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Dedicated to protecting and improving the health and environment of the people of Colorado

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Colorado Department
of Public Health
and Environment

HAZARDOUS WASTE **PENALTY POLICY**

The attached policy is used by the Colorado Department of Public Health and Environment, Hazardous Materials and Waste Management Division (the Division), to determine appropriate penalties for violations of hazardous waste laws and regulations in Colorado. This policy replaces the previous policy used by the Division.

original /s/ by Gary W. Baughman

6/10/08

Gary W. Baughman
Division Director

Date

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT
HAZARDOUS WASTE CONTROL PROGRAM
PENALTY POLICY

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COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT
HAZARDOUS WASTE
PENALTY POLICY

I. INTRODUCTION

In order to respond to the problem of improper management of hazardous waste, Congress amended the Solid Waste Disposal Act with the Resource Conservation and Recovery Act (RCRA) of 1976. Although RCRA has several objectives, Congress' overriding purpose in enacting RCRA was to establish the basic statutory framework for a national system that would ensure the proper management of hazardous waste. Since 1976, the Solid Waste Disposal Act has been amended by the Quiet Communities Act of 1978, P.L. 95-609, the Used Oil Recycling Act of 1980, P.L. 96-463, the Hazardous and Solid Waste Amendments of 1984, P.L. 98-616, the Safe Drinking Water Act Amendments of 1986, P.L. 99-339, the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499, and most recently, the Medical Waste Tracking Act of 1988, P.L. 100-582. For simplicity and convenience, the Solid Waste Disposal Act, as amended, will hereinafter be referred to as "RCRA". On November 2, 1984 the Colorado Department of Public Health and Environment ("the Department") received final federal authorization to conduct the state hazardous waste program in lieu of the base federal program, pursuant to section 3006 of the federal act. The Colorado Hazardous Waste Act is found at sections 25-15-101 to 515, C.R.S. The Colorado Hazardous Waste Regulations (the "Regulations") are found at 6 CCR 1007-3.

This penalty policy is established pursuant to the Department's penalty authority under the Colorado Hazardous Waste Act, §§ 25-15-101 through 515, C.R.S. (the "Act"). Section 25-15-309, C.R.S. provides, inter alia, that any person who violates the provisions of 25-15-308, C.R.S. or who violates any compliance order issued by the Department pursuant to Part 3 of the Act may be subject to an administrative penalty of up to \$15,000.00 per day per violation and to a civil penalty of up to \$25,000.00 per day per violation. Section 25-15-309(3), C.R.S. sets out the factors the Department shall consider when determining penalties for a violation of Part 3 of the Act. The factors are as follows:

- a. The seriousness of the violation;
- b. Whether the violation was intentional, reckless, or negligent;
- c. The impact upon or the threat to the public health or the environment as a result of the violation;
- d. The degree, if any, of recalcitrance or recidivism upon the part of the violator;
- e. The economic benefit realized by the violator as a result of the violation;

- f. The voluntary and complete disclosure by the violator of such violation in a timely fashion after discovery and prior to the department's knowledge of the violation provided that all reports required pursuant to the state environmental law have been submitted as and when otherwise required;
- g. Full and prompt cooperation by the violator following disclosure of a violation, including, when appropriate, entering into, in good faith, and implementing a legally enforceable agreement to undertake compliance and remedial efforts;
- h. 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
- i. Any other aggravating or mitigating circumstances.

This document sets forth the Department's policy, procedures, interpretations, and internal guidelines that shall be used in determining the amount of administrative penalties the Department shall seek in administrative compliance orders issued pursuant to Section 25-15-308(2), C.R.S. and the amount of civil penalties sought in civil actions. Penalty assessments are made under the authority of the Executive Director of the Colorado Department of Public Health and Environment or his or her designee.

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

This document does not address whether the assessment of a penalty is an appropriate enforcement response to a particular violation. Rather, this document focuses on determining the proper penalty amount that the Department should seek once a decision has been made to pursue a penalty. This policy is intended to be used by the Department in calculating penalties, which the Department may unilaterally impose; however, the Department 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 Department personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the Department. The Department reserves the right to be at variance with this policy. The Department 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 that were relied upon by the Department's decision-maker.

