

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

September 30, 1997

MEMORANDUM

OFFICE OF
ENFORCEMENT AND COMPLIANCE ASSURANCE

SUBJECT: Issuance of the Interim Policy on Settlement of CERCLA Section 106(b)(1) Penalty Claims and Section 107(c)(3) Punitive Damages Claims for Noncompliance with Administrative Orders

FROM: Steven A. Herman
Assistant Administrator



TO: Regional Administrators, Regions I-X
Regional Counsel, Regions I-X
Director, Office of Site Remediation and Restoration
Region I
Director, Emergency and Remedial Response Division
Region II
Director, Hazardous Waste Management Division
Regions III, IX
Director, Waste Management Division
Region IV
Director, Superfund Division
Regions V, VI, VII
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation
Region VIII
Director, Environmental Cleanup Office
Region X

Attached is a policy for settling CERCLA §106(b)(1) civil penalty and §107(c)(3) punitive damages claims for noncompliance with administrative orders (AOs). Civil penalties may be sought when EPA enforces a §106(a) administrative order and punitive damages may be sought when Superfund monies have been spent as a result of noncompliance with an administrative order. The policy does not alter existing policy on the collection of stipulated penalties. The policy is issued in "interim" form to permit the Agency to gain greater experience with administrative order compliance issues.



Issuance of this policy is part of an ongoing effort to make the Superfund program fairer for the parties that take responsibility for cleaning up Superfund sites by taking appropriate enforcement action against those parties who are liable and who fail to participate in the cleanup. In the past, some have criticized EPA for failing to pursue noncompliers when private parties are conducting Superfund cleanups. The establishment of national guidelines for settling administrative order noncompliance cases should facilitate the government initiation and settlement of enforcement actions against noncompliers and produce consistent settlement results across the country. Although limited resources prevent EPA from initiating enforcement actions against every noncomplier, strategic targeting of enforcement actions against noncompliers is intended to deter noncompliance with administrative orders and encourage settlement of civil penalty and punitive damages claims when noncompliance occurs.

The policy is intended to make calculation of CERCLA civil penalties and punitive damages for purposes of settlement a fair and effective process for deterring noncompliance with EPA's administrative orders. The policy contains an innovative approach toward penalty calculation which takes into account factors particularly relevant to Superfund cases by incorporating both harm and equitable adjustment factors into a single "harm - recalcitrance" matrix. Unlike existing EPA penalty policies developed for the assessment of penalties in the Agency's regulatory programs, factors such as the noncomplier's degree of responsibility for the site and ability to finance compliance with an administrative order are considered early in the calculation process to encourage companies that have greater responsibility for the creation of the Superfund site and/or are better able to finance a cleanup to step forward and work with other viable PRPs to take responsibility for cleanups.

The policy provides for smaller penalties for noncompliance by smaller contributors to Superfund sites, companies with limited financial resources, and less sophisticated parties. This policy reserves the highest penalties for the most egregious offenders - the noncompliers who are financially capable of performing, who are most responsible for creating the Superfund site, and whose failure to perform results in actual harm to human health, the environment, or EPA's enforcement and response program, or results in serious inequities to complying parties.

Consistent with the Agency's "Policy on Civil Penalties" (Feb. 16, 1984), this policy should be used only in cases where the government is settling civil penalty and punitive damages claims. The government's decision to adjust a penalty based on case-specific factors for purposes of settlement reflects a determination that settlement of the case is in the government's interest. Where the government must litigate the case, the United States is free to seek substantially higher penalty and punitive damages amounts without being bound by the non-statutory mitigation factors outlined in this policy. This approach is consistent with the language and legislative history of CERCLA, which encourages settlement and disfavors noncompliance.

If you have any questions concerning the attached policy, please contact Steven Rollin, Policy and Guidance Branch, PPEd, OSRE (202-564-5142).

cc: Sylvia Lowrance
Barry Breen
Eric Schaeffer
Linda Boornazian
Charles Breece
Lori Boughton
Earl Salo
Lead Region UAO Work Group
Bruce Gelber

Interim Policy on Settlement of CERCLA Section 106(b)(1) Penalty Claims and Section 107(c)(3) Punitive Damages Claims for Noncompliance with Administrative Orders

September 30, 1997

Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

Contents

	<u>Page</u>
I. Calculating Section 106(b)(1) Civil Penalties for Settlement	1
A. Overview of the Penalty Calculation Process	1
B. Step 1: Selecting the Per Day Penalty	4
1. Selecting the Harm Category	4
a. Factors to be Considered	4
b. Defining the Harm Categories	5
2. Selecting the Recalcitrance Category	6
a. Factors to be Considered	6
b. Defining the Recalcitrance Categories	8
3. Further Guidance on Selecting a Penalty from the Matrix Range	9
4. Examples	9
C. Step 2: Determining the Total Penalty	12
1. Period of Noncompliance	13
a. Failure to Initiate Work/Work Stoppage	13
b. One or More Order Recipients Out of Compliance/Failure to Continue Compliance with a Coordinate and Participate Order	14
c. Single vs. Multiple Violations	14
d. Inadequate Work	15
2. Economic Benefit	15
D. Step 3: Final Adjustments	15
1. Litigation Risk	16
2. Inability to Pay	16
3. Supplemental Environmental Projects	17
II. Calculating Section 107(c)(3) Punitive Damages	17
A. Relationship Between Penalties and Punitive Damages	17
1. Noncompliance Resulting in EPA Site Work	18
2. Noncompliance Resulting in Enforcement Costs	18
B. Calculating Punitive Damages Claims	19
III. Provisions for Stipulated Penalties in Orders on Consent	20
IV. Documentation of Penalty and Damages Claims	20

A.	Pre-negotiation Calculation	20
B.	Deviation from this Policy and Headquarters Consultation Requirements	20
C.	Final Settlement Amount	20
V.	Purpose and Use of This Policy	21
Appendix A		

Interim Policy on Settlement of CERCLA Section 106(b)(1) Penalty Claims and Section 107(c)(3) Punitive Damages Claims for Noncompliance with Administrative Orders

I. Calculating Section 106(b)(1) Civil Penalties for Settlement

A. Overview of the Penalty Calculation Process

CERCLA §106(b)(1) establishes a maximum civil penalty of either \$25,000 per day for noncompliance prior to January 30, 1997, or \$27,500 per day for noncompliance on or after January 30, 1997 with a §106(a) administrative order (AO).¹ When settling a §106 penalty claim, this amount may be reduced according to the facts and circumstances of the noncompliance. Where more than one respondent fails to comply with a given AO, a penalty is calculated individually for each noncomplier - the penalty is not divided among noncompliers. Settlement of CERCLA §106(b)(1) penalty claims and Section 107(c)(3) punitive damages claims for failure to comply with administrative orders is generally in the form of judicial consent decrees.²

