COLORADO
Department of Public Health & Environment

CLEANUP OF METHAMPHETAMINE-AFFECTED PROPERTIES 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 6 CCR 1014-3, Cleanup of Methamphetamine-Affected Properties.

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5/27/15
Date

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT
CLEAN-UP OF METHAMPHETAMINE-AFFECTED PROPERTIES
PENALTY POLICY

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COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT
CLEAN-UP OF METHAMPHETAMINE-AFFECTED PROPERTIES
PENALTY POLICY

I. INTRODUCTION

In order to respond to the threat posed by potential contamination in properties that have housed clandestine methamphetamine (meth) labs, the Colorado legislature passed the Colorado Illegal Drug Laboratories Act in 2004, subsequently amended in 2005, 2009, 2010, and 2013, which requires that clandestine meth labs be cleaned up in accordance with standards established by the state Board of Health. The Colorado State Board of Health passed regulations, which became effective on March 30, 2005, which set both a cleanup standard for meth labs and a process by which meth labs must be sampled and cleaned. The regulations were subsequently amended, effective on December 15, 2014. The amended regulations established a training and certification program for persons involved in the assessment, sampling and decontamination of meth labs, and established enforcement procedures and administrative penalties for violations of the regulations.

The Colorado Illegal Drug Laboratories Act is found at sections 25-18.5-101 to 109, C.R.S. (the "Act"). The Colorado Cleanup of Methamphetamine-Affected Properties Regulations (the "Regulations") are found at 6 CCR 1014-3.

This penalty policy is established pursuant to the Department's penalty authority under the Act. Section 25-18.5-107, C.R.S. provides, among other things, that any person who violates any rule promulgated by the Colorado State Board of Health pursuant to section 25-18.5-102, C.R.S. is subject to an administrative penalty of up to $15,000.00 per day per violation. Section 25-18.5-107(2)(g), C.R.S. sets out the factors the Department shall consider when determining penalties for a violation of 6 CCR 1014-3. The factors are as follows:

(g)(I)	The seriousness of the violation;
(g)(II)	Whether the violation was intentional, reckless, or negligent;
(g)(III)	Any impact on, or the threat to, the public health or the environment as a result of the violation;
(g)(IV)	The violator's degree of recalcitrance;
(g)(V)	Whether the violator has had a prior violation and, if so, the nature and severity of the prior violation;
(g)(VI)	The economic benefit the violator received as a result of the violation;

(g)(VII) Whether the violator voluntarily, timely and completely disclosed the violation before the Department discovered it;

(g)(VIII) Whether the violator fully and promptly cooperated with the Department following disclosure or discovery of the violation;

(g)(IX) 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

(g)(X) Any other relevant 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 25-18.5-107, C.R.S.

The purposes of this policy are to ensure that penalties assessed pursuant to the Colorado Illegal Drug Laboratories 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 the Regulations are eliminated; that penalties are sufficient to deter persons from committing violations of the Regulations; 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 25-18.5-107(2)(g), C.R.S. shall be considered. This shall be done by first considering statutory factors (g)(I), regarding the seriousness of the violation, and (g)(III), regarding the impact on, 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 X). This amount is the base penalty amount.

The base penalty amount may then be increased or decreased upon consideration of the remaining factors in §25-18.5-107(2)(g), C.R.S. Statutory factors (g)(II), (g)(IV), and (g)(V) 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 (g)(VII) and (g)(VIII) 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 (g)(IX) 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 (g)(II), (g)(IV), (g)(V), (g)(VII) and (g)(VIII), 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 (g)(II) and (g)(IV) yielded an increase of 30%, and statutory factor (g)(VIII) 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 XX).

Statutory factor (g)(VI), 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 <u>not</u> 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 calculation exceeds $15,000 per day for a given violation, the Department is restricted to assessing $15,000 per day, per violation. When an order contains more than one violation, statutory factors (g)(I) through (g)(IX) 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 (g)(I)**
  Seriousness of the Violation:

Section 25-18.5-107(2)(g)(I), 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 regulatory requirement.

To evaluate the extent of deviation from the requirements of the Regulations, 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 violator's compliance or non-compliance. In evaluating the extent of deviation, Department personnel should consider whether the violator complied with most or all of the requirements of the specific section of the Regulations.

a) a "major" deviation occurs when the violator deviates from the regulations 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, but some of the requirements are implemented as intended.

c) a "minor" deviation occurs when the violator deviates somewhat from the regulation, but most (or all important aspects) of the requirements are met.

- **Statutory Factor (g)(III)**
  The impact on, 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 a failure to meet the requirements of the Regulations 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 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 to hazardous 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 to hazardous 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 to hazardous 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 meth lab waste or meth contaminated materials were released into the environment or methamphetamine-affected properties were not adequately decontaminated. 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 waste or contamination will be transported by way of environmental media, such as air or groundwater; and

    c) the potential for exposure to occupants of contaminated properties and the existence or potential for adjacent receptors.

