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VI. Penalty Calculations and Documentation

A. Introduction

The term "penalty" (or "penalties") is used generically to refer to any kind of monetary payment sought from the Respondent other than restitution or cost recovery. Most penalty actions initiated by DES are administrative fine cases or referrals to the AGO for civil penalties. If DES requests the AGO to consider criminal prosecution in a referred case, DES probably will ask the AGO to seek monetary penalties in addition to any appropriate restitution and sentence of incarceration. The AGO also typically seeks criminal penalties in prosecutions it initiates based on information received from sources other than DES. A chart showing the different penalty authorities for DES programs is provided in **Appendix VI-1**.

Penalties have two components. The first is the **economic benefit** component, which is intended to recover any significant monetary benefit that the Respondent realized from not complying with applicable requirements. The second is the **gravity** component, which is intended to reflect the seriousness of the violation. The seriousness of the violation usually is based on two factors: how much the violation deviated from the applicable requirement (the extent of deviation) and the significance of the harm or potential for harm to human health and the environment posed by the violation. Some programs include a consideration of harm to the regulatory process itself in determining the gravity of a violation.

Since DES's overall objective is to promote compliance, DES has an appropriate focus on getting violators to address violations promptly. However, a penalty often is appropriate even if the violator does come back into compliance, for several reasons. First, if there are no consequences for non-compliance, responsible parties have less incentive to comply. This results in more DES resources having to be directed to investigations and enforcement rather than to outreach and assistance. Second, imposing penalties deters the violator from future non-compliance and deters other responsible parties from non-compliance. This helps to protect public health and the environment by reducing the likelihood of additional violations. Third, recouping economic benefit prevents the violator from gaining a competitive advantage over those who complied with the requirements. The business community in particular often is most interested in making sure the playing field is level. Finally, penalties often provide an incentive for responsible parties to undertake pollution prevention or pollution reduction activities or other projects that benefit the environment; this also results in an overall benefit to society.

The discussion which follows applies to cases in which DES, in the exercise of its enforcement discretion and based on the factors identified in Chapter I, has determined that a penalty is appropriate. The discussion does **not** mean that DES always will seek a penalty for every violation identified in every case, because that is not reasonable or appropriate. Also, although this chapter discusses the approach that usually will be taken, the final penalty sought in any penalty case will depend on the equities of the case as a whole.

B. Initial Penalty Calculation

DES's statutory penalty authorities do not distinguish between economic benefit and gravity components, but rather specify a per-violation maximum for administrative fines, civil penalties, and criminal penalties. Whatever penalty is calculated for a given case cannot exceed the statutory maximum that could be applied to the case. Since civil penalty caps are much higher than administrative fine caps, this may be the factor that determines whether DES seeks an administrative fine or a civil penalty in a case that is not a criminal case. In the absence of a federal or program-specific policy, penalties will be calculated as discussed below. (Any DES program may adopt a program-specific penalty policy. Before a program-specific policy can be effective, it must first be approved by the Commissioner. Program-specific penalty policies are included in **Appendix VI-2**.)

Economic Benefit

The first step in any enforcement case is to assess the economic benefit that may have accrued to the Respondent. "Assess" in this context means to take a common-sense view of the case to see if it is likely that the economic benefit was "significant". The "significance" of the economic benefit must be determined with respect to the circumstances of the case; it cannot be defined as an absolute number. Economic benefit usually will be found to be "significant" if the amount of the benefit was more than inconsequential to the Respondent, including whether the benefit conferred a competitive advantage. If the economic benefit that accrued was significant, then DES will seek to recoup it through a penalty action.

If, based on the initial assessment, it appears that the economic benefit may be significant, then it will be more precisely calculated. The benefit realized from delaying costs of compliance (*e.g.*, not installing control equipment when required or not preparing and submitting a permit application) and from avoiding costs of compliance (*e.g.*, not paying operation and maintenance costs) usually are calculated using a computer model called BEN (developed by EPA). EPA's penalty policies for the Clean Water Act and the Safe Drinking Water Act include adjustments that are made when calculating the economic benefit in certain cases under those statutes (such as where the original capital outlay would have been very large and should have been made quite a long time ago), which DES would also apply in analogous situations. If the amount calculated using BEN does not appear to accurately reflect the economic benefit in other cases, DES will look at the inputs and assumptions underlying the calculation to see whether adjustments can be made.

In cases where the economic benefit isn't attributable (in whole or in part) to delayed or avoided costs, DES will take a logical approach. If money was received for accepting wastes in violation of applicable requirements, DES will consider the amount that was received; if wastes were illegally disposed of and can't be retrieved for proper disposal (*e.g.*, were discharged to surface or ground water), DES will consider the amount that should have been paid to properly dispose of the wastes. Cases in other jurisdictions are increasingly looking at illegal competitive advantage ("ICA") as a component of economic benefit. EPA's policy regarding calculation of economic benefit, including ICA, is at **Appendix VI-3**. As appropriate and where it can be reasonably determined, DES may consider ICA when determining economic benefit.

Although doing a calculation to determine the economic benefit suggests that a precise figure will result, economic benefit often cannot be absolutely determined. For example, if hazardous wastes were illegally discharged to a surface water, a primary component of the economic benefit is the avoided costs of proper disposal. However, it is unlikely that the exact amount of wastes discharged can be determined; often, a reasonable estimate must be made. Thus, the calculated economic benefit should not be seen as an unadjustable amount.

If the economic benefit that accrued is not significant, then economic benefit will not be the deciding factor in whether to seek a penalty or, if a penalty is otherwise appropriate, whether to seek an administrative fine or a civil penalty. Instead, other criteria will be used to make those decisions.

If violations resulted in a significant economic benefit and the other factors in the case would not automatically lead to a referral to the AGO, DES will calculate the total administrative fine that could be sought for the violations, as discussed in B.2, below. If the total fine is greater than the economic benefit and is large enough to provide an appropriate deterrent/punitive impact, then DES probably will seek an administrative fine while pursuing whatever other action may be necessary to compel remediation and/or compliance.