III. SUMMARY OF PENALTY CALCULATION PROCESS

To determine the amount of the penalty to be assessed against a violator, all of the factors in 25-15-309(3), C.R.S. shall be considered. This shall be done by first considering statutory factors (a), regarding the seriousness of the violation, and (c), regarding the impact upon or threat to the public health or environment as a result of the violation. Based upon its consideration of these two statutory factors, the Department shall choose an amount from the appropriate cell on the penalty matrix (shown on page 6). This amount is the base penalty amount.

The base penalty amount may then be increased or decreased upon consideration of the remaining factors in §25-15-309(3), C.R.S. Statutory factors (b) and (d) shall be considered aggravating factors, and if determined to be applicable, an upward adjustment to the initial penalty matrix amount shall be made. Statutory factors (f) through (h) shall be considered mitigating factors and if determined to be applicable, a downward adjustment to the initial penalty matrix amount shall be made. Statutory factor (i) allows the Department to consider other aggravating and mitigating circumstances that do not fall into one of the above categories. To determine the penalty adjustment, the Department considers statutory factors (b), (d), and (f) through (i), and then adds the percentage adjustments calculated for each factor, and adjusts the base penalty amount by the resulting sum. For example, if analysis of statutory factors (b) and (d) yielded an increase of 30%, and statutory factor (f) resulted in a decrease of 20%, the net penalty adjustment would be an increase of 10%.

If the Department has evidence that the violation continued for multiple days, the adjusted base penalty is then further adjusted to reflect the duration of the violation using the violation duration matrix (shown on page 14).

Statutory factor (e), the economic benefit realized by the violator as a result of the violation, is then added to the adjusted penalty 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 § 25-1-114.5, C.R.S.). If the final penalty amount exceeds \$15,000 per day of violation,

the Department may choose to seek a civil penalty of up to \$25,000 per day of violation, or may exercise its enforcement discretion to settle for an administrative penalty that does not exceed \$15,000 per day of violation. If the final penalty amount does not exceed \$15,000 per day of violation, the Department may choose to either seek a civil penalty in district court or impose an administrative penalty for the amount calculated.

When an order contains more than one violation, statutory factors (a) through (i) are applied on a case-by-case basis to each cited violation.

IV. DETERMINATION OF BASE PENALTY

A base penalty for a violation is calculated considering the statutory factors regarding the seriousness of the violation and the impact or threat to public health or the environment.

- **Statutory Factor (a)
Seriousness of the Violation:**

Section 25-15-309(a), C.R.S. states that the seriousness of a violation shall be considered in assessing a penalty for the violation. The seriousness of the violation shall be determined by examining the extent of deviation from a statutory or regulatory requirement.

To evaluate the extent of deviation from the statutory and regulatory requirements of the Colorado Hazardous Waste Act, the Department shall examine the facts, conditions and circumstances surrounding each violation and consider the overall behavior and actions of the violator. Department 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, Department personnel should consider whether the facility complied with most or all of the requirements of the specific section of the Act or the Regulations.

- a) a "major" deviation occurs when the violator deviates from the regulations or statute to such an extent that most (or important aspects) of the requirements are not met.
- b) a "moderate" deviation occurs when the violator significantly deviates from the requirements of the regulations or statute, but some of the requirements are implemented as intended.
- c) a "minor" deviation occurs when the violator deviates somewhat from the regulation or statute, but most (or all important aspects) of the requirements are met.

- **Statutory Factor (c)**
The impact upon or threat to the public health or the environment as a result of the violation:

In evaluating the impact or threat to human health or the environment from hazardous waste, hazardous constituents, and/or hazardous conditions resulting from non-compliance, the following factors shall be considered: probability that human or other environmental receptors may be exposed to hazardous waste, hazardous constituents and/or hazardous conditions, and the potential risk of such exposure. However, 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 violation did not result in actual harm.