EPA's general regulatory civil penalty policies identify three criteria for determining an appropriate penalty amount: (1) the penalty should be large enough to serve as a deterrent, (2) it should treat the violator fairly and equitably, and (3) it should resolve swiftly the environmental problems posed by noncompliance, without compromising deterrence.³ This policy provides a framework for determining an appropriate amount to accept in settlement of a claim for noncompliance with an AO. This policy does not specify particular settlement amounts for particular types of AO noncompliance because the consequences of noncompliance vary from

¹Section 106(b)(1) provides: "Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than \$25,000 for each day in which such violation occurs or such failure to comply continues." Pursuant to EPA's Civil Monetary Penalty Inflation Adjustment Rule (implementing the Debt Collection Improvement Act of 1996), EPA adjusted for inflation the maximum civil monetary penalties that can be imposed pursuant to the Agency's statutes. For noncompliance with an administrative order that takes place after January 30, 1997, the maximum civil monetary penalty is \$27,500 per day. Noncompliance with administrative orders that occurs prior to January 30, 1997 is subject to a maximum civil monetary penalty of \$25,000.

²Settlement of penalty claims generally requires consultation with and approval of the Department of Justice.

³ Two documents contain general civil penalty policies for Agency regulatory statutes: "Policy on Civil Penalties" (Feb. 16, 1984) and "A Framework for Statute-Specific Approaches to Penalty Assessments" (Feb. 16, 1984).

site to site.⁴ The adverse effect of AO noncompliance may be only site-specific or also may include an impact on the Agency's enforcement program. This policy focuses on two areas of analysis: (1) the degree of harm caused by the noncompliance in light of the extent of deviation from the requirements of the AO and the impact of such deviation on site conditions, response activities, EPA's Superfund enforcement program, and other parties who have complied with or are complying with the AO or a consent decree; and (2) the degree of recalcitrance exhibited by the noncomplier in failing to comply with the AO, considering the noncomplier's degree of responsibility, financial and technical ability, past practices, and other relevant factors.

The policy outlines a three-step process for calculating a §106 penalty. First, a per day penalty should be determined by evaluating the harm caused by the noncompliance and the recalcitrance of the noncomplier. Second, the per day penalty should be multiplied by the number of days of noncompliance. If the noncomplier obtains an economic benefit by its noncompliance, that benefit should be calculated and added to the per day penalty, yielding the total penalty (which cannot exceed the statutory maximum). Finally, the total penalty may be adjusted by other factors, including litigation risk, the noncomplier's inability to pay a penalty, and the noncomplier's agreement to conduct a supplemental environmental project to arrive at an adjusted total penalty.

⁴ The process for calculating penalty amounts outlined in this policy deviates from "A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties" (Framework) (1984). The Framework process consists of selecting a "preliminary deterrence amount" which is the sum of economic benefit and the gravity component of a penalty. The preliminary deterrence amount is then adjusted by equitable factors, ability to pay, and litigation risk. In this policy, the factors which the Framework lists for selecting the gravity component and the equitable adjustment factors are incorporated into the definitions of the harm and recalcitrance classes which form the axes of the penalty matrix, the use of which produces the gravity component of the penalty. The factors discussed in the Framework are included in this policy but have not been broken out for line by line adjustment and no specific percentages for adjustments are included. The definitions of the harm and recalcitrance classes have been carefully drafted to ensure that use of this policy results in consistent and fair penalty calculations, as called for in the Framework. Further, the examples included in the policy provide sample calculations for many of the most common scenarios involving AO noncompliance.

Three -Step Process for Calculating Settlement Penalty

Step 1: Use Matrix to Select Per Day Penalty⁵

		Recalcitrance		
Harm		Recalcitrance I	Recalcitrance II	Recalcitrance. III
	Harm A	\$17,600 to \$27,500	\$8800 to \$17,600	\$2750 to \$8800
	Harm B	\$8800 to \$17,600	\$2750 to \$8800	\$550 to \$2750
	Harm C	\$2750 to \$8800	\$550 to \$2750	\$110 to \$550

Step 2: Calculate Total Penalty

(Per day Penalty x Period of Noncompliance) + Economic Benefit = Total Penalty

Step 3: Calculate Adjusted Total Penalty

Total Penalty - Final Adjustment Factors (Litigation Risk/SEPs/Ability to Pay) = Adjusted Total Penalty

Certain claims for enforcement of an AO may present unique factual or legal issues which fall outside the intended scope of these settlement penalty calculation guidelines. EPA

⁵ Pursuant to EPA's Civil Monetary Penalty Inflation Adjustment Rule (implementing the Debt Collection Improvement Act of 1996), EPA adjusted for inflation the maximum civil monetary penalties that can be imposed pursuant to the Agency's statutes. For noncompliance with an administrative order that takes place after January 30, 1997, the maximum civil monetary penalty is \$27,500 per day. Noncompliance with administrative orders that occurs prior to January 30, 1997 is subject to a maximum civil monetary penalty of \$25,000. The matrix includes ranges based on a daily maximum civil monetary penalty of \$27,500. Where noncompliance occurs before January 30, 1997, the enforcement team should ensure that the per day penalty does not exceed \$25,000 per day.

may depart from the policy where its use produces inadequate or inappropriate results. The Ten Point Settlement Analysis⁶ should document the bases for the departure.

B. Step 1: Selecting the Per Day Penalty

A per day penalty amount is calculated by determining the gravity of the administrative order noncompliance. The penalty matrix (see above) has nine cells, each containing a penalty range. The specific cell is chosen by classifying the noncompliance according to one of three levels of harm and one of three levels of recalcitrance which requires a careful analysis of the particular circumstances of the noncompliance and review of the harm and recalcitrance class definitions. The intersection of the harm and recalcitrance axes determines the range of penalty from which to identify an appropriate per day penalty. Enforcement teams⁷ have discretion to select a specific penalty from within the range of penalty amounts for a particular harm and recalcitrance class combination based on a weighting of the factors listed for selecting the appropriate harm or recalcitrance class.