If the total fine is <u>not</u> greater than the economic benefit or is <u>not</u> large enough to provide an appropriate deterrent/punitive impact, DES will review the calculations to see whether they can/should be adjusted or whether a civil penalty should be sought. If the case is referred, DES will calculate the gravity component of the civil penalty as discussed in B.3, below.

2 <u>Administrative Fines</u>

In an administrative fine case that is initiated using a Notice of Proposed Administrative Fine and Hearing ("NPF/H") or in an AOC that will include an administrative fine, the total overall penalty is the sum of the total fine for each type of violation. The total fine for each type of violation is the per-violation dollar amount multiplied by the number of violations. The per-violation dollar amount either is found in the schedule of fines or is calculated using a penalty matrix, as discussed below. The total overall penalty is the amount that the Division initially will seek in its NPF/H or that will be the starting point for the penalty discussions for the AOC. In an administrative fine case that is initiated using a Field Citation, the fines are the amounts shown in the schedule of fines. In a case initiated with a proposed settlement, the proposed fine amount usually is less than the total potential penalty for the violations. The total potential penalty is the amount that may be sought if the case doesn't settle, but goes to a hearing instead.

Note that while the economic benefit in a case is considered in deciding whether to seek an administrative fine or a civil penalty, it is not sought as a separate element in an administrative fine case. That is, the total fine is based on the scheduled or calculated fines, as discussed below; economic benefit is **not** then added to the scheduled or calculated amount.

a. Scheduled Fines

If a fine is being determined for a violation for which an amount is specified in the schedule of fines (Env-C 602 - 616), the per-violation dollar amount is the amount that is specified in the

appropriate rule. If the per-violation fine is less than the statutory maximum, the fine can be adjusted upward (to no more than the maximum) if there are aggravating factors as specified in Env-C 601.09(d), such as a history of non-compliance or failure to alleviate the harm that was caused by the violation. This amount then is multiplied by the number of violations, determined in accordance with B.4, below.

b. Calculated Fines

Some "scheduled" fines provide that the fine will be calculated in accordance with Env-C 610. A fine also can be calculated in accordance with Env-C 610 if a specific violation is not listed in the schedule of fines. That is, even if a program has a schedule of fines for most of the violations that could occur in that program, there may be a case that presents a violation for which an amount was not scheduled. In such a case, a fine amount can be calculated in accordance with Env-C 610.

Env-C 610 establishes a method of calculating an administrative fine that accounts for both how much the violation deviated from the applicable requirement (the extent of deviation) and the significance of the harm or potential for harm to human health and the environment posed by the violation (the potential for harm). It does so by first breaking each of the two components into three categories (major, moderate, and minor) and then combining each category with each other category to get the nine possible combinations of the categories, as shown below:

Generic Penalty Matrix			
	Major Deviation from Req'mt ("Deviation")	**Moderate Deviation from Requirement**	**Minor Deviation from Requirement**
Major Potential for Harm ("Potential")	**Major** Potential / **Major** Deviation	**Major** Potential/ **Moderate** Deviation	**Major** Potential / **Minor** Deviation
Moderate Potential for Harm	**Moderate** Potential / **Major** Deviation	**Moderate** Potential / **Moderate** Deviation	**Moderate** Potential / **Minor** Deviation
Minor Potential for Harm	**Minor** Potential / **Major** Deviation	**Minor** Potential / **Moderate** Deviation	**Minor** Potential / **Minor** Deviation

The definitions of the categories found in Env-C 610 (and included in the Glossary) are applied in all cases other than those relating to air pollution control violations[1]. Generally, a "major deviation from requirement" is analogous to less than half of the requirements being met or involves a situation where the Respondent acted or failed to act where the Respondent knew or should have known that the action or inaction would cause a deviation from a requirement. A "moderate deviation from requirement" is analogous to approximately half of the requirements being met; a "minor deviation from requirement" is analogous to more than half of the requirements being met. "More than half" and "less than half" are not determined simply based on

[1] RSA 125-C:2 defines these terms for air-related violations; the definitions also are included in the Glossary.

the number of requirements or sub-requirements; the significance of the requirements that were not met will also be considered. The "potential for harm" is the threat that the violation posed to human health or the environment. The potential for harm is based on (1) the quantity, as applicable, of waste mismanaged or disposed, or of surface water, ground water, wetlands, or land impacted; (2) the threat to human life or health; (3) the threat to land-based and aquatic species, including domestic animals and wildlife; and (4) the threat to the environment, including habitat for land-based and aquatic species. Env-C 610 specifies a method of calculating the potential for harm which is designed to minimize differences that might result from having different people calculate the fine.

To create the matrix, a dollar range is assigned to each of the six categories (major, moderate, and minor deviation and major, moderate, and minor potential for harm), and the dollar ranges then are added to give a dollar range for each of the nine possible combinations of the categories. The dollar range for each category is a portion of half of the maximum per-violation penalty. For example, for an administrative fine having a per-violation cap of $2,000, the most that can be assessed for "Potential for Harm" (in the major category) is $1,000 and the most that can be assessed for "Deviation from Requirement" (again, in the major category) is $1,000, so that if a violation posed a major potential for harm and was a major deviation from requirement, the total fine for that violation would not exceed $2,000.