1. Ranking the impact on or threat to human health or the environment: In order to evaluate the impact upon or threat to the 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 exposure from hazardous waste, constituents or conditions to human health or the environment;
 - b) a "moderate" potential for harm means that the violation poses or may pose a moderate risk of exposure from hazardous waste, constituents or conditions to human health or the environment;
 - c) a "minor" potential for harm means that the violation poses or may pose a low risk of exposure from hazardous waste, constituents or conditions to human health or 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 hazardous waste or constituent was released into the environment. The following factors shall be considered in making that determination:
 - a) the quantity and toxicity of wastes released or potentially released or the severity of the hazardous condition;
 - b) likelihood or fact that such hazardous waste or constituent will be transported by way of environmental media, such as air or groundwater; and

- c) the existence, size and proximity or potential receptor populations (e.g. local residents, fish & wildlife (including threatened or endangered species), and sensitive environmental media (e.g. surface waters and aquifers).

PENALTY ASSESSMENT MATRIX

The above statutory factors (seriousness of the violation and the impact upon or threat to public health or the environment as a result of the violation) form the vertical and horizontal axes of the penalty assessment matrix shown below. The matrix has nine cells, each containing a penalty amount based on the civil penalty maximum of \$25,000. The specific cell is chosen after determining which category (major, moderate, or minor) is appropriate for the seriousness of the violation factor, and which category is appropriate for the impact upon or threat to public health or the environment factor. The amount from the appropriate cell becomes the initial per day penalty amount.

PENALTY MATRIX

| | | SERIOUSNESS OF VIOLATION | | |
|---|----------|--------------------------|----------|----------|
| | | MAJOR | MODERATE | MINOR |
| IMPACT OR THREAT TO PUBLIC HEALTH OR ENVIRONMENT FROM VIOLATION | MAJOR | \$25,000 | \$20,000 | \$14,000 |
| | MODERATE | \$12,000 | \$8,000 | \$6,000 |
| | MINOR | \$5,000 | \$2,000 | \$400 |

Again, if the final penalty amount exceeds \$15,000 per day of violation, the Department may choose to seek a civil penalty in district court of up to \$25,000 per day of violation, or may exercise its enforcement discretion to settle for an administrative penalty that does not exceed \$15,000 per day of violation. Even if the final penalty amount does not exceed \$15,000 per day of violation, the Department may seek a civil penalty in district court or impose an administrative penalty for the amount calculated.

ASSESSMENT OF MULTIPLE COUNTS

Multiple counts are typically assessed when one regulatory requirement has been violated multiple times. For example, when a facility fails to make hazardous waste determinations for three separate waste streams, three separate counts are likely to be assessed.

V. ADJUSTMENTS TO BASE PENALTY

Adjustments are made to the base penalty to account for the remaining statutory factors which must be considered, and to account for any economic benefit that may have been realized by the violator as a result of the violation. Following is a detailed discussion of these adjustments.

- **Statutory Factor (b)**
Whether the violation was intentional, reckless, or negligent

While intentional, reckless, and negligent violations can be subject to criminal sanctions in accordance with section 25-15-310, C.R.S. and other statutes, there may be instances of heightened culpability where the Department chooses not to pursue a criminal action. In such instances, the penalty may be adjusted upward as described below.

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 action causing the violation was done by the violator with indifference to the consequences. For conduct to be reckless, it must be such as to demonstrate 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 causing the violation was the result of an omission by the violator in doing something that a reasonable person, guided by the ordinary considerations which ordinarily regulate human affairs would do, or the doing of something which a reasonable or prudent person would not do; it is a departure from the conduct expected of a reasonable and prudent person under like circumstances. Since all violations are rooted in negligence, the Department calculates base penalties assuming that the violator has been negligent.

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

- a) how much control the violator had over the events constituting the violation;
- b) the foreseeability of the events constituting the violation;
- c) whether the violator took or could have taken reasonable precautions against 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 with specific knowledge of whether the violator knew or should have known of the legal requirement which was violated.

It should be noted that this last factor, lack of knowledge of the legal requirement, should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, if a violator is deemed to have acted intentionally, this will result only in an upward adjustment to the penalty.

