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Colorado Department
of Public Health
and Environment

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

HAZARDOUS MATERIALS AND WASTE MANAGEMENT DIVISION

SOLID WASTE

PENALTY POLICY

This policy is used by the Colorado Department of Public Health and Environment, Hazardous Materials and Waste Management Division, to determine appropriate penalties for violations of solid waste laws and regulations in Colorado.

original document signed by Joe Schieffelin for GWB

9/23/10

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Date

TABLE OF CONTENTS

I.	<u>INTRODUCTION</u>	1
II.	<u>DOCUMENTATION OF INFORMATION</u>	2
III.	<u>SUMMARY OF PENALTY CALCULATION PROCESS</u>	3
IV.	<u>DETERMINATION OF BASE PENALTY</u>	3
	• Statutory Factor I: Seriousness of the Violation	4
	• Statutory Factor III: The impact upon or threat to the public health or the environment as a result of the violation	5
	• Base Penalty Assessment Matrix	7
V.	<u>ADJUSTMENTS TO BASE PENALTY</u>	7
	• Statutory Factor II: Whether the violation was intentional, reckless, or negligent	8
	• Statutory Factor IV: The degree, if any, of recalcitrance or recidivism upon the part of the violator	9
	• Statutory Factor VI: The voluntary and complete disclosure by the violator of the violation in a timely manner after discovery of, and prior to the Division's knowledge of, the violation, as long as all reports required to be submitted under state environmental laws have been submitted as and when required	9
	• Statutory Factor VII: Full and prompt cooperation by the violator following disclosure of the violation including, when appropriate, entering into, into and implementing a good faith and legally enforceable agreement to undertake compliance and remedial efforts	9
	• Statutory Factor VIII: The existence of a regularized and comprehensive environmental compliance program or an environmental audit program that was adopted in a timely and good faith manner and that includes sufficient measures to identify and prevent future noncompliance	10
	• Statutory Factor IX: Other aggravating or mitigating circumstances or factors	10

VI.	<u>VIOLATION DURATION MATRIX</u>	10
VII.	<u>ECONOMIC BENEFIT OF NON-COMPLIANCE (Statutory Factor V)</u>	12
VIII.	<u>MULTIPLE VIOLATIONS</u>	14
IX.	<u>PENALTY FOR FAILURE TO PAY AN ADMINSTRATIVE PENALTY</u>	15

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PENALTY POLICY

I. INTRODUCTION

In order to respond to the problem of improper disposal of solid waste, the Colorado Legislature enacted the Solid Wastes Disposal Sites and Facilities Act ("the Act") on June 8, 1967. Although the Act has several objectives, the Legislature's overriding purpose in enacting the Act was to establish the basic statutory framework for a system that would ensure protection of human health and the environment through the proper management, recycling and disposal of solid waste. The Act is found at sections 30-20-100.5 to 122, C.R.S. The Regulations Pertaining to Solid Waste Sites and Facilities (the "Regulations") are found at 6 CCR 1007-2.

This penalty policy is established pursuant to the Colorado Department of Public Health and Environment, Hazardous Materials and Waste Management Division's ("the Division's") penalty authority under the Act, sections 30-20-100.5 through 122, C.R.S. Section 30-20-113(5)(a), C.R.S., provides that any person who is found to be in violation of section 30-20-113(1), C.R.S., or who fails to comply with an order issued by the Division shall be subject to a civil penalty of not more than \$10,000 for each day of such violation. Section 30-20-113(5)(b), C.R.S., allows the Division to enter into settlement agreements regarding any penalty or claim under the Act.

Pursuant to section 30-20-113(5.5)(a), C.R.S. the Division shall consider the following factors in calculating penalties for violations of the Act and the Regulations:

- I. The seriousness of the violation
- II. Whether the violation was intentional, reckless, or negligent;
- III. The impact upon or the threat to the public health or the environment as a result of the violation;
- IV. The degree, if any, of recalcitrance or recidivism upon the part of the violator;
- V. The economic benefit realized by the violator as a result of the violation;
- VI. The voluntary and complete disclosure by the violator of the violation in a timely manner after discovery of, and prior to the Division's knowledge of, the violation, as long as all reports required to be submitted under state environmental laws have been submitted as and when required;

- VII. The full and prompt cooperation by the violator following disclosure of a violation including, when appropriate, entering into, and implementing a good faith and legally enforceable agreement to undertake compliance and remedial efforts;
- VIII. The existence of a regularized and comprehensive environmental compliance program or an environmental audit program that was adopted in a timely and good faith manner and that includes sufficient measures to identify and prevent future noncompliance; and
- IX. Other aggravating or mitigating circumstances or factors.