Env-C 610 establishes the dollar ranges for administrative fines in programs other than those relating to air pollution control as follows: minor - $50 to 50% of half the maximum; moderate - 50% to 75% of half of the maximum; major - 75% to 100% of half of the maximum. The resulting penalty matrices are as follows:

Penalty Matrix - Administrative Fines up to $2,000 per violation			
	Major Deviation from Requirement ($750 to $1,000)	**Moderate Deviation from Requirement** ($500 to $750)	**Minor Deviation from Requirement** ($50 to $500)
Major Potential for Harm ($750 to $1,000)	$1,500 to $2,000	$1,250 to $1,750	$800 to $1,500
Moderate Potential for Harm ($500 to $750)	$1,250 to $1,750	$1,000 to $1,500	$550 to $1,250
Minor Potential for Harm ($50 to $500)	$800 to $1,500	$550 to $1,250	$100 to $1,000

Penalty Matrix - Administrative Fines up to $5,000 per violation[2]			
	Major Deviation from Requirement ($1,875 to $2,500)	**Moderate Deviation from Requirement** ($1,250 to $1,875)	**Minor Deviation from Requirement** ($50 to $1,250)
Major Potential for Harm ($1,875 to $2,500)	$3,750 to $5,000	$3,125 to $4,375	$1,925 to $3,750
Moderate Potential for Harm ($1,250 to $1,875)	$3,125 to $4,375	$2,500 to $3,750	$1,300 to $3,125
Minor Potential for Harm ($50 to $1,250)	$1,925 to $3,750	$1,300 to $3,125	$100 to $2,500

The administrative fine ranges for violations relating to air pollution control are established in narrative form in RSA 125-C:15, I-b(b). In table form, the fine ranges are as follows:

Penalty Matrix - Administrative Fines Relating to Air Pollution Control			
	Major Deviation from Requirement	**Moderate Deviation from Requirement**	**Minor Deviation from Requirement**
Major Potential for Harm	$1,501 to $2,000	$1,251 to $1,750	$851 to $1,500
Moderate Potential for Harm	$1,251 to $1,750	$851 to $1,500	$601 to $1,250
Minor Potential for Harm	$851 to $1,500	$601 to $1,250	$100 to $1,000

Classifying a violation appropriately establishes the penalty range for that violation. In most cases, the starting penalty will be the mid-point of the applicable penalty range; the amount is then adjusted upward (to no more than the statutory maximum) if there are aggravating factors such as those specified in Env-C 601.09(d). If a factor listed as an aggravating factor was used initially to determine whether the violation was a major, moderate, or minor deviation or potential for harm, in most cases it will not be used again to adjust the penalty. (An exception might be if the violation was committed knowingly or wilfully, but for other reasons the case is not being handled as a criminal case.) When adjusting based on aggravating factors, the penalty typically remains within the starting penalty range. If a violation is a repeat of a violation for which a penalty was previously imposed, the penalty range for the violation will be determined assuming no prior violation and then is moved to the next highest range.

The Shoreland Protection Program, RSA 483-B.

3 Civil Penalties

In a case that DES refers to the AGO for judicial action, the AGO makes the ultimate decision of what penalty will be sought and/or accepted in settlement. However, the decision is made in close consultation with DES. When calculating civil penalties for referred cases or for AOCs, DES usually will follow the process discussed here.

The total penalty calculated will be the economic benefit, if any, plus the gravity component (calculated as discussed below), up to the per-violation maximum, multiplied by the number of violations (as per B.4, below). If the economic benefit plus gravity exceeds the statutory maximum that could be sought for the violations, the amount over the statutory maximum is subtracted from the gravity component.

As noted, the gravity component of a civil penalty reflects the seriousness of the violation (extent of deviation from requirement and harm/potential for harm). DES programs that are federally-delegated, authorized, or approved to implement federal programs generally follow the applicable EPA penalty policy to calculate the gravity component of a civil penalty. **Appendix VI-4** lists relevant federal penalty policies. As DES gains more experience with calculating penalties under the federal policies, adjustments may be made to the underlying formulae to account for state-specific circumstances. Some DES programs that aren't federal analogs have developed a program-specific penalty policy. Programs that don't have a program-specific policy usually will apply the matrix approach that is discussed below.

For penalties calculated using a matrix, each violation is evaluated using the definitions and criteria specified for administrative fines (discussed above). The following penalty matrices for maximum per-violation penalties of $4,000, $10,000, $20,000, and $25,000 have been prepared using a minimum fine of $500 and the same proportional ranges as are used in the administrative fine matrices:

Penalty Matrix - Penalties up to $4,000 per violation[3]			
	Major Deviation from Requirement ($1,500 to $2,000)	**Moderate Deviation from Requirement** ($1,000 to $1,500)	**Minor Deviation from Requirement** ($250 to $1,000)
Major Potential for Harm ($1,500 to $2,000)	$3,000 to $4,000	$2,500 to $3,500	$1,750 to $3,000
Moderate Potential for Harm ($1,000 to $1,500)	$2,500 to $3,500	$2,000 to $3,000	$1,250 to $2,500
Minor Potential for Harm ($250 to $1,000)	$1,750 to $3,000	$1,250 to $2,500	$500 to $2,000

[3] Civil penalties for violations of rules adopted pursuant to RSA 146-A (*see* RSA 146-A:14, II).

Penalty Matrix - Penalties up to $10,000 per violation			
	Major Deviation from Requirement ($3,750 to $5,000)	**Moderate Deviation from Requirement** ($2,500 to $3,750)	**Minor Deviation from Requirement** ($250 to $2,500)
Major Potential for Harm ($3,750 to $5,000)	$7,500 to $10,000	$6,250 to $7,500	$4,000 to $7,500
Moderate Potential for Harm ($2,500 to $3,750)	$6,250 to $8,750	$5,000 to $7,500	$2,750 to $6,250
Minor Potential for Harm ($250 to $2,500)	$4,000 to $7,500	$2,750 to $6,250	$500 to $5,000

Penalty Matrix - Penalties up to $20,000 per violation			
	Major Deviation from Requirement ($7,500 to $10,000)	**Moderate Deviation from Requirement** ($5,000 to $7,500)	**Minor Deviation from Requirement** ($250 to $5,000)
Major Potential for Harm ($7,500 to $10,000)	$15,000 to $20,000	$12,500 to $17,500	$7,750 to $15,000
Moderate Potential for Harm ($5,000 to $7,500)	$12,500 to $17,500	$10,000 to $15,000	$5,250 to $12,500
Minor Potential for Harm ($250 to $5,000)	$7,750 to $15,000	$5,250 to $12,500	$500 to $10,000