1. Selecting the Harm Category

a. Factors to be Considered in Selecting a Harm Classification

The harm category should reflect the threat to human health and the environment posed by conditions at a site⁸, the impact of the noncompliance on the complying parties (and/or settlers) and on conditions at the site, and on the integrity of the enforcement program. Penalties for noncompliance should be higher when actual harm occurs as a result of the noncompliance. Higher penalties are also appropriate when site conditions pose an immediate threat to human health or the environment. Further, enforcement teams also may determine the harm category based upon the adverse impact on EPA's enforcement and response resources in circumstances where noncompliance requires EPA to take over a response action, diverting Superfund resources from other cleanups - including those cases where there may be no other viable parties to conduct the cleanup. Penalty category selection also should reflect the enforcement team's

⁶The Ten Point Settlement Analysis is explained in EPA's 1984 Interim CERCLA Settlements Policy (50 Fed. Reg. 5034, Feb. 5, 1985); see also OSWER Directive 9835.14, Submittal of Ten Point Settlement Analyses of CERCLA Consent Decrees (August 11, 1989).

⁷Enforcement teams are generally composed of EPA enforcement personnel working on a Superfund case and, where applicable, Department of Justice (DOJ) staff. See EPA Enforcement Memorandum, Case Management Plans (March 11, 1988).

⁸The enforcement team may evaluate the threat using information found in the action memorandum for removal actions and RI/FSs, the risk assessment and/or the record of decision (ROD) for remedial actions, as well as other sources of information.

consideration of the extent to which compliers/settlers are burdened unfairly by the noncomplier's failure to coordinate and participate in the response action.

The following factors should be considered in determining the degree of harm and have been incorporated into the harm classification definitions:

- o Degree of threat to human health or the environment (consider the quantity and toxicity of hazardous substances present at the site, the threat of explosion, fire or other release, the extent of migration or leaching, the existence, size, and proximity of human populations, including environmental justice considerations, and the existence of sensitive environmental media, the sensitivity of the environmental media, and the potential effects of ongoing exposure);
- o Extent that failure to comply aggravates the threat to human health or the environment (consider whether there are or may be continued or additional releases of hazardous substances, the importance of the order to reducing risk or otherwise abating the release or threat of release, whether the noncompliance worsens conditions at the site to the extent that EPA and/or complying order recipients are unable to correct the effects of the noncompliance expeditiously, and whether additional media are or may be contaminated);
- o Likelihood that the complying order recipients will complete the response action, including consideration of the compliers' financial resources;
- o Impact on the integrity of EPA's enforcement program (consider the extent to which additional resources were diverted from other cleanups to address the noncompliance or to take over a response action and the effect of the noncompliance on the behavior of other parties at the site and other Superfund sites); and
- o Increased burden on complying order recipients or settlers (consider whether the compliers/settlers have difficulty financing the work or obtaining the expertise to conduct the response action without the noncomplier)

b. Defining the Harm Categories

CLASS A: The noncompliance caused actual harm to human health or the environment at the site, resulted in continued or increased exposure or increased threat of explosion, or fire, caused other serious and immediate adverse consequences to human health or the environment from an actual release of hazardous substances, resulted in substantial burdens to EPA or settlers/complying order recipients, or a combination of the above.

- CLASS B:** The noncompliance resulted in an aggravated or significant threat to human health or the environment from a potential release of hazardous substances (This will usually occur when the quantity and toxicity is high, there is a large exposed population or the threat is imminent, but there is no immediate threat of fire or explosion or ongoing exposure) , resulted in significant burdens to EPA or settlors/complying order recipients, or a combination of the above.
- CLASS C:** The noncompliance occurred at a site where the toxicity of hazardous substances is not as high or the need for an accelerated cleanup is not as great, the noncompliance did not result in a significantly increased threat to human health or the environment from an actual or potential release of hazardous substances (which may occur when EPA or settlors/complying order recipients conduct the response action without delay), placed little or no burden on EPA or settlors/complying order recipients, or a combination of the above.

2. Selecting the Recalcitrance Category

a. Factors to be Considered in Selecting a Recalcitrance Classification

For purposes of this policy, "recalcitrance" focuses on aspects of the noncomplier's general circumstances and the noncomplier's site-specific behavior. Thus, the same type of noncompliance may fall into a higher or lower classification depending on factors which affect the noncomplier's behavior at the site, such as the noncomplier's degree of responsibility for the hazardous substances at the site, financial resources, and level of sophistication. While not excusing noncompliance, using these factors to distinguish among noncompliers serves the policy's goal of achieving both fairness and deterrence in the penalty calculation.

The recalcitrance class definitions are written so that higher penalties are appropriate for a noncomplier with even one negative factor, such as a history of recalcitrance. As a result, a noncomplier with a significant history of recalcitrance who refuses to comply with the order - total noncompliance - may fit within Recalcitrance Class I (assuming there are no significant mitigating factors). Thus, the Class I category would be particularly appropriate where the noncompliance is coupled with one or more aggravating factors. In contrast a noncomplier may have demonstrated a good faith effort to comply with the order for the site. To provide recognition (and a lower penalty) for the positive factor, the enforcement team should select a Class II or III penalty category. For example, the Class II category could be appropriate for instances of partial noncompliance with an AO. Even total noncompliance with an AO may result in a Class II determination if the noncompliance is coupled with an absence of aggravating factors or the presence of significant mitigating factors.

The following factors should be considered in selecting the appropriate recalcitrance category and have been incorporated into the recalcitrance classification definitions:

- o Extent of noncompliance;
- o Quality and timeliness of work performed;
- o Need for substantial oversight;
- o Noncomplier's degree of responsibility for the harm at the site (for example, volumetric share or other contribution to the release or threatened release of hazardous substances,⁹ and degree of involvement in the selection of the site);
- o Degree of willfulness and/or negligence;¹⁰
- o History of recalcitrance at the site in question or a pattern of recalcitrance at Superfund sites generally; and

⁹Enforcement teams may consider the noncomplying party's relative share of hazardous substances found at the site. This approach is intended to encourage the larger contributors of hazardous substances to the site, as well as owners and operators, to take greater responsibility for organizing PRP groups and for complying with AOs. For example, a generator PRP that contributes 50% of the hazardous substances to the site and then refuses to comply with an order should pay a larger penalty than the party that fails to comply but is responsible for a smaller share.