This document sets forth the Division's policy, procedures, interpretations, and internal guidelines that shall be used in determining the amount of penalties the Division shall seek in enforcement actions initiated pursuant to section 30-20-113(2), C.R.S., as well as in settlement agreements entered into pursuant to section 30-20-113(5)(b), C.R.S.

The purposes of this policy are to ensure that: penalties sought pursuant to the Act are calculated in a uniform and consistent manner, while allowing for a reasonable amount of flexibility and discretion; penalties are appropriate for the gravity of the violation committed; economic incentives for noncompliance with requirements of the Act are eliminated; penalties are sufficient to deter persons from committing solid waste violations; and compliance is expeditiously achieved and maintained.

This document focuses on determining the proper penalty amount that the Division should seek once a decision has been made to pursue a penalty, rather than whether the pursuit of a penalty is appropriate in a given circumstance. This policy is intended to be used by the Division in calculating penalties that the Division may seek in a formal enforcement action as well as the amount of penalty that may be sought in a settlement agreement; however, the Division retains the enforcement discretion to impose lesser penalties as part of a negotiated settlement.

The procedures set out in this document are intended solely for the guidance of Division personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the Division. The Division reserves the right to be at variance with this policy. The Division also reserves the right to change this policy at any time with appropriate publication.

II. DOCUMENTATION OF INFORMATION

To support a penalty calculation, enforcement personnel must prepare a written explanation of how the proposed penalty amount was calculated. Documentation must include all relevant information and evidence that served as the basis for the penalty amount and were relied upon by the Division's decision-maker.

III. SUMMARY OF PENALTY CALCULATION PROCESS

The amount of the penalty to be sought against a violator shall be calculated by first considering the seriousness of the violation (factor I) and the impact upon or threat to the public health or environment as a result of the violation (factor III). Based upon its consideration of these two factors, the Division shall choose an amount from the appropriate cell on the penalty matrix (shown on page 7). This becomes the “base penalty amount”.

The base penalty amount may then be increased or decreased upon consideration of the remaining factors listed on pages 7 through 10. Factors II and IV shall be considered aggravating factors, and if determined to be applicable, an upward adjustment to the initial penalty matrix amount shall be made. Factors VI, VII and VIII shall be considered mitigating factors and if determined to be applicable, a downward adjustment to the initial penalty matrix amount shall be made. Factor IX allows the Division to consider other aggravating and mitigating circumstances that do not fall into one of the above categories. To perform the adjustment, the Division considers factors II, IV, VI, VII, VIII and IX, adds the percentage adjustments calculated for each factor, and adjusts the base penalty amount by the resulting sum. For example, if analysis of factors II and IV yielded an increase of 30%, and factor VI resulted in a decrease of 20%, the net penalty adjustment would be an increase of 10%. In no case shall a penalty be reduced by more than 100%.

The base penalty amount, as adjusted by the six factors (II, IV, VI, VII, VIII and IX) becomes the “per-day” penalty amount. When the Division has evidence that a violation continued for more than one day, a per-day penalty amount will be used in conjunction with the violation duration matrix shown on page 11.

The total penalty amount is then further adjusted by adding factor V, the economic benefit realized as a result of the violation, to reach the final penalty amount. The economic benefit portion of the total penalty is calculated separately and is not adjusted by the aggravating and mitigating factors, because its purpose is to ensure that the violator does not gain a competitive economic advantage by virtue of violating regulatory requirements. Even in cases where the presence of mitigating factors results in no base penalty assessment, a penalty sufficient to offset any economic benefit gained by the violation should be imposed (unless the violator is entitled to the immunity provided by section 25-1-114.5, C.R.S.).

When more than one violation exists, factors I through IX are applied on a case-by-case basis to each cited violation.

IV. DETERMINATION OF BASE PENALTY

A base penalty amount for a violation is calculated considering the factors described in I and III above regarding the seriousness of the violation and the impact or threat to public health or the environment, and considering the duration of the violation.