If a violation is determined to be intentional or reckless the base penalty shall be increased by up to 50%. The Department reserves the right to aggravate the penalty beyond 50% for this factor if deemed warranted given the circumstances surrounding any given violation

- **Statutory Factor (d)**
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, Department enforcement personnel should examine the violator's compliance history with all environmental laws, not just the Colorado Hazardous Waste Act. Recalcitrance means that the violator has not obeyed or complied with all of the requirements of the Hazardous Waste 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 Hazardous Waste Act and/or other environmental laws or regulations at any time in the past. If the violator has a history of recalcitrance and/or recidivism, the base penalty shall be increased by 5-50%. The Department reserves the right to aggravate the penalty beyond 50% for this factor if deemed warranted given the circumstances surrounding any given violation.

- **Statutory Factor (e)**
The economic benefit realized by the violator as a result of the violation:

This policy intends that the Department should recapture any significant economic benefit of noncompliance that accrues to a violator. The fundamental reason for this is that all economic incentives for noncompliance should be eliminated. 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.

Examples of regulatory requirements for which violations are particularly likely to present significant economic benefits include, but are not limited to: illegal disposal, failure to conduct weekly inspections, and failure to train employees who have hazardous

waste management responsibilities.

For certain Colorado Hazardous Waste Act 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. If there are multiple violations whose individual economic benefits are not likely to be significant but whose cumulative benefits are significant, economic benefits should be calculated for each violation.

There are two types of economic benefit of noncompliance which a violator may realize as a result of a violation: delayed costs and avoided costs. Enforcement personnel should examine both delayed costs and avoided costs to evaluate and determine the economic benefit component.

1. Calculation of economic benefit: Because the savings that are derived from delayed costs differ from those derived from avoided costs, the economic benefit from delayed and avoided costs are calculated in a different manner. For avoided costs, the economic benefit equals the cost of complying with the requirements, adjusted to reflect anticipated rate of return. For delayed costs, the economic benefit does not equal the cost of complying with the requirements, since the violator will eventually have to spend the money to achieve compliance. The economic benefit for delayed costs consists of the amount of interest on the unspent money that reasonably could have been earned by the violator during noncompliance. If noncompliance has continued for more than a year, compliance/enforcement personnel should calculate the economic benefit of both the delayed and avoided costs for each year.

In its discretion the Department may use the USEPA'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 Colorado Hazardous Waste 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 Department 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 after the final penalty amount has been calculated, including accounting for any multi-day component as described in Section VI below, to determine the total penalty amount. The total penalty amount may not exceed \$15,000 per day per violation for administrative penalties and \$25,000 per day per

violation for civil penalties.

2. **Delayed Costs** are those expenditures which have been deferred by the violator's failure to comply with the requirements. It is assumed that the violator will eventually 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 include:

- a) failure to conduct initial hazardous waste training for a large quantity generator;
- b) Failure to develop a contingency plan for a large quantity generator;
- c) Failure to develop a tank integrity assessment for a large quantity generator; and
- d) Failure to provide hazardous waste training to a small quantity generator.

Example calculation:

The Department's determination is that the facility received an economic benefit by not providing the required hazardous waste training to facility personnel that manage hazardous waste. The economic benefit for this violation has been calculated as a delayed cost for X number of personnel. An assumption has been made that a cost of at least \$2,000 would have been incurred by the facility if an off-site consultant were contracted to conduct the training. Therefore, the economic benefit has been calculated as follows:

Economic Benefit = Delayed Costs = (Cost of compliance x Duration of Non-compliance) x interest rate

Delayed Cost = (\$2000 x 2 years) x 8% = \$320

Economic Benefit = \$320.00

3. **Avoided Costs** are those expenditures which 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 include:

- a. Failure to provide annual hazardous waste refresher training for a large quantity generator;
- b. Disposal of hazardous waste on-site or at a facility that does not have interim status or a permit;
- c. Failure to conduct weekly inspections of hazardous waste accumulation areas; and
- d. Failure to conduct daily tank inspections.;