¹⁰Although willfulness is not a statutory prerequisite for enforcement of an administrative order, a higher penalty may be appropriate for a willful violation. In determining whether a violation is willful, each of the following factors should be considered with respect to the noncomplier's behavior in refusing to comply with the AO (how the noncomplier became involved with the Superfund site is not relevant):

- o Extent of respondent's control over events constituting the violation;
- o Foreseeability of events constituting the violation;
- o Whether reasonable precautions were taken by respondent to avoid the events constituting the violation;
- o Whether respondent knew or should have known of hazards associated with its conduct; and
- o the level of sophistication within the industry in dealing with compliance issues.

- o Good faith attempts to comply (may take into consideration noncomplier's ability to finance the work required by the order,¹¹ sophistication of noncomplier, and attempts to participate and coordinate with complying respondents)¹²

b. Defining the Recalcitrance Categories

CLASS I: The noncompliance consists of total noncompliance or such poor work as to be tantamount to total noncompliance, where there is evidence of significant bad faith, a history of recalcitrance, a willful violation, responsibility for a large share of the response costs, or other evidence of significant recalcitrance.

CLASS II: The noncompliance consists of partial noncompliance, work of poor quality, work deficiencies requiring significant oversight, and/or a pattern of delayed compliance. Total noncompliance may also be Class II recalcitrance where there is evidence that the noncomplier made a sufficient good faith effort to comply with the order, has no history of recalcitrance, there is no evidence of a willful violation, is not responsible for a large share of the response costs, or there are other mitigating factors suggesting a lower degree of recalcitrance.

¹¹Enforcement teams may consider the noncomplying party's financial resources and its ability to fund and/or contribute to the cleanup. The penalty should be appropriate in light of these resources while being of sufficient magnitude to deter noncompliance. Similarly, although compliance is not excused for an order recipient with limited finances, the penalty may reflect its greater difficulty in financing response work. Enforcement teams have the discretion not to seek a penalty for a party with limited financial resources who fails to comply with an order because of unreasonable demands from other parties.

¹²Good faith efforts to comply include prompt identification and reporting of anticipated noncompliance, and prompt institution of measures to remedy the noncompliance. Any beneficial change in management personnel or policies following AO noncompliance may be considered by the enforcement team as evidence of a good faith effort. Downward penalty adjustment may be appropriate if new management practices demonstrably foster increased AO compliance.

Early notification of difficulty complying with order terms may also justify a change in class of recalcitrance or a reduction within the range of the penalty for a particular class of recalcitrance. Notification increases the potential for speedy resolution of compliance difficulties. Notice of anticipated inability to comply, however, without attempts to implement measures to correct or prevent recurrence of noncompliance, may not represent good faith efforts to comply.

CLASS III: Class III noncompliance includes missed interim deadlines on primary tasks where the work performed meets specifications and/or inadequate completion of a task ancillary to the primary work requirements. Failure to comply with reporting requirements, such as failure to submit a monthly report, may also be Class III noncompliance. Partial compliance, work of poor quality, work deficiencies requiring significant oversight, and/or a pattern of delayed compliance may also be Class III recalcitrance where there is evidence that the noncomplier made a sufficient good faith effort to comply with the order, has no history of recalcitrance, there is no evidence of a willful violation, is not responsible for a large share of the response costs, or there are other mitigating factors suggesting a lower degree of recalcitrance.

3. Further Guidance on Selecting a Penalty from the Range Provided by the Harm/Recalcitrance Classification

After selecting the appropriate harm/recalcitrance classification, enforcement teams have discretion to select a specific penalty from within the penalty range provided by the matrix. The mid-range penalty is the starting point for determining the most appropriate per day penalty. However, the factors set forth above to be considered in assessing the degree of harm or recalcitrance should be balanced against any mitigating or aggravating considerations to determine whether a penalty in the higher or lower end of the range may be appropriate. In addition, the recalcitrance classes are defined to provide that one or more negative recalcitrance factors suggest a higher penalty class. To distinguish noncompliers with more than one negative factor or with one or more positive factors, enforcement teams can move within the penalty range based on a weighting of the factors listed for selecting the appropriate harm or recalcitrance class. Movement within in a penalty range provides the enforcement teams with the flexibility needed to select appropriate penalties and distinguish among noncompliers.

4. Examples¹³

Each example includes a description of the noncomplier followed by several scenarios describing the actions of other parties and the condition of the site. These examples are intended to clarify the use of the matrix by suggesting appropriate penalty categories based on a combination of factors involving the noncomplier, other parties involved at the site, and the condition of the site. The result listed is the suggested penalty for the noncomplier described in the example.

¹³Results are middle of the range for each harm/recalcitrance category unless otherwise noted.

Example 1: A financially sound and sophisticated company responsible for the highest share (considering both volume and toxicity) of hazardous substances at the site refuses to comply with a UAO as it has at several sites.

Scenario 1 - A second financially sound and sophisticated company responsible for a high share (considering both volume and toxicity) of hazardous substances at the site performs completely without delay. RESULT: CLASS C-I.

Scenario 2 - Another party struggles to finance the cleanup without the participation of the noncomplier and has completed the remedial design without missing any deadlines. RESULT: CLASS A-I (unclear whether complier will be able to complete the response action).

Scenario 3 - EPA performs completely without delay. RESULT: CLASS B-I

Scenario 4 - Another party tries to perform but creates a threat of explosion at the site and EPA takes over its tasks. RESULT: High end of CLASS A-I.

Scenario 5 - EPA performs completely but cleanup is delayed during attempts to attain compliance, resulting in a continued imminent threat of a potential release into the nearby community. RESULT: High end of CLASS B-I.

Example 2: A financially sound and sophisticated company responsible for a small, but not de minimis share (considering both volume and toxicity) of hazardous substances at the site with no prior Superfund experience fails to comply

Scenario 1 - A second financially sound and sophisticated company responsible for a high share (considering both volume and toxicity) of hazardous substances at the site performs completely without delay. RESULT: CLASS C-II

Scenario 2 - Another party struggles to finance the cleanup without the participation of the noncomplier and has completed the remedial design without missing any deadlines. RESULT: High end of CLASS B-II (unclear whether complier will be able to complete the response action)

Scenario 3 - EPA performs completely without delay. RESULT: High end of CLASS C-II

Scenario 4 - Another party tries to perform but creates a threat of explosion at the site and EPA takes over its tasks. RESULT: High end of CLASS A-II.

Scenario 5 - EPA performs completely but cleanup is delayed during attempts to attain compliance, resulting in a continued imminent threat of a potential release into the nearby community. RESULT: High end of CLASS B-II.

Example 3: Sophisticated, financially sound company is the only complier of five order recipients. After completing the design phase of the remedial action, the company refused to continue compliance.