Statutory Factor I: The seriousness of the violation

The seriousness of the violation shall be determined by examining the extent of deviation from a statutory or regulatory requirement and/or the adverse impact on the Division's ability to implement the regulatory program.

Extent of deviation from requirements: To evaluate the extent of deviation from the statutory and regulatory requirements of the Act and Regulations, the Division shall examine the facts, conditions and circumstances surrounding each violation and consider the overall behavior and actions of the violator. Division personnel shall evaluate each violation in the context of the overall scheme of the facility's compliance or non-compliance. In evaluating the extent of deviation, Division personnel should consider whether the facility complied with most or all of the requirements of the specific section of the Act or Regulations.

Adverse impact on the Division's ability to implement the regulatory program: To evaluate the adverse impact non-compliance may have on the Division's ability to implement the regulatory program, the Division shall determine the significance of the violation in terms of the result or consequences to the Division's ability to implement the regulatory program.

There are some requirements of the Act and/or the Regulations that, if violated, may not be likely to cause a direct or immediate significant risk to human health or the environment. Nonetheless, because compliance with all of the regulatory requirements is fundamental to maintaining the integrity of the program, violations of such requirements still have serious implications and may merit substantial penalties. This is particularly true in cases where the violation adversely impacts the Division's ability to implement the purposes or requirements of the Colorado Solid Waste Program. Examples of violations that may adversely impact the Division's ability to implement the purposes or requirements of the Act and the Regulations include:

- a. Disposal of solid wastes without first obtaining a certificate of designation;
- b. Failure to provide financial assurance for a facility; and
- c. Failure to pay Hazardous Substance Response Fund ("HSRF") fees.

Ranking the seriousness of the violation: Division personnel shall consider the extent of deviation from the requirement and/or the adverse impact on the Division's ability to implement the regulatory program in determining the seriousness of a violation. Division personnel shall assign a degree of seriousness to each violation based upon the following guidelines.

- a. A “**MAJOR**” seriousness rating for a given violation means that the violator has deviated from the regulations or statute to such an extent that most or all of the requirements are not met and the violator’s actions have, or may have, a substantial adverse impact on the Division’s ability to implement the solid waste program. Examples of violations which may warrant a “major” seriousness rating include: failure to obtain a Certificate of Designation, failure to have an approved Engineering Design and Operations Plan, and failure to obtain Division approval prior to implementing solid waste management or disposal activities.
- b. A “**MODERATE**” seriousness rating for a given violation means that the violator deviates significantly from the requirements of the regulation or statute, but at least some of the requirements are implemented as required and the violator’s actions have, or may have, a significant adverse impact on the Division’s ability to implement the solid waste program. Examples of violations which may warrant a “moderate” seriousness rating include: failure to conduct groundwater or explosive gas monitoring, significant corrective action or closure issues, and failure to submit required documentation or HSRF fees.
- c. A “**MINOR**” seriousness rating for a given violation means that the violator deviates somewhat from the regulation or statute, but most (or all of the important aspects) are met and the violator’s actions do not especially impact the Division’s ability to implement the solid waste program. Examples of violations which may warrant a “minor” seriousness rating include: most nuisance conditions such as lack of odor control, excessive birds or litter, rodent problems, lack of daily cover, and inadequate compaction.

Statutory Factor III: The impact upon or threat to public health or the environment as a result of the violation

In evaluating the impact or threat to human health or the environment from solid waste, and/or hazardous conditions resulting from non-compliance, the following factors shall be considered: (1) Whether the violator’s actions are creating conditions that are or may become an imminent and substantial threat to human health, safety, or the environment; and (2) Whether the violator’s actions are creating conditions that are or may lead to environmental degradations which may cause threats to human health or safety. In determining the impact or threat to human health or the environment, the emphasis shall be placed on the potential for harm posed by a violation, rather than whether the harm actually occurred. The presence or absence of direct harm from a violation is something over which the violator may have no control, and therefore, the violator should not be rewarded by lower penalties simply because the violations did not result in actual harm.

1. **The Probability of Exposure:** When a violation relates to the management or the operations of a solid waste facility, the penalty to be assessed should reflect the probability that the cited violation could have resulted in, or has resulted in, conditions that may pose a threat to human health or the environment.