Penalty Matrix - Penalties up to $25,000 per violation			
	Major Deviation from Requirement ($9,375 to $12,500)	**Moderate Deviation from Requirement** ($6,250 to $9,375)	**Minor Deviation from Requirement** ($250 to $1,250)
Major Potential for Harm ($9,375 to $12,500)	$18,750 to $25,000	$15,625 to $18,750	$9,625 to $13,750
Moderate Potential for Harm ($6,250 to $9,375)	$15,625 to $18,750	$12,500 to $18,750	$6,500 to $10,625
Minor Potential for Harm ($250 to $1,250)	$9,625 to $13,750	$6,500 to $10,625	$500 to $12,500

For civil penalties under RSA 147-A which have a maximum of $50,000 per violation, the matrix shown above for $25,000 usually is used. If the violation was particularly egregious, *e.g.*, was committed recklessly or with knowledge of the legal requirement, resulted in actual harm to persons or the environment, continued after DES ordered the Respondent to stop, or posed a substantial threat to public health or the environment, the penalty will be calculated using the $25,000 matrix and then will be doubled.

As with an administrative fine, the starting point when calculating the gravity component of a civil penalty using a matrix usually will be the mid-point of the penalty range applicable to the violation. The amount is then adjusted upward (to no more than the maximum) if there are aggravating factors such as those listed in Env-C 601.09(d). Again, though, if a factor listed as an aggravating factor was used initially to determine whether the violation was a major, moderate, or minor deviation or potential for harm, it usually will not be used again to adjust the penalty. When adjusting based on aggravating factors, the penalty usually will stay within the starting penalty range. For a repeat of a violation for which a penalty was previously imposed, the penalty range for the violation will be determined assuming no prior violation and then will be moved to the next highest range.

4 Number of Violations

a Number of Events

In most penalty actions, a penalty will be sought for a violation for each event for which DES has credible evidence that the violation occurred. For example, if DES has credible eyewitness testimony that an individual illegally disposed of solid waste on five separate occasions, DES usually will seek a penalty for each of five instances of illegal disposal, even if all of the solid waste ended up in the same pile. In this example, if DES is unable to obtain credible evidence about the number of disposal events that occurred, a single penalty probably would be sought. If a single administrative fine did not appear to be sufficient to recoup economic benefit and provide a sufficient deterrent, then the case would be considered for referral to the AGO for a civil penalty.

If two separate inspections were done and the same violation was observed at each inspection, but the violation is minor and the initial DES response was to send an inspection report or LOD noting the violation and requesting that it be corrected, in many programs a fine will only be sought for the second (repeat) violation.

Scheduled fines now include a more precise definition of what constitutes a single event of a "violation". For example, a fine for failing to maintain records may be imposed per type of record not maintained. If a fine is being calculated, DES will review the scheduled fines to see whether an "event" has been defined for a similar violation and will consider that when determining what constitutes a reasonable "event".

b Number of Days

Some programs have statutory authority to calculate per-day penalties for continuing violations. A continuing violation is one that occurs unabated over a period of time, rather than occurring multiple times in discrete events. For continuing violations, the question arises of whether a penalty will be sought for each day of the violation or whether the total number of days the violation lasted will be used to increase the severity of the violation when making the initial determination of major/moderate/minor deviation and/or potential for harm. The decision usually turns on a number of factors, including those discussed below.

i. Administrative Fines

As noted above, scheduled fines now include a more precise definition of what constitutes a "violation", including in some cases a unit of time that is deemed to constitute one violation (*e.g.* a calendar day or a calendar three-month period). When determining the total fine for a continuing violation where the schedule specifies a unit of time, the scheduled amount will be multiplied by the number of time units over which the violation occurred. If the scheduled fine amount does not already specify a unit of time, the unit of time will be determined based on factors such as the type of violation and the amount of time in which it would be reasonable to discontinue or correct the violation.

When calculating an administrative fine for a violation using Env-C 610, the fine usually will be calculated assuming that the violation occurred for one unit of time and then multiplying that amount by the number of time units over which the violation occurred. The unit of time will be determined as noted in the previous paragraph. For calculated fines, though, the length of time may be used to increase the severity of the violation rather than as a per-time-unit multiplier. The latter approach is more likely to be used if DES believes that the violation continued for a long period of time but is otherwise relatively minor. Which approach is taken ultimately depends on the type of violation and the equities of the case as a whole.

ii. Civil Penalties

When calculating a civil penalty in a program that is federally-designated, approved, or authorized, the corresponding EPA policy will be used to determine whether to seek a penalty for each day that a continuing violation was observed (or can be reasonably inferred to have continued) or whether to consider the number of days when determining the severity of the violation. When calculating a civil penalty using a matrix where a federal policy doesn't apply, the number of days a continuing violation lasted generally is used when determining the severity of the violation -- again, either in the deviation from requirement or potential for harm or both.

c. Violations Included

As a starting point, a penalty will be sought in a given case for each violation that caused the penalty action to be the appropriate response to that case. If the penalty action is appropriate due to several violations which, if taken separately, would not result in a penalty action, a penalty will be sought for enough of the violations to make the total fine reasonable in the circumstances.

In some cases, violations may appear to overlap, or one violation might seem to "include" another violation, or the same occurrence may violate provisions of two separate programs (*e.g.*, discharging hazardous waste to a surface water violates both RSA 147-A and RSA 485-A). In such cases, the penalty usually is eliminated for all but one of the overlapping/inclusive/ duplicative violations.

C. Penalty Settlements

General Considerations

DES and the AGO are never obligated to settle a case by mitigating the penalty. However, DES usually considers settling its penalty actions, just as the AGO may be interested in settling judicial cases. While in many cases a settlement is reached by simply establishing a payment schedule, in many other cases some consideration is given to mitigating the penalty amount. Also, while the AGO makes the final decision on penalty mitigation in referred cases, the decision is made in close consultation with DES. In most cases, DES will use the following parameters to guide its decisions.