Scenario 1 - A second financially sound and sophisticated company, newly identified as a PRP, completes the response action without further delay after receiving a UAO ordering completion of the remainder of the response action. RESULT: CLASS C-II.

Scenario 2 - After a newly identified, second financially sound and sophisticated company complies with the UAO, the noncomplier agrees to resume compliance. Result: CLASS C-III.

Scenario 3 - A group of newly identified PRPs, each with limited finances, struggles to complete the remedial action (in accordance with a second round UAO) without the participation of the noncomplier and as of the date of settlement negotiations has not missed any deadlines. RESULT: High end of CLASS B-II (unclear whether compliers will be able to complete the response action)

Scenario 4 - EPA performs completely without delay. RESULT: CLASS B -II

Scenario 5 - A newly identified PRP tries to perform but creates a threat of explosion at the site and EPA takes over its tasks. RESULT: High end of CLASS A-II.

Scenario 6 - EPA performs completely but cleanup is delayed during attempts to attain compliance, resulting in a continued imminent threat from a potential release to the nearby community. RESULT: High end of CLASS B-II.

Example 4: An unsophisticated and financially limited party ordered to provide site security and maintain the groundwater pump and treatment system fails to comply.

Scenario 1 - A financially sound and sophisticated company responsible for a high share (considering both volume and toxicity) at the site performs completely without delay. RESULT: CLASS C-III

Scenario 2 - EPA performs completely without delay. RESULT: CLASS B-III

Scenario 3 - Another party conducting response action at the site creates a threat of explosion at the site (aggravation of harm not related to performance of the

noncomplier's tasks) and EPA takes over its tasks, including the noncomplier's ancillary tasks. RESULT: High end of CLASS C-III

Scenario 4 - Local vandals smash drums at the site, resulting in the release of hazardous substances into a nearby stream (and causing severe chemical burns and eye damage to the vandals) and creating a threat of explosion at the site from the combination of hazardous substances. EPA takes over performance of security for the site. RESULT: High end of CLASS A-III.

Scenario 5 - EPA takes over security functions at the site after discovering that trespassers riding motorcycles have created ruts in the cap, leading to erosion of the cap and resulting in a continued imminent threat from a potential release to a nearby community. RESULT: High end of CLASS B-III.

Example 5: Following entry of a consent decree providing for a group of PRPs to conduct the response action at an urban site with nearby residences, EPA issues a "coordinate and participate" order to a sophisticated and financially sound nonsettlor who is a major contributor to the site. The nonsettlor fails to comply with the order.

Scenario 1 - The settlors, responsible for 50% of the hazardous substances at the site, perform completely without delay. RESULT: CLASS C-I

Scenario 2 - The settlors struggle to finance the cleanup without the participation of the noncomplier and have completed the remedial design without missing any deadlines. RESULT: CLASS A-I (unclear whether settlors will be able to complete the response action).

Scenario 3 - The settlors try to perform but create a threat of explosion at the site and EPA takes over the response action. RESULT: High end of CLASS A-I.

Scenario 4 - After the settlors run out of money, EPA performs completely but cleanup is delayed during attempts to attain compliance, resulting in a continued imminent threat of a potential release into the nearby community. RESULT: High end of CLASS B-I.

C. Step 2: Determining the Total Penalty

The per day penalty amount established by application of the matrix should be multiplied by the number of days of noncompliance. Next, economic benefit, if any, is added to ensure that noncompliers do not save money by failing to comply.

1. Period of Noncompliance

This section provides general policy on the determination of the number of days to be included in the period of noncompliance. To the extent that the terms of the order specify when noncompliance occurs, the order, and not this policy, controls the determination of the period of noncompliance.

a. Failure to Initiate Work and Work Stoppage

If there are no complying order recipients, the period of noncompliance should begin on the day following the first missed milestone (which may be the date specified in the order for informing EPA that it will comply with the order) or work deadline. If all order recipients stop work, the period of noncompliance should run from the last day that site work was done or from the day following the deadline for the first missed deliverable for non-field activities, such as design work.

The noncompliance period should end (a) when the noncomplier demonstrates compliance with the order,¹⁴ (b) when the work required by the original order is completed by other order recipients or pursuant to a subsequent order or consent decree, or (c) when EPA initiates the work required by the order.¹⁵ The precise point when EPA "takes over" site work varies by site condition, type of noncompliance, and what is required to "take over" the work. The official date may be fixed when EPA makes its decision to perform, or commits Fund resources to perform site response work.¹⁶

¹⁴If other parties are not completing the work, the noncomplier may demonstrate compliance with the order by meeting the first milestone or work deadline. If other parties are conducting the response action, the noncomplier may demonstrate compliance by working with the compliers. The required performance may include payment of money or performance of work as agreed to by the complying PRPs.

¹⁵For purposes of this settlement policy only, the ending dates for the period of noncompliance differ depending on whether a complying PRP (or group of complying PRPs) or EPA is conducting the work because the noncomplier can choose to work with the complying PRPs at any time prior to completion of the response action. However, for purposes of settlement only, this policy suggests that the period of noncompliance for calculation of penalties ends when EPA takes over the work, at which point EPA begins calculating punitive damages.

¹⁶The most appropriate end date generally is when EPA notifies respondent that its authority has been terminated or when EPA commits resources to take over site work. AOC terms, e.g., for dispute resolution, also may govern the date.

b. One or More Order Recipients Drop Out of Compliance

When one or more order recipients drops out of the complying group and the group continues to perform the response action, EPA will determine the period of noncompliance with the order. Typically, such noncompliance begins on the day following the date that the noncomplier fails to meet the performance requirement contained in the complying group's internal agreement or the date of the noncomplier's withdrawal from the group, whichever is earlier.¹⁷ If the noncomplier had agreed to pay money, then the period of noncompliance begins on the date of the missed payment. If the noncomplier had agreed to perform work, then the period of noncompliance begins on the missed deadline for performance of the work.

The period of noncompliance ends (a) when the order recipient resumes compliance with the order, (b) when the work required by the order is completed by other order recipients/settlers or (c) if the remaining order recipients/settlers fail to complete the work, when EPA initiates the work required by the order.

c. Single vs. Multiple Violations

When a deadline is missed for an AO deliverable or for response work completion, the period of noncompliance should begin the day following the missed deadline. Administrative orders, including such items as work plan requirements and deadlines, may contain a series of related deadlines. Missed deadlines generally are treated as separate acts of noncompliance, and penalties are calculated for each act. For purposes of settlement only, missed interrelated deadlines, however, may comprise only one act of noncompliance, and only a single penalty may be appropriate. For example, missing both the interim deadline for submitting a draft feasibility study (FS) and the final deadline for submitting a completed FS generally should be considered one act of noncompliance. The enforcement team should calculate the period of noncompliance beginning with the first missed deadline and ending with completion of the work or submission of the deliverable subject to the last missed deadline.