Factors to consider in determining the probability of exposure are:

- a. Evidence of waste mismanagement which could result in injury to employees or the public, environmental degradation, nuisance conditions and operational violations;
- b. The violator's actions to immediately correct the condition; and
- c. The adequacy of procedures for detecting and preventing release of explosive gasses or groundwater contamination to the environment.

2. **Potential Risk of Exposure:** When calculating the potential risk of exposure or of creating a hazardous condition, enforcement personnel should weigh the harm that would result if the conditions at the facility were left untreated and resulted in harm to employees and/or the public or the environment. The following factors shall be considered in making that determination:

- a. The detection of explosive gasses or contaminated groundwater at or near the facility;
- b. The presence of potential receptors of explosive gasses or contaminated groundwater at or near the facility; and
- c. The existence, size and proximity of potential receptor populations (e.g., local residents), fish and wildlife (including threatened or endangered species), and sensitive environmental media (e.g., surface waters and aquifers).

3. **Ranking the impact on or threat to human health or the environment:** In order to evaluate the impact upon or threat to human health or the environment as a result of the violation, enforcement personnel should determine whether the impact or threat to human health or the environment in a particular situation is Major, Moderate, or Minor.

- a. A "Major" potential for harm means that the violation poses or may pose a substantial risk of deleterious or hazardous conditions to human health or the environment resulting from the mismanagement of solid wastes;

- b. A "Moderate" potential for harm means that the violation poses or may pose a moderate risk of deleterious or hazardous conditions to human health or the environment resulting from mismanagement of solid wastes;
- c. A "Minor" potential for harm means that the violation poses or may pose a low risk of deleterious or hazardous conditions to human health or the environment resulting from mismanagement of solid wastes.

Base Penalty Assessment Matrix:

Each of the above two factors, the seriousness of the violation and the impact upon or threat to public health or the environment as a result of the violation, forms one of the axes of the penalty assessment matrix shown below. The matrix has nine cells, each containing a penalty amount. The specific cell is chosen after determining which category (major, moderate, or minor) is appropriate for the seriousness of the violation, and which category is appropriate for the impact upon or threat to public health or the environment. The amount from the appropriate cell becomes the base penalty amount.

BASE PENALTY MATRIX

		SERIOUSNESS OF THE VIOLATION (Factor I)		
		MAJOR	MODERATE	MINOR
IMPACT OR THREAT UPON PUBLIC HEALTH OR THE ENVIRONMENT (Factor III)	MAJOR	\$10,000	\$8,000	\$5,500
	MODERATE	\$5,000	\$3,000	\$2,500
	MINOR	\$2,000	\$800	\$200

V. ADJUSTMENTS TO BASE PENALTY

Adjustments are made to the base penalty, including the multi-day base penalty amount if there are multiple days of a violation, to account for the remaining factors, and any economic benefit that the violator may have realized as a result of the violation. Following is a detailed discussion of these adjustments.

Statutory Factor II: Whether the violation was intentional, reckless, or negligent

1. An intentional violation means that the action causing the violation was done with purpose or with intention. Intention means the act or instance of determining mentally upon some action or result.
2. A reckless violation means that the violator did the action causing the violation with indifference to the consequences. For conduct to be reckless, it must be such as to evince disregard or indifference to consequences, under circumstances involving danger to life or safety to others, although no harm may have actually been intended.
3. A negligent violation means that the action or lack of action causing the violation was the result of an omission by the violator in doing something that a reasonable person, guided by the ordinary considerations that ordinarily regulate human affairs, would do. It could also be the act of doing something that a reasonable or prudent person would not do. It is a departure from the conduct expected of a reasonable and prudent person under similar circumstances.

In assessing whether the violation was intentional, reckless, and/or negligent, the following factors should be considered, as well as any other factors the Division deems appropriate:

- a. How much control the violator had over the events constituting the violation;
- b. The predictability of the events constituting the violation;
- c. Whether the violator took or could have taken reasonable precautions to prevent the events constituting the violation;
- d. Whether the violator knew or should have known of the hazards associated with the events constituting the violation; and
- e. Whether the violator proceeded with actions constituting the violation when the violator should have known of the legal requirement that was violated.