In DES programs that are federally-delegated, authorized, or approved, the settlement provisions of the applicable federal policy generally will be applied. EPA policies typically identify factors that can be considered and the amount (usually a percentage) by which the penalty can be reduced for each factor. For example, if the Respondent is cooperative, the settlement provisions of a federal penalty policy may allow the penalty to be reduced by 10% or more. EPA also has policies such as the Small Business Policy that operate to reduce federal penalties in certain cases.

If a federal policy does not apply, DES considers several factors when determining a final penalty. The determination is a three-step process. First, DES determines whether the Respondent has provided any new facts concerning the violation which should be used to recalculate the penalty. DES then decides whether the gravity portion of the penalty could be reduced, by applying percentage reductions based on mitigating factors which generally relate to the Respondent's behavior or characteristics rather than to the violation itself. Finally, DES decides whether to suspend a portion of that amount or to credit a Supplemental Environmental Project ("SEP") against some of the total - *i.e.*, to accept less than that amount as a cash payment

2 Adjusting the Penalty Amount Based on New Information

In some cases, the total penalty includes penalties calculated on information obtained by DES through its investigative processes, without extensive discussions with the Respondent. Once settlement discussions commence, additional facts may become known. For example, the Respondent might provide more accurate information on delayed or avoided costs or some other aspect of the economic benefit arising from a violation. The Respondent also might provide information to show that a particular rule didn't apply to its operations (e.g., that its emissions were below a regulatory threshold) or that an alleged violation otherwise didn't occur (e.g., that a document required to be maintained by the Respondent actually did exist, even though it could not be produced at the time of the inspection). The Respondent also might provide other information which alters DES's conclusion about the existence or severity of a violation. DES will review any new facts presented by the Respondent to determine whether those facts affect the penalty calculation, and will adjust the penalty as appropriate.

3 Mitigating Factors

After recalculating the penalty as may be appropriate based on new facts, DES will determine

whether the penalty should be mitigated based on the factors discussed below. DES usually will view each violation separately for purposes of penalty mitigation, rather than applying the factors to the total penalty as a lump sum. Of course, if the same factors apply to all of the penalties comprising the total penalty, then they can be applied to the total penalty instead of to each individual penalty. As noted above, DES is not obligated to reduce any penalties when settling a case. Thus, when a range of allowable reduction is identified (*e.g.*, "up to 20%"), DES will not necessarily agree to the maximum reduction, and won't agree to more than the maximum in any case. In deciding what, if any, percentage to apply, DES will consider (1) the overall result of applying the reductions in relation to the minimum cash payment requirement identified in C.4, below; and (2) the equities of the case as a whole, including whether any aggravating factors such as those identified in Env-C 601.09(d) are present.

a. RSA 147-E, Environmental Self-Audits

Under RSA 147-E, the environmental self-audit law, the gravity portion of a penalty will be waived if all of the conditions specified in the statute are met. While the statute should be consulted for precise terms, the conditions can be stated generally as follows:

> The violations must be discovered in the course of a qualifying audit (as defined in the statute);
>
> Within 30 days of discovering the violation, the Respondent must (1) report the violation for which the penalty mitigation is sought to DES and certify that all other violations discovered through the audit have been or will be disclosed to DES; (2) inform DES of the nature and extent of corrective and remedial actions proposed or already undertaken and commit to perform all necessary and appropriate corrective and remedial actions as soon as practicable (*i.e.*, within 90 days or, if incapable of being performed within 90 days, in accordance with an agreement negotiated with DES providing for a longer schedule); and (3) commit to undertake measures to prevent a recurrence of the violation.
>
> Within 10 days of completing all corrective and remedial action, the Respondent must report to DES (1) that all necessary and appropriate corrective and remedial actions were completed; (2) the nature and extent of measures which have been taken to prevent a recurrence of the violation; and (3) that such measures constitute all measures believed to be necessary and appropriate to prevent a recurrence.
>
> The Respondent must submit information adequate to allow DES to confirm that corrective and remedial actions and measures to prevent recurrence are appropriate and that they were implemented in accordance with these conditions.

The Respondent will not qualify for a 100% reduction in the gravity component of the penalty even if the above conditions are met if:

> The violation was a criminal act committed knowingly, purposefully, or recklessly or resulted in serious harm to human health or the environment;

Within 3 years preceding discovery of the violation, the Respondent was the subject of:

A compliance action or penalty action for violation of the same environmental law; or
Multiple compliance actions or penalty actions for violations of any environmental laws; or
Any criminal conviction for violation of any environmental law;

The violation was discovered by the state before it was disclosed to DES by the Respondent or was disclosed to DES by the Respondent after the commencement of a federal, state, or local agency action, including an inspection, investigation, or environmental information request;

Any of the reports or notices provided to DES by the Respondent prove not to be true; or

Absent good cause shown, corrective and remedial actions were not appropriate or implemented in accordance with these conditions, or measures to prevent recurrence were not adequate or were not implemented in accordance with these conditions.