Where work tasks are not closely related, a penalty may be calculated for each. For example, a removal action may require the installation of a fence around the property to provide site security as well as the removal of drummed waste at the site as initial steps. The two discrete tasks, the installation of the fence and the removal of the drums, can be performed independently, and a failure to do either may be considered a separate act of noncompliance. The enforcement team should keep in mind that the statute provides for a maximum per day penalty even if there are multiple actions that constitute noncompliance occurring on the same day. Thus, if the

¹⁷ The remaining members of the complying group may provide the government with the noncomplier's notice of withdrawal from the group or a letter to the noncomplier documenting its failure to perform as required by their internal agreement.

fencing and drum removal are required to be done on the same day, but are not, then \$27,500¹⁸ is the highest possible total penalty.

d. Inadequate Work

The period of noncompliance for work that is inadequately performed, such as deficient plans, should be calculated from the date the work is due under the order. The penalty period should end once the deficient work has been corrected.

2. Calculate and Add Economic Benefit

Enforcement teams should ensure that the penalty captures the economic benefit of noncompliance, if any. At least initially, noncompliers benefit from noncompliance with an AO by avoiding response costs. If the complying parties/settlers successfully sue for contribution, the noncomplier will be required to pay its share of response costs, plus interest. The payment required by the contribution action, plus reimbursement of EPA's enforcement costs and punitive damages likely will recover this economic benefit. Similarly, if EPA undertakes the work and then recovers its costs plus interest from the noncomplier, the settlement or judgment amount will recover economic benefit. In contrast, if the noncomplier delays the implementation of costly response work for a significant amount of time prior to completing the work, the noncomplier will benefit from the use of its money during the period of delay.

When the enforcement team suspects that the noncomplier has benefitted from noncompliance and will continue to do so, it should calculate the economic benefit of noncompliance using the BEN computer model. For purposes of this settlement policy and notwithstanding each noncomplier's joint and several liability for an AO issued to a group, the enforcement team should apportion economic benefit among the financially viable noncompliers based on their estimated share of the cost of the response work ordered rather than the entire amount of the cost estimate for the work ordered where allocation information is available. Where the noncomplier signed an agreement with settling or complying parties which documents its promised contribution, the economic benefit may be calculated based on this commitment. Economic benefit of noncompliance is added to the calculated penalty to yield a total penalty.

D. Step 3: Final Reductions

After an appropriate penalty amount has been calculated, the enforcement team may determine that final reductions to this amount are warranted based upon litigation risk, the noncomplier's inability to pay, or the use of Supplemental Environmental Projects. The applicability of these final reduction considerations may not become known to the enforcement

¹⁸The maximum total penalty for noncompliance with an administrative order prior to January 30, 1997 is \$25,000 per day. See footnote 5, above, for further explanation.

team until after a demand for civil penalties has been made. For example, information in support of a noncomplier's claim of inability to pay the civil penalty amount likely will not be proffered until after a demand for the penalty has been made. Accordingly, the three final reduction factors discussed below may be used to reduce a penalty amount at any point in the settlement process. However, the basis for reduction must be fully explained in the Ten Point Settlement Analysis and reflected in the final penalty worksheet. The enforcement team may determine that unusual site-specific circumstances justify a departure from the numbers derived by application of this policy. In that event, the rationale for the proposed settlement shall be set forth in the Ten-Point Settlement Analysis.

1. Litigation Risk

Penalty reduction based on the strength of the government's case or respondent's defenses should reflect the specific strengths and weaknesses of the enforcement action. The enforcement team should evaluate the strength of the liability case, the strength of any sufficient cause defense(s), potential challenges to the selected response action, the adequacy of the administrative record supporting the response action, the clarity of the order, and judicial precedent. Evaluation of these factors is within the discretion of the enforcement team in consultation with the team members' supervisors.

There may be instances where the penalty calculated using the full period of noncompliance is disproportionate to the gravity of the noncompliance or the total site response costs. In instances where the enforcement team concludes that the duration of the violation yields a disproportionately high penalty, the enforcement team may recommend that the penalty be reduced for purposes of calculating the final penalty amount¹⁹

Penalty reductions due to litigation risk should be documented in the Ten Point Settlement Analysis and penalty worksheet as described further in Section IV of this policy. Reductions should be broken out for the gravity portion of the penalty, the economic benefit portion of the penalty, and punitive damages if the strength of the litigation case differs for each type of claim.

2. Inability to Pay

The penalty may be adjusted to take into account the noncomplier's inability to pay the calculated total civil penalty. If the noncomplier demonstrates an inability to pay the penalty, EPA may consider installment payments or delayed payment with interest. If the noncomplier demonstrates an inability to pay the full amount of the penalty, even over a longer term, then the

¹⁹EPA's Office of Enforcement and Compliance Assurance (OECA) is available to provide consultation to enforcement teams to provide national consistency. To that end, OECA has data on penalties entered.

enforcement team has discretion to reduce the penalty. Decisions made to adjust the term or penalty amount are based on an evaluation of the noncomplier's financial condition.²⁰ Although the penalty may reflect the noncomplier's financial condition, it still should retain an adequate deterrent effect.

It is the noncomplier's burden to demonstrate its inability to pay the full amount of the penalty. The enforcement team should consider all resources available to the noncomplier claiming an inability to pay a penalty.²¹ Useful financial information may be obtained through tax returns, audited financial statements, loan applications, financing and security agreements, annual reports to shareholders, SEC filings, Dun & Bradstreet reports, and similar financial reporting services. In addition, the enforcement team should consider whether payment of the penalty would jeopardize further site response activities.

3. Supplemental Environmental Projects

To further EPA's goals to protect and enhance public health and the environment, the Agency encourages the use of Supplemental Environmental Projects (SEPs) in settlements provided the requirements of the SEP guidance are satisfied. See "Interim EPA Supplemental Environmental Projects Policy" (May 3, 1995). Supplemental environmental projects are defined as environmentally beneficial projects which a noncomplier agrees to undertake in settlement of an enforcement action, but which the violator is not otherwise legally required to perform. The adjustment for a SEP, if any, is the final step in determining the appropriate penalty amount.

