Penalty Amount (Lines 1 + 2 + 3d.)	
5. Litigation Considerations (if any)	
6. Ability to Pay Reduction (if any)	
7. Reduction for SEPs (if any)	
8. Bottom-Line Cash Settlement Penalty (Line 4 less lines 5, 6, and 7)	