Example calculation:

The Division has determined that the facility has received an economic benefit by not conducting the required weekly inspections for two years. In this case, an assumption has been made that at least 15 minutes would have been necessary to inspect the two accumulation areas. Further, an hourly wage of \$20 per hour has been used for this assessment. The economic benefit, which has been calculated as an avoided cost, has been calculated as follows:

$$\text{Economic Benefit} = \text{Avoided Costs} + (\text{Delayed Costs} \times \text{Interest})$$

$$\text{Economic Benefit} = (104 \text{ inspections} \times .25 \text{ hours per inspection} \times \$20/\text{hour}) + (104 \text{ inspections} \times .25 \text{ hours per inspection} \times \$20/\text{hour} \times 8 \%)$$

$$\text{Economic Benefit} = \$520 + \$42 = \$562$$

- **Statutory Factor (f)**

The voluntary and complete disclosure by the violator of such violation in a timely fashion after discovery and prior to the Department's knowledge of the violation provided that all reports required pursuant to the Colorado Hazardous Waste Act have been submitted as and when otherwise required:

If the violator discovers a violation, notifies the Department about such a violation as soon as practicable, gives a voluntary and complete disclosure detailing the violation, and takes actions to remedy the violation, the base penalty may be reduced by up to 80%. To obtain this level of reduction, the violator must comply with each requirement listed in the previous sentence. If the violator complies with some, but not all, of the above requirements, the Department 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 (g)**
Full and prompt cooperation by the violator following disclosure of a violation, including when appropriate, entering into, in good faith, and implementing a legally enforceable agreement to undertake compliance and remedial efforts:

If, following disclosure (by the violator) the violator acts fully and cooperatively with the Department to resolve all issues surrounding its non-compliance and any related remedial activities required to protect public health and the environment, the base penalty may be reduced by 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 provision for future violations.

- **Statutory Factor (h)**
The existence of a regularized and comprehensive environmental compliance program or an environmental audit program that was adopted in a timely, good faith manner and that includes sufficient measures to identify and prevent future non-compliance:

An environmental compliance program is designed to ensure that a company knows about and satisfies all environmental regulatory requirements. Such a program should include documents, written procedures, a recognized department or division in the company, and assigned personnel whose purpose is monitoring and maintaining compliance with the applicable hazardous waste statutory and regulatory requirements. An audit program is an inspection/verification process that checks the company's operations on a routine basis to determine compliance with the statutory and regulatory requirements. An audit program is typically an element of a comprehensive environmental compliance program. These programs must be legitimate and verifiable within the company and operating prior to the inspection. If such programs are operating effectively, any problems which are in existence, are likely to be found. The existence of such programs are evidence of good faith efforts to comply and that the violator has taken reasonable precautions against the events that might lead to violations.

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

- **Statutory Factor (i)**
Any other aggravating or mitigating circumstances.

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

VI. VIOLATION DURATION MATRIX

After the base penalty has been calculated, the duration of the violation must be considered. The Colorado Hazardous Waste Act provides the Department with the authority to assess administrative penalties of up to \$15,000 per day of noncompliance for each violation of any permit, rule, regulation, or requirement of Part 3 of the Act, and to seek civil penalties of up to \$25,000 per day of noncompliance for each violation of any permit, rule, regulation, or requirement of Part 3 of the Act. This language explicitly authorizes the Department to consider the duration of each violation as a factor in determining an appropriate total penalty amount. Accordingly, 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 calculated. 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 Department determines that a violation persists, the penalty may be calculated for a period ending on the date of compliance or the date the Compliance Order is issued, provided there is evidence to support a finding that such a violation has occurred. For example, if an inspection revealed that unlabeled drums of hazardous wastes were being stored by a generator for more than 90 days in violation of section 25-15-308(1)(a), C.R.S and 6 CCR 1007-3, § 100.10, enforcement personnel should allege in the Compliance Order, and present evidence as to the number of days each violation lasted. Documentation for this type of violation might consist of an admission by a facility employee that drums were stored improperly for a certain number of days. In such a case, a penalty could then be calculated for the number of days stated.