II. Calculating Section 107(c)(3) Punitive Damages for Settlement

A. Relationship Between Civil Penalties and Punitive Damages

CERCLA §107(c)(3) punitive damages may be appropriate whenever noncompliance with an administrative order causes EPA to expend money from the Fund.²² Noncompliance that

²⁰ See generally, Guidance on Determining a Violator's Ability to Pay a Civil Penalty (Dec. 16, 1986); General Policy on Superfund Ability to Pay Determinations (Sept. 30, 1997).

²¹ Resources include cash on hand; salable assets; ability to borrow funds (increase respondent's debt); ability to sell stock (decrease respondent's equity); forgoing or deferring planned expansion investments and other planned expenditures; and in some cases, ability to obtain insurance payments. Internal expenditures, such as executive salaries, entertainment funds, and car rentals, should also be considered in evaluating ability to pay.

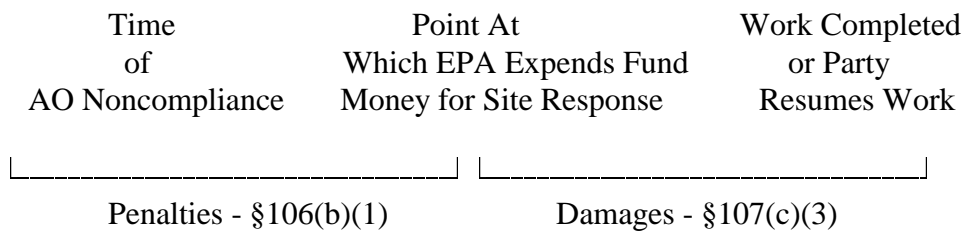
²²Section 107(c)(3) provides: "If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to provide removal or remedial action upon order of the President pursuant to section 104 or 106 of this Act, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount at least equal to, and not more than three times, the amount of costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages which shall be in addition to any costs recovered

results in the expenditure of Fund money to perform site work required by the AO, or resulting in additional enforcement costs is serious because it requires substantial diversion of Agency resources from other sites.

1. Noncompliance Resulting in EPA Site Work

Congress included CERCLA section 107(c)(3) as an indication that administrative order noncompliance requiring EPA to perform some or all response activities warrants punitive damages commensurate with the noncompliance. Punitive damages under §107(c)(3) work in tandem with §106(b)(1) penalties. For settlement purposes only, when respondent's noncompliance results in EPA incurring response costs, EPA may consider calculating §106(b)(1) penalties based on a period of noncompliance ending at the time spends fund money to perform the response work.

The relationship between the accrual of civil penalties and punitive damages suggested as an approach by this policy is represented graphically below.



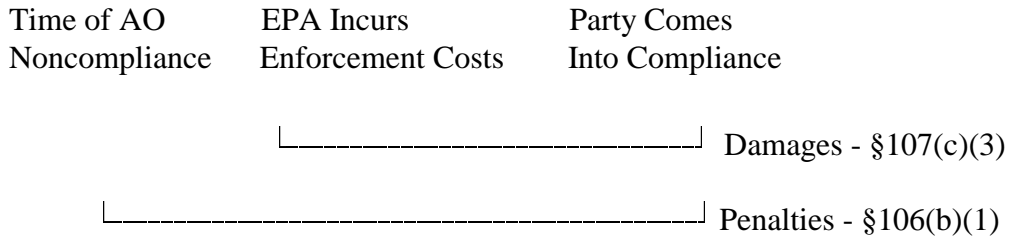
2. Noncompliance Resulting in Enforcement Costs

Administrative order noncompliance often results in Fund expenditures for enforcement costs, even if EPA does not take over site response work. For example, the noncompliance may result in EPA taking any or all of the following enforcement actions: to compel compliance, to recover civil penalties and punitive damages, and to have other parties take over site response work pursuant to a new or revised AO. When AO noncompliance requires Fund expenditures before EPA takes over site work, EPA may assert a punitive damages claim for these enforcement costs.

from such person pursuant to section 112(c) of this Act. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.”

The suggested approach to calculating penalties and enforcement cost damages is presented graphically in the example below.

Party violates administrative order; EPA initiates enforcement efforts, eventually resulting in party coming into compliance.



B. Calculating Punitive Damages Claims

EPA needs to maintain a strong enforcement program and send strong messages that PRPs are expected to comply with Administrative Orders to conduct response actions. Where parties do not comply, EPA must use funds that could have been used for other cleanups. Recovery of punitive damages is generally appropriate in cases where PRPs are not complying with the Administrative Order and EPA incurs response costs. Punitive damages are calculated at up to three times Fund expenditures in addition to recovery of costs incurred by EPA in site enforcement and response actions.²³ Where the AO is issued to a group of noncompliers, §107 punitive damages are calculated against each noncomplier for up to the full amount of three times the government’s costs and are not divided among the group of noncompliers.

In calculating the amount of the punitive damages claim, enforcement teams should begin with the presumption that they will seek the full measure of punitive damages. In instances where seeking the full measure of punitive damages would be inconsistent with the goal of obtaining an equitable settlement of the specific violation, the enforcement team may recommend a compromise of punitive damages. Any recommendation to compromise punitive damages must be weighed against the need to maintain a strong deterrent to AO violations, particularly in cases where the violation results in the diversion of substantial Superfund resources from cleanups at other sites. Reductions in the punitive damages claim should consider factors comparable to the “harm” and “recalcitrance” criteria discussed in connection with the compromise of civil penalties. Other adjustments may include reductions for litigation risk and ability to pay. An additional relevant factor may be a non-compliers ability and commitment to perform a SEP.

²³See United States v. Parsons, 936 F.2d 526 (11th Cir. 1991) (awarded costs plus treble damages); United States v. Lecarreux, 1992 U.S. Dist. LEXIS 9365 (D.N.J. Feb. 18, 1992) (same).

III. Provisions for Stipulated Penalties in Orders on Consent

Administrative orders on consent (AOCs) include stipulated penalties for noncompliance with AOC provisions. AOCs generally reserve the government's right to seek statutory penalties even for violations covered by stipulated penalties. If stipulated penalties fail to deter noncompliance or if EPA otherwise believes that the stipulated penalties are inadequate to address the violation, it is appropriate to invoke any reserved statutory penalty authority.