It should be noted that this last factor, lack of knowledge of the legal requirement, should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, knowing violations should serve only to enhance the penalty.

If a violation is determined to be intentional, the base penalty shall be increased by 50%.

If a violation is determined to be reckless, the base penalty shall be increased by 30%.

If a violation is determined to be negligent, the base penalty shall be increased by 10%.

Statutory Factor IV: The degree, if any, of recalcitrance or recidivism upon the part of the violator

To evaluate and assess the degree, if any, of the violator's recalcitrance or recidivism, the Division enforcement personnel should examine the violator's compliance history with all environmental laws, not just the Colorado Solid Wastes Disposal Sites and Facilities Act. Recalcitrance means that the violator has not obeyed or complied with all of the requirements of the Act and/or other environmental laws or regulations, thereby evincing a level of disregard for the statutory or regulatory requirements. Recidivism means that the violator has demonstrated a pattern or history of similar or like behavior resulting in non-compliance with the Act and/or other environmental laws or regulations. If the violator has a history of recalcitrance and/or recidivism, the base penalty shall be increased up to 50%.

Statutory Factor VI: The voluntary and complete disclosure by the violator of the violation in a timely manner after discovery of, and prior to the Division's knowledge of, the violation, as long as all reports required to be submitted under state environmental laws have been submitted as and when required

If the violator discovers a violation, notifies the Division about such a violation as soon as practicable and prior to the Division's knowledge of the violation, and gives a voluntary and complete disclosure detailing the violation, the base penalty may be reduced up to 75%. To obtain this reduction, the violator must comply with each requirement listed above. If the violator complies with some, but not all, of the above criteria, the Division may reduce the penalty by a lesser percentage. To be voluntary, the disclosure must not be required by any statute, regulation, order, permit, or other legal requirement.

Statutory Factor VII: The full and prompt cooperation by the violator following disclosure of the violation, including, when appropriate, entering into and implementing a good faith and legally enforceable agreement to undertake compliance and remedial efforts

If, following disclosure (by the violator) or discovery (by the Division) of a violation, the violator acts fully and cooperatively with the Division to resolve all issues surrounding its non-compliance and any related remedial activities required to protect public health and environment, the base penalty may be reduced up to 25%. To obtain the benefit of this factor, the violator may also be required to fully and cooperatively enter into a legally enforceable agreement relating to compliance and remedial efforts, if deemed appropriate. A legally enforceable agreement may include a stipulated penalty for future

violations. To provide a reduction for future good faith efforts to implement a legally enforceable agreement, the Division may order that part of the penalty be suspended upon timely and adequate completion of the actions required in the agreement.

Statutory Factor VIII: The existence of a regularized and comprehensive environmental compliance program or an environmental audit program that was adopted in a timely and good faith manner and that includes sufficient measures to identify and prevent future noncompliance

An environmental compliance program is designed to ensure that facility owners and operators know about and satisfy all environmental regulatory requirements. Such a program should include documents, written procedures, a recognized department or division in the facility, and assigned personnel whose purpose is monitoring and maintaining compliance with the applicable solid waste statutory and regulatory requirements. An audit program is a program that checks the company's operations on a routine basis to determine compliance with the statutory and regulatory requirements. These programs must be legitimate and verifiable within the facility. If such programs are operating effectively, any problems in existence are likely to be discovered.

If a facility satisfies the requirements of this factor by having a regularized and comprehensive compliance program or an environmental audit program, the base penalty may be reduced up to 25%.

Statutory Factor IX: Other aggravating or mitigating circumstances or factors

Any other aggravating or mitigating circumstances the Division deems relevant shall be considered. The amount of increase or reduction to the base penalty amount shall be determined by the Division on a case-by-case basis.

VI. VIOLATION DURATION MATRIX

The Colorado Solid Waste Disposal Sites and Facilities Act provides the Division with the authority to seek penalties of up to \$10,000 per day of noncompliance for each violation of any rule, regulation, or requirement of Part 1 of the Act. This language explicitly authorizes the Division to consider the duration of each violation as a factor in determining an appropriate total penalty amount. Accordingly, to the extent that violations can be shown or presumed to have continued for more than one day, an appropriate multi-day component will be considered. The multi-day component should reflect the duration of the violation at issue.