If the Respondent does not qualify for a 100% reduction in the gravity portion of the penalty, some smaller reduction may still be appropriate. Factors to consider in determining what the smaller reduction should be include how closely the Respondent came to meeting all of the above criteria and how likely it is that DES would have discovered the violation had it not been self-reported (usually, the less likely it is that DES would have found it, the higher the percent reduction will be).

b. Self-Reported Violations

If a Respondent voluntarily self-reports a violation that was not discovered as a result of a qualifying audit under RSA 147-E, DES will consider reducing the gravity portion of the penalty for the reported violation by up to 75%, subject to the minimum cash payment requirement identified in C.4, below. The factors that will be applied are the same as those enumerated in RSA 147-E (discussed above).

c. One-time, Unintentional Violation

If the Respondent shows, in the case of a non-continuing or one-time offense, that the Respondent did not know or have reason to know of the environmental law that was violated, the violation has not continued or recurred, any environmental threat or harm caused by the offense has been remediated, and the Respondent did not derive any economic benefit from the offense, the gravity portion of the penalty can be mitigated by up to 20%.

d Good Faith

If the Respondent shows that the violation occurred despite the Respondent's good faith efforts to comply with applicable environmental laws, the gravity portion of the penalty can be mitigated by up to 20%.

e. Compliance History

If DES does not have a record of prior violations of environmental laws by the Respondent or by anyone acting under the Respondent's direction or control, the gravity portion of the penalty can be mitigated by up to 20%. In the case of a Respondent that is an entity (not an individual), this reduction will not be allowed if any of the officers, directors, partners, or other principals of the Respondent have a record of prior violations, even if the violations occurred before the person was affiliated with the Respondent.

f. Small Business

If the Respondent is a small business and the size of the business has not already been accounted for in the penalty calculation, the gravity portion of the penalty can be reduced by up to 20% (generally, the smaller the business, the greater the percent reduction). For purposes of this penalty reduction only, "small business" means an independently owned and operated business that employs fewer than 10 individuals in total, regardless of the number of locations at which the business operates, and has gross annual revenues not exceeding $2 million. This reduction usually will not be applied by a program if the majority of parties regulated by that program qualify as a "small business" under this definition.

g. Cooperation

If the Respondent has been promptly and consistently cooperative in providing information and correcting the violations, the gravity portion of the penalty can be reduced by up to 25%.

h Inability to Pay

If the Respondent claims an inability to pay a penalty based on financial constraints, DES will request financial documentation to support the claim. If the Respondent provides all of the information needed to run the applicable computer program developed by EPA (ABEL for companies, INDIPAY for individuals, and MUNIPAY for municipalities) and the computer model supports the claim, the gravity portion of the penalty can be reduced to the amount that the Respondent can pay (taking into account a reasonable payment schedule). If the Respondent provides some but not all of the information needed but DES believes the claim is credible, DES will consider suspending a portion of the gravity portion of the fine and/or allowing a longer payment schedule. (DES can also consider a payment schedule in the absence of a documented inability to pay.)

Other Circumstances

If there are other circumstances in the case which tend to legitimately explain or excuse the violations, the gravity portion of the penalty can be mitigated by up to 20%.

4 Minimum Cash Payment

A fundamental consideration in any penalty action is to recoup any significant economic benefit that accrued and to impose an appropriate gravity/deterrence penalty. This consideration

establishes the minimum cash payment that will be accepted unless the penalty mitigation provisions of RSA 147-E relating to environmental self-audits apply (discussed in C.3.a, above)

In cases where RSA 147-E does not apply and the violation was not voluntarily self-reported by the Respondent, the amount of cash paid by a Respondent (absent exceptional circumstances) must be the greater of:

The economic benefit plus 10% of the gravity component;
50% of the gravity component if no SEP is included in the settlement; or
25% of the gravity component if a SEP is included in the settlement.

In cases where RSA 147-E does not apply and the violation was voluntarily self-reported by the Respondent, the amount of cash paid by a Respondent (absent exceptional circumstances) must be the greater of:

The economic benefit;
30% of the gravity component if no SEP is included in the settlement; or
15% of the gravity component if a SEP is included in the settlement.

The mitigating factors and suspension/SEP provisions discussed below will not be applied in any combination that results in a cash payment that is less than the applicable minimum cash payment identified above. Also, any DES program may adopt a program-specific settlement policy. Before a program-specific policy can be effective, it first must be approved by the Commissioner. Program-specific settlement policies are included in **Appendix VI-2**.

5. Reducing the Amount of Cash Paid

After making appropriate adjustments, if any, to the total penalty amount, DES will consider whether to reduce the amount of cash that the Respondent must pay. The amount of cash paid can be reduced by conditionally suspending a portion of the penalty and/or by accepting a SEP as a credit against a portion of the penalty. As noted previously, the amount of cash paid must be at least the minimum identified in C.4, above.

a. Conditional Suspensions

DES may consider suspending a portion of the penalty conditionally. Sometimes, an amount will be suspended contingent on the Respondent performing certain corrective or remedial actions by a specified date. A more common condition of suspension is that the Respondent does not commit any further violations for a specified period of time. The condition can be limited to violations of the program from which the original violation arose, or can be broadened to include violations of any environmental laws. If the conditions are met, payment of the suspended portion is waived. If the conditions are not met, the suspended portion becomes due and payable, and will be collected. If not meeting the conditions results in additional violations, DES will consider whether to take a separate action for the new violations.

The time period for a penalty suspended contingent on continued compliance in most cases will be two years from the date of the settlement agreement. If the penalty was suspended

contingent on remedial measures being undertaken, such as planting trees or restoring a wetlands, the time period usually will be two years from the completion of the remedial measures. This provides a long enough time to be a deterrent (and to make sure the remedial measures have been effective) without being too onerous for DES to monitor. Note that the critical element of the time period is when the subsequent violation occurs -- not when the determination is made that the violation occurred.

DES often will consider suspending a portion of the penalty conditional on continued compliance for a specified period of time if doing so will provide an extra incentive for a first-time violator to pay more attention to applicable requirements, or where it is not appropriate to reduce the total penalty outright but the equities weigh against collecting the entire penalty.

b. Supplemental Environmental Projects

The amount of cash paid to the State also can be reduced by having the Respondent agree to undertake a Supplemental Environmental Project (SEP). A SEP is an environmentally-beneficial project that the Respondent is not otherwise legally obligated to perform and that is not part of the Respondent's achieving compliance. While a SEP may provide some benefit to the Respondent, the primary benefit of the SEP must be to public health or the environment. Also, the SEP cannot be something that the Respondent would have done anyway. DES favors SEPs that involve pollution prevention, pollution reduction at the site or facility at which the violations occurred, land conservation, and/or brownfields redevelopment or other projects that are consistent with anti-sprawl/smart growth policies.