IV. Documentation of Penalty and Damages Claims

A. Pre-negotiation Penalty and Punitive Damages Calculations

The penalty and/or punitive damages amounts should be clearly documented in a worksheet format. See Appendix A for a sample worksheet. The worksheet should be filed in the primary case file (generally a central file room or the Office of Regional Counsel if there is no central file room). The worksheet should also be attached to the Ten Point Settlement Analysis. These documents are enforcement sensitive work products and will not generally be made available to PRPs and the public.

Justifications for penalty and damages calculations, including adjustments, should be clearly explained with references to the circumstances of the specific site. Information from CERCLA §104(e) information requests, or affidavits from responsible parties or others may be used to justify adjustments to penalties. In negotiating a reduction with the Agency, the burden is on the AO violator to prove that a reduction is justified and to provide sufficient documentation as requested by the enforcement team.

B. Deviation From This Policy and Headquarters Consultation Requirements

If an enforcement team determines that a particular case requires deviation from this policy, this decision should be documented clearly in the Ten Point Settlement Analysis and the justification for developing the alternate penalty or damages claim should be clearly stated. At this time, Headquarters consultation is required for settlements less than 100 percent of a treble damages claim or less than 50% of the 106(b) civil penalty calculated in accordance with this policy. Headquarters concurrence is required as well for settlements which significantly deviate from written Agency policy. The enforcement team should consult current delegation memoranda and complete consultation requirements prior to finalizing a settlement.

C. Final Settlement Amount

Once initial settlement amounts have been determined for all §106 penalty and §107 punitive damages claims, it may be appropriate to settle the multiple claims by a single amount. Enforcement teams may negotiate each claim separately and aggregate them in a single settlement amount or may negotiate a single amount that represents settlement of multiple

claims. The settlement document, however, should break out the cost recovery claim and the penalty and damages claims. The breakout may also affect whether the settlement payment is deductible for tax purposes and whether insurers will reimburse the settlers. The enforcement team should consider these issues in finalizing the settlement document.

The Ten Point Settlement Analysis and penalty worksheet (internal government settlement documents) should also break out the settlement amount into the cost recovery claim, penalty claim, and punitive damages claim for internal accounting purposes. The enforcement team has the discretion to determine the breakout although the penalty should not exceed the \$27,500 per day of noncompliance²⁴ or treble the amount of Fund costs expended.

The settlement document may specify that payment of the specified amount is in satisfaction of all §106 and §107 claims. The United States may covenant not to sue or to take administrative action against the settling party upon payment, only for the administrative order noncompliance underlying the §106 and/or §107 claims.

V. Purpose and Use of This Policy

NOTICE: The policies set out in this memorandum are not final agency action, but are intended solely as policy. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the policy provided in this memorandum, or to act at variance with the policy, based on an analysis of specific site circumstances. The Agency also reserves the right to change this policy at any time without public notice.

If you have any questions concerning the attached policy, please contact Steven Rollin, Program Policy and Guidance Branch, PPED, OSRE (202-564-5142).

Additional copies of this document can be ordered from the National Technical Information Service (NTIS), U.S. department of Commerce, 5285 Port Royal Road, Springfield, VA 22161. Each order must reference the NTIS item number, PB97-208086. For telephone orders or further information on placing an order, call NTIS at (703) 487-4650 or (800) 553-NTIS. For orders via E-mail/Internet, send to the following address: orders@ntis.fedworld.gov.

²⁴The maximum total penalty for noncompliance with an administrative order prior to January 30, 1997 is \$25,000 per day. See footnote 5, above, for further explanation.

APPENDIX A: SAMPLE WORKSHEET FOR DOCUMENTATION OF PENALTY AND TREBLE DAMAGES CLAIMS

Site Name and Location:

Case Name:

Enforcement Team Members and Phone Numbers:

I. PENALTY CLAIM: TOTAL PENALTY \$_____

Step 1: Per Day Penalty

List harm classification _____ and list recalcitrance classification _____
_____. List dollar amount of penalty selected from appropriate cell in matrix \$_____.

justification for harm classification (review factors and definitions found in Section I.B.1)

Describe harm or threat of harm:

justification for choice of penalty within range of harm classification box:

Describe burden to EPA:

Describe burden on Complying PRPs/Settlors

justification for recalcitrance classification (review factors and definitions found in Section I.B.2)

Describe degree of noncompliance (total, poor work and type of work involved, work deficiency requiring significant oversight, partial, missed deadlines and type of task missed, and/or noncompliance with a reporting requirement)

Step 2: Total Penalty

i. Period of Noncompliance is _____ (date) to _____ (date) for a total of _____ days OR consider 180 Day Cutoff where appropriate (see Section I.C.1.e.).
Period selected is _____.

justification:

ii. Per Day Penalty (Step 1) \$_____ x period of noncompliance _____ = calculated total penalty of \$_____.

iii. Add economic benefit of noncompliance \$_____

attach BEN computer model printout (or explain why BEN was not necessary to determine that noncomplier did not benefit economically from noncompliance):

iv. Calculated total penalty (Step 2, ii) \$_____ + economic benefit of noncompliance (Step 2, iii) \$_____ = Total Penalty \$_____.

II. Punitive Damages Claim = \$_____.

Step 1: Initial Punitive Damages Claim

Amount of Site Response Costs, including enforcement costs resulting from AO violation
\$_____ + 3 x \$_____ = \$_____.

Step 2: Punitive Damages Claim Adjusted for Gravity

Reduction based on factors comparable to “harm” and “recalcitrance” factors =
\$_____.
Other adjustments = \$_____.

**III. Settlement Amount Adjusted for Litigation Risk and Ability to Pay = \$-
_____.**

Step 1: Litigation Risk Reduction

Litigation Risk Reduction if any: \$_____. It may be necessary to break out the litigation risk reduction to the gravity portion of the penalty claim \$_____, the economic benefit portion of the penalty claim \$_____, and the damages claim \$_____ if the strength of the litigation case differs for each type of claim. The justification should state clearly whether the concern is for the penalty claim, the damages claim, or both.

justification:

Step 2: Reduction for Ability to Pay

i. Total Settlement Claim (Penalty, Section I + Damages, Section II) \$_____ - Litigation Risk Reduction \$_____ = \$_____.

i. Total Settlement Claim Adjusted by Litigation Risk - Settlement Respondent Has the Ability to Pay \$_____ = Amount Written Off for Ability to Pay \$_____.

justification:

IV. Supplemental Environmental Project Offset, if any \$_____. The SEP guidance requires separate documentation.