After it has been determined that an alleged violation has continued for more than one day, the next step is to determine the length of time each violation continued. Where the Division determines that a violation persists, the penalty may be calculated for a period ending on the date of compliance, provided there is evidence to support a finding that such a violation has occurred for more than one day.

The multi-day component is calculated by subjecting the adjusted per-day base penalty amount to the violation duration matrix shown below and is based upon the type of violation and the number of days the violation has continued. The duration of the violation is separated into the intervals shown on the matrix. For each time interval the initial per day penalty is multiplied by the number of days in that interval that are alleged, and then multiplied by the percentage for that interval from the matrix depending on the type of violation. The results of this calculation for each time interval are then summed for the total multi-day penalty (see example calculation).

VIOLATION DURATION MATRIX

	Duration of Violation (days)						
		1-10	11-30	31-60	61-120	121-365	366+
Type of Violation	Maj-Maj	100.00%	50.00%	25.00%	10.00%	5.00%	2.00%
	Maj-Mod	100.00%	45.00%	22.50%	9.00%	4.50%	1.80%
	Maj-Min	100.00%	40.00%	20.00%	8.00%	4.00%	1.60%
	Mod-Maj	100.00%	35.00%	17.50%	7.00%	3.50%	1.40%
	Mod-Mod	100.00%	30.00%	15.00%	6.00%	3.00%	1.20%
	Mod-Min	100.00%	20.00%	10.00%	4.00%	2.00%	0.80%
	Min-Maj	100.00%	18.30%	9.20%	3.70%	1.80%	0.70%
	Min-Mod	100.00%	16.70%	8.30%	3.30%	1.70%	0.70%
	Min-Min	100.00%	15.00%	7.50%	3.00%	1.50%	0.60%

EXAMPLE CALCULATION

For illustration, consider a violation that has been determined to have a seriousness ranking of Major, and an impact or threat to public health or the environment ranking of Moderate. The duration of the violation has been determined to be 82 days. From the Penalty Matrix, the initial per day penalty amount is \$5,000. The multi-day penalty is then calculated for a Major-Moderate violation using the Violation Duration Matrix as follows:

Days 1-10	(\$5,000) X (10 days) X (100%)	=	\$50,000
+ Days 11-30	(\$5,000) X (20 days) X (45%)	=	\$45,000
+ Days 31-60	(\$5,000) X (30 days) X (22.5%)	=	\$33,750
+ Days 61-82	(\$5,000) X (22 days) X (9%)	=	<u>\$9,900</u>
Total Base Penalty			\$138,650

While this policy provides general guidance on the use of multi-day penalties, nothing in this policy precludes or should be construed to preclude the Division from seeking penalties of up to \$10,000 for each day after the first day of any given violation. Particularly in circumstances where significant harm has in fact occurred and immediate compliance is required to avert a continuing threat to human health or the environment, it may be appropriate to demand the statutory maximum. The penalty for violations of the Act may never exceed \$10,000 per day.

VII. ECONOMIC BENEFIT OF NON-COMPLIANCE

Statutory Factor V: The economic benefit realized by the violator as a result of the violation

Consideration of this factor is intended to recapture any economic benefit of noncompliance that accrues to a violator. The calculated economic benefit is added onto the final penalty amount after all adjustments have been made and the duration has been calculated. The fundamental reason for including the economic benefit is to eliminate any economic incentives for noncompliance. As stated above, the penalty amount that is finally determined should never be less than the economic benefit realized as a result of the violation.

The following are examples of regulatory areas for which violations are particularly likely to present significant economic benefits:

- a. Failure to obtain financial assurance for the facility;
- b. Failure to pay HSRF fees to the Division; and
- c. Failure to conduct monitoring for explosive gasses and/or ground water.

For certain statutory and regulatory requirements the economic benefit of noncompliance may be relatively insignificant (e.g., failure to submit a report on time). In the interest of simplifying and expediting an enforcement action, enforcement personnel should forego calculating the benefit component where it is determined that the amount of the component is likely to be insignificant.