The federal SEP Policy[4] provides guidelines for determining whether a project meets the federal definition of a SEP. DES is generally guided by these provisions in reviewing proposed SEPs, but is not bound by the provisions. (In particular, DES usually is more flexible on the nexus requirement.) EPA's SEP Policy also describes categories of projects into which a proposed SEP must fit; again, DES is guided by these provisions but does not strictly apply them A checklist that can be used to evaluate proposed SEPs is included in **Appendix VI-5**.

If a SEP is to be considered in a settlement, DES first will consider how much of the gravity portion of the penalty to allow to be offset by a SEP, and then will look at how much the SEP must cost to gain that offset. A provision usually will be included in the settlement that requires a cash payment if the SEP is not completed or if the Respondent spends less on the SEP than was originally estimated.

Allowable Offset

As noted in C.4, above, if a SEP is included in a settlement, the minimum cash payment for a violation that was not voluntarily self-reported must be the greater of the economic benefit plus 10% of the gravity component or 25% of the gravity component; for a violation that was voluntarily self-reported, the minimum cash payment must be the greater of the economic benefit or 15% of the gravity component. This puts a limit on how much of the penalty can be offset by a SEP.

EPA's final Supplemental Environmental Projects (SEP) Policy, effective May 1998.

For example, in a case where DES discovered the violation, if a Respondent realized an economic benefit of $10,000 from a violation and the calculated gravity component is $60,000 (after any appropriate recalculation based on new facts), the total penalty originally sought is $70,000. The minimum cash payment is thus $16,000 ($10,000 + 10% of $60,000, which is greater than 25% of $60,000). The maximum credit that will be allowed for the SEP is thus $54,000. If the gravity is reduced 20% (to $48,000) based on mitigating factors, the minimum cash payment would be $14,800 ($10,000 + 10% of $48,000, which is greater than 25% of $48,000), and the maximum credit amount allowed for the SEP would be $43,200. Also, DES may not agree to allow the entire amount to be offset, depending on the other factors in the case. (Note that if no SEP were included in the settlement, the minimum cash payment would be $30,000 (50% of $60,000) if the gravity portion was not mitigated, and would be $24,000 (50% of $48,000) if the gravity portion was mitigated 20%.)

ii. Value of the SEP

After determining the allowable offset, DES will decide how much the SEP must cost in order to obtain that amount of credit. If the SEP is (1) a non-tax-deductible direct cash payment to an approved charity or other non-profit organization, (2) the purchase of a conservation easement or a parcel of land that is then made subject to a conservation easement, or (3) a P2 project that doesn't directly financially benefit the Respondent, DES usually will allow a dollar-for-dollar valuation (*i.e.*, 100% of the SEP cost will be credited against the penalty).

For other SEPs, less than 100% of the cost usually will be credited (*i.e.*, the SEP must cost more than the amount credited against the penalty). The factors DES considers when determining how much of the SEP cost to credit include (1) how much pollution the SEP will reduce or eliminate, especially if pollution is not created in or transferred to a different medium; (2) whether the SEP will contribute significantly to developing transferrable innovative technologies; (3) whether the SEP will have an educational impact on other regulated entities or the public; (4) how soon the SEP will turn a profit for the Respondent; and (5) how much it will "cost" DES to oversee the SEP (staff time, *etc.*). SEPs that require monitoring by DES are not encouraged, since any resources that DES has to expend as part of the settlement decreases the net value of the settlement to DES. Also, if a Respondent undertakes a SEP that provides a direct benefit beyond New Hampshire's borders (*e.g.*, at facilities owned by the Respondent in other states), only the portion of the SEP that provides direct benefits in New Hampshire will be credited.

The value of the SEP is the actual cost to the Respondent of undertaking and completing the project. This means that any tax benefits the Respondent receives for the SEP must be subtracted from the total amount paid to determine the true value of the SEP. This is especially important in any 100% credit situation, since a Respondent should never have an after-tax cost for a SEP that is less than the amount by which the penalty was reduced based on the SEP. For instance, if the Respondent spends $1,000 on a SEP but receives a $100 tax credit based on the expenditure, the Respondent has only "paid" $900. In such a case, DES would not accept a reduction in the penalty based on the SEP of more than $900. In cases where the tax benefits are uncertain or otherwise too difficult to calculate, DES will require the Respondent to agree that no tax benefit will be realized by the Respondent as a result of the SEP. EPA has developed a computer model, PROJECT, that can be used to determine the value of a proposed SEP, which DES will use in appropriate cases.

DES has not accepted SEPs in administrative fine settlements very often, usually because the fine amount is small compared to the resources needed to monitor implementation of the SEP. However, in cases with larger fine amounts or that otherwise present special circumstances, SEPs can be considered. SEPs that are "one shot deals" (contributions, conservation easements, training seminars) are preferred in administrative fine cases.

D. Stipulated Penalties

1 Stipulated Penalties Defined

Stipulated penalties are conditional penalties that are included in a settlement agreement or administrative order by consent (AOC) which the Respondent agrees to pay if certain conditions arise. The amount of the penalty is stated together with the circumstances that will cause it to become due and payable. Typical circumstances that trigger payment of stipulated penalties include failing to meet a compliance deadline that is also specified in the settlement agreement or AOC or failing to comply with some other condition of the agreement/AOC.

2. Use of Stipulated Penalties

Stipulated penalties are most useful when there are actions that the Respondent must undertake to completely resolve a case - *e.g.*, where there are outstanding compliance issues for which a schedule has been established. The purpose of including stipulated penalties is to provide an extra incentive for the Respondent to attain compliance or otherwise meet the deadlines. The stipulated penalties thus must be more than just a "cost of doing business", such that the Respondent would rather pay the stipulated penalties than comply or meet the deadlines.