The duration of the violation is separated into the intervals shown on the matrix below. 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 base 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 serious ranking of major, and 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 found to be \$12,000. The base penalty is then calculated for a Maj-Mod violation using the Violation Duration Matrix as follows:

| | | | |
|--------------------|------------------------------|---|------------------|
| Days 1-10 | (\$12,000)X(10 days)X(100%) | = | \$120,000 |
| +Days 11-30 | (\$12,000)X(20 days)X(45%) | = | \$108,000 |
| +Days 31-60 | (\$12,000)X(30 days)X(22.5%) | = | \$ 81,000 |
| +Days 61-82 | (\$12,000)X(22 days)X(9%) | = | <u>\$ 23,760</u> |
| Total Base Penalty | | | \$332,760 |

While this policy provides general guidance on the use of multi-day penalties, nothing in this policy precludes or should be construed to preclude the assessment of administrative penalties of up to \$15,000 and civil penalties of up to \$25,000 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.

VII. MULTIPLE VIOLATIONS

In certain situations, the Department may find that a particular facility or individual has violated several different state hazardous waste requirements. A separate penalty should be sought in a compliance order 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 in the compliance order 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. For example, a large quantity generator's failure to conduct initial hazardous waste training for facility personnel, 6 CCR 1007-3, section 265.16(a), and failure to develop a contingency plan, 6 CCR 1007-3, section 265.52, are violations that can be proven only if the Department substantiates different sets of factual allegations. In the case of a facility which has violated both of these sections of the regulations, a separate penalty should be calculated for each violation.

It is also possible that different violations of the same section of the regulations could constitute independent and substantially distinguishable violations. For example, a large quantity generator's failure to provide initial hazardous waste training to certain facility personnel, 6 CCR 1007-3, section 265.16(a), and failure to provide annual refresher training to certain other facility personnel that had received the initial training, 6 CCR 1007-3, section 265.16(c) are two independent acts. While the violations are both of the same regulatory section, each requires distinct elements of proof. In this situation, two separate penalties would be appropriate. For penalty purposes, each of the violations should be assessed separately and the amounts totaled.

Penalties for multiple counts of the same violation are appropriate when a facility violates the same requirement on separate occasions that cannot be connected as a single multi-day violation. For example, consider a facility found to be accumulating hazardous waste at the facility's 180-day accumulation area in four containers that were open on the day of an inspection. In this case, it would be appropriate to assess four separate counts to the violation of failure to keep containers of hazardous waste closed, 6 CCR 1007-3, section 265.173. Each open container represents a separate violation of the same regulation. Another example would be the accumulation of hazardous waste in three separate hazardous waste accumulation tanks that do not meet the technical standards for hazardous waste tanks. In this case, it would be appropriate to assess three separate counts for the violation because there were three separate tank systems that did not meet the technical standards for hazardous waste tanks.

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 make a hazardous waste determination as required by 6 CCR 1007-3, section 262.11, as a consequence it may run afoul of the numerous other regulatory requirements imposed on it by 6 CCR 1007-3, Part 262 or Part 265. Another example would be where a generator operates as a small quantity generator of hazardous waste but failed to notify the Division of its hazardous waste generation activities (6 CCR 1007, Part 99) and, therefore, was not issued an EPA identification number. Since the facility did not receive an EPA identification number, the facility would have also failed to include that number on line one of each manifest (6 CCR 1007-3, section 262.20(a), and would not have received an invoice to pay its annual generator fees (6 CCR 1007-3, section 262.13(a)(2)). In cases such as these where multiple violations result from a single initial transgression, assessment of a separate penalty for each distinguishable violation may produce a total penalty which is disproportionately high. Accordingly, in the specifically limited circumstances described, 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.

VIII. PENALTY DETERMINATION FOR VIOLATION OF ADMINISTRATIVE ORDERS WHEN ENFORCED IN DISTRICT COURT

Failing to comply with an administrative order may result in an additional penalty of \$25,000 or two times the amount of the original penalty, whichever is greater.