Division enforcement personnel may evaluate and determine whether the violator has realized an economic benefit as a result of the violation by examining two types of economic benefit from noncompliance:

1. The economic benefit from **Delayed Costs** is comprised of those expenditures that have been deferred by the violator's failure to comply with the requirements. The violator will be required to spend money to achieve compliance. Delayed costs should be calculated from the date of noncompliance to the date of compliance and assume the violator will continue operation. A delayed cost can

become an avoided cost if the violator ceases operation. Examples of violations which result in savings from delayed costs are:

- a. Failure to obtain financial assurance for the facility;
- b. Failure to pay HSRF fees to the Division; and
- c. Failure to install monitoring wells or obtain required equipment to conduct monitoring for explosive gasses or groundwater.

2. The economic benefit from **Avoided Costs** is comprised of those expenditures that are nullified by the violator's failure to comply. These costs will never be incurred. Avoided costs include operating and maintenance costs. Avoided costs also would include any periodic costs, such as leasing monitoring equipment. Examples of violations which result in savings from avoided costs are:

- a. Failure to adequately compact solid waste prior to covering;
- b. Failure to provide adequate daily or intermediate cover;
- c. Failure to correct nuisance conditions; and
- d. Failure to collect and analyze periodic monitoring samples.

3. Calculation of economic benefit: Because the savings that are derived from delayed costs differ from those derived from avoided costs, the economic benefits from delayed and avoided costs are calculated in a different manner. For avoided costs, the economic benefit equals the cost of complying with the requirements, adjusted to reflect anticipated rate of return and income tax effects on the facility. For delayed costs, the economic benefit does not equal the cost of complying with the requirements, since the violator will eventually have to spend the money to achieve compliance. The economic benefit for delayed costs consists of the amount of interest on the unspent money that reasonably could have been earned by the violator during noncompliance.

In its discretion the Division may use the U.S. EPA's BEN computer model to calculate the economic benefit accruing to a violator through delay or avoidance of the costs of complying with applicable requirements of the Act and its implementing regulations. However, the BEN methodology in some instances either cannot compute or will fail to capture the actual economic benefit of noncompliance. In those instances, it will be appropriate for the Division to include in its penalty analysis a calculation of economic benefits in a manner other than those provided for in the BEN methodology.

After calculating the total economic benefit realized from delayed costs and avoided costs, that amount will be added to the penalty amount calculated above

to determine the total penalty amount. The total penalty amount for violations of the Act may not exceed \$10,000 per day per violation.

VIII. MULTIPLE VIOLATIONS

In certain situations, the Division may find that a particular facility or individual has violated several different state solid waste requirements. A separate penalty should be sought for each separate violation that results from an independent act (or failure to act) by the violator and is substantially distinguishable from any other violation for which a penalty is to be assessed. A given violation is independent of, and substantially distinguishable from, any other violation when it requires an element of proof not required to establish another violation. In many cases, violations of different sections of the regulations constitute independent and substantially distinguishable violations.

It is also possible that different violations of the same regulatory or statutory section could constitute independent and substantially distinguishable violations and warrant separate penalties. For penalty purposes, each of the violations should be assessed separately and the amounts totaled.

Penalties for multiple violations are appropriate when a facility violates the same requirement on separate occasions not cognizable as multi-day violations. An example would be the case where a facility fails for a year to take required quarterly groundwater or explosive gas monitoring samples.

In general, penalties for multiple violations may be less likely to be appropriate where the violations are not independent or substantially distinguishable. Where a violation derives from or merely restates another violation, a separate penalty may not be warranted.

A facility's failure to satisfy one statutory or regulatory requirement may either necessarily or generally lead to the violation of numerous other independent regulatory requirements. For example, if a facility, through ignorance of the law, fails to obtain a Certificate of Designation as required by the Act and the Regulations, as a consequence it may run afoul of the numerous other regulatory requirements. In cases such as this where multiple violations result from a single initial transgression, assessment of a separate penalty for each distinguishable violation may produce a total penalty that is disproportionately high. Accordingly, enforcement personnel have discretion to forego separate penalties for certain distinguishable violations, so long as the total penalty for all related violations is appropriate (considering the gravity of the offense) and sufficient to deter similar future behavior and recoup economic benefit. Any economic benefit directly related to the violation would still be calculated under the separate violations.

IX. PENALTY FOR FAILURE TO PAY AN ADMINISTRATIVE PENALTY

When seeking to enforce payment of an administrative penalty in district court, the Division may seek an additional penalty of \$10,000 or two times the amount of the original penalty, whichever is greater.