Stipulated penalties should not be confused with suspended penalties, although the two are similar. A suspended penalty is a portion of the original penalty sought that is held in abeyance contingent on some action occurring or not occurring (*e.g.*, contingent upon no further violations for a specified period of time). A stipulated penalty is an amount of money, unrelated to the original penalty sought, that will be due each time the specified condition arises, regardless of how many times that might be.

3 Amount of Stipulated Penalties

As noted above, stipulated penalties must be high enough to serve as motivation for the Respondent to meet the specified conditions -- they must be more than just a "cost of doing business". If the Respondent will spend less to pay the stipulated penalty than to meet the requirement, the primary purpose of having the stipulated penalty (to encourage timely compliance) will not be met.

The upper limit on stipulated penalties is the maximum per-violation amount from the applicable penalty authority. In a settlement agreement or AOC, there is more leeway in defining what a "violation" is going to be because the Respondent is agreeing to how it is defined. For instance, in a typical settlement agreement or AOC the Respondent agrees to do something by a certain date (*e.g.*, file a report, hire a consultant, establish erosion controls). In the agreement/AOC, a stipulated penalty could be set for failing to do what was agreed to by the

agreed-upon date, in which case only one penalty would ever be collected under that agreement/ AOC. If, however, a penalty is set for each day (week, month) or portion thereof that the Respondent fails to do what was agreed to, the Respondent has more incentive to do what was agreed to even if the original date was missed, because the stipulated penalties will continue to accrue until the Respondent acts.

Stipulated penalties also reflect the seriousness of the condition to which they relate -- *i.e.*, the urgency of meeting the deadline and the consequences of not meeting it. Especially if stipulated penalties are set for each day (week, month) or portion thereof that the Respondent fails to meet a deadline, the penalty amount should provide incentive but not become so high so quickly that the money will never be collected. For instance, if a penalty is being set for each day or portion thereof that the Respondent fails to submit a report, a per-day penalty of $2,000 probably is not reasonable, since even if the report is only a week late, the penalties will add up to $14,000 (which is unlikely to reflect the seriousness of filing the report a week late). In the same situation, a smaller amount such as $100 per day (or $300 per week) or portion thereof may be a more appropriate amount. Compare that to a case where the stipulated penalty is for each day or portion thereof that erosion control is not established or air pollution control equipment is not installed. If the erosion is depositing large quantities of sediment into a particularly valuable surface water or wetland or the air emissions are dispersing toxic air pollutants into a residential neighborhood, a per-day penalty of $1,000 or even $2,000 might well be appropriate.

E. Documenting Penalty Calculations and Reductions

Documenting the Original Calculation

The penalty calculation must be documented for the file. The documentation must include the calculation of economic benefit as well as the calculation of the total administrative fine or civil penalty gravity component. While penalty calculations are considered to be confidential at least initially, the documentation should be in a form that could be made available to the Respondent and/or the public should it become necessary or desirable to make it available.

a Economic Benefit

If the economic benefit is calculated using BEN, the BEN run sheet(s) must be included in the file. The program must also prepare a memo that explains how the dollar values of the inputs (*e.g.*, initial capital outlay, annual O&M) were determined and that explains any deviations from the standard assumptions or from program-specific assumptions, if any have been established. If the economic benefit was not calculated using BEN, the penalty calculation documentation must explain how the program determined the economic benefit (*e.g.*, avoided disposal costs, illegal profits, *etc.*).

If the preliminary assessment led to a conclusion that a significant economic benefit did not result from the violation, the penalty calculation documentation must explain how that conclusion was reached. The explanation does not have to be lengthy, but it must provide enough information so that other people looking at the file will be able to understand, from the memo, why the conclusion was reached that there was no significant economic benefit.

b. Total Administrative Fine

If an administrative fine is based on a fine schedule, the documentation must cite the specific section of the fine schedule (rules) that was used and include an explanation of how the total number of violations was determined (per the discussion in B.4, above).

If an administrative fine is calculated using the matrix, the documentation must include all of the calculations that were done. For cases where a violation continued over a period of time, the documentation must include an explanation of (1) whether a per-day penalty was calculated and then multiplied by the total number of days or whether the total number of days was considered in the severity determination, and (2) why the penalty was calculated that way.

c. Civil Penalties

For a referred case for which the penalty is calculated based on a federal or program-specific policy, the documentation must explain how the policy was applied. For any other referred case or an AOC that includes a civil penalty, the documentation must identify each violation and, for each, must indicate the degree of deviation from requirement and potential for harm, the penalty range for each based on the deviation/potential category (major/major, moderate/minor, *etc.*), and the specific penalty amount recommended. If no penalty is recommended for a violation, there must be an explanation of why (*i.e.*, the violation is minor or is overlapping, inclusive, or duplicative of another violation for which a penalty is being sought).

2. Documenting Penalty Reductions for Purposes of Settlement

In many cases that are settled, the penalty ultimately agreed to is less than the penalty originally calculated by DES, and/or the amount of cash paid is less than the final penalty amount. If the total penalty is reduced, the reason(s) for the reduction must be documented in the file. Usually, this will take the form of a memo that identifies each factor on which the reduction is based (as discussed in C.3, above) and indicates the percent reduction taken based on each factor. If the amount of cash paid is less than the final penalty amount, the reason(s) must also be documented in the file. Usually this will take the form of a memo that explains the basis for the difference, *e.g.*, a conditional suspension (with an explanation of why it is being done) or a SEP. If a SEP is accepted as part of the penalty, the file must include an explanation of the terms of the SEP and how the SEP value was determined.

For administrative fine cases and AOCs that include a civil penalty, the documentation will be prepared by DES. For referred cases, the AGO will prepare appropriate documentation, a copy of which will be sent to DES so that DES's file will be complete. Again, while penalty calculations are considered confidential at least initially, the documentation should be in a form that could be made available to the Respondent and/or the public should it become necessary or desirable to make it available.