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 administrative penalty maximum of $15,000. 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

IMPACT OR THREAT TO PUBLIC HEALTH OR ENVIRONMENT FROM VIOLATION	MAJOR	MODERATE	MINOR
MAJOR	$15,000	$12,000	$8,400
MODERATE	$7,000	$4,700	$3,500
MINOR	$3,000	$1,000	$250

ASSESSMENT OF MULTIPLE COUNTS

Multiple counts are typically assessed when one regulatory requirement has been violated multiple times. For example, when a contractor fails to make hazardous waste determinations for three separate waste streams or a consultant uses improper sampling procedures for three separate samples, 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 (g)(II)**
  Whether the violation was intentional, reckless, or negligent

Intentional, reckless, and negligent behavior results in heightened culpability. 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 (g)(IV)**
  The violator's degree of recalcitrance

To evaluate and assess the degree, if any, of the violator's recalcitrance, Department enforcement personnel should examine the violator's compliance with all environmental laws, not just the Colorado Illegal Drug Laboratories Act. Recalcitrance means that the violator has not obeyed or complied with all of the requirements of the Regulations and/or other environmental laws or regulations, thereby evincing a level of disregard for the statutory or regulatory requirements. If the violator demonstrates recalcitrance, 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 (g)(V)**
  Whether the violator has had a prior violation and, if so, the nature and severity of the prior violation

  To evaluate and assess the degree, if any, of the violator's recidivism, Department enforcement personnel should examine the violator's compliance history with all environmental laws, not just the Colorado Illegal Drug Laboratories Act. Recidivism means that the violator has demonstrated a pattern or history of similar or like behavior resulting in non-compliance with the Regulations and/or other environmental laws or regulations at any time in the past. If the violator has a history of non-compliance, 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 (g)(VI)**
  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 collect adequate samples, and failure to use trained and certified workers as required by the regulation.

  For certain requirements of the Regulations, 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 economic 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 <u>are</u> 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, 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 Illegal Drug Laboratories 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.

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 employ trained and certified workers for meth lab decontamination;

b) Failure to establish containment during decontamination in multi-unit structures;

c) Failure to use decontamination procedures that physically remove contamination; and

d) Failure to collect and analyze clearance samples for each room in a methamphetamine-affected property.

Example calculation:

The Department's determination is that the contractor received an economic benefit by not providing the required meth lab decontamination training to contractor personnel that decontaminate methamphetamine-affected properties. 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 contractor if employees attended required training and paid certification application fees. 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 transportation and disposal costs. Avoided costs also would include any periodic costs, such as leasing decontamination or sampling equipment. Examples of violations which result in savings from avoided costs include:

a. Failure to provide bi-annual meth lab refresher training;

b. Disposal of hazardous waste on-site or at a facility that does not have interim status or a permit;

c. Failure to conduct visual inspection of ventilation systems after decontamination; and

d. Failure to conduct septic tank inspections to determine if meth lab waste has been disposed of in the on-site wastewater disposal system (OWTS).

Example calculation:

The Division has determined that the consultant has received an economic benefit by not conducting required inspections of OWTS at methamphetamine-affected properties for two years. In this case, an assumption has been made that at least 30 minutes would have been necessary to inspect each OWTS. 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:

Economic Benefit = Avoided Costs + (Delayed Costs x Interest)

Economic Benefit = (20 inspections x .5 hours per inspection x $20/hour) + (20 inspections x .5 hours per inspection x $20/hour x 8 %)

Economic Benefit = $200 + $26 = $216

- **Statutory Factor (g)(VII)**
  Whether the violator voluntarily, timely, and completely disclosed the violation before the Department discovered it:

  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)(VIII)**
  Whether the violator fully and promptly cooperated with the Department following disclosure or discovery of the violation:

  If, following disclosure or discovery, 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 (g)(IX)**
  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 Illegal Drug Laboratories Act provides the Department with the authority to assess administrative penalties of up to $15,000 per day of noncompliance for each violation of the Regulations. 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 personnel that were not trained or certified conducted decontamination of a methamphetamine-affected property for 30 days in violation of section 25-18.5-3104(a), C.R.S and 6 CCR 1014-3, part 1, § 5.0, 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 contractor employee that they conducted decontamination activities for a certain number of days without receiving training or being certified under the regulations. 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 $8,000. The base penalty is then calculated for a Maj-Mod violation using the Violation Duration Matrix as follows:

Days 1-10	($8,000)X(10 days)X(100%)	=	$80,000
+Days 11-30	($8,000)X(20 days)X(45%)	=	$72,000
+Days 31-60	($8,000)X(30 days)X(22.5%)	=	$54,000
+Days 61-82	($8,000)X(22 days)X(9%)	=	$15,840
Total Base Penalty			$221,840

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 for each 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 violator has violated several different state Cleanup of Methamphetamine-Affected Properties 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 contractor's failure to provide decontamination worker training for contractor personnel, 6 CCR 1014-3, part 3, sections 4.1 and 7.1.3 , and failure to submit required Decontamination Summary Reports, 6 CCR 1014-3, part 1, section 8.6, are violations that can be proven only if the Department substantiates different sets of factual allegations. In the case of a contractor 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 contractor's failure to provide initial decontamination worker training to personnel conducting decontamination, 6 CCR 1014-3, part 3, sections 4.1 and 7.1.3, and failure to provide annual refresher training to other decontamination workers that had received the initial training, 6 CCR 1014-3, part 3 section 7.5.3 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 violator violates the same requirement on separate occasions that cannot be connected as a single multi-day violation. For example, consider a consultant that did not collect clearance samples from four different rooms at a methamphetamine-affected property. In this case, it would be appropriate to assess four separate counts to the violation of failure to collect clearance samples, 6 CCR 1014-3, part 1, section 6.9.1. Each un-sampled room represents a separate violation of the same regulatory requirement. Another example would be the failure to collect clearance samples from the attics at three separate methamphetamine-affected properties. In this case, it would be appropriate to assess three separate counts for the violation because there were three properties that were not adequately sampled.

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 violator'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 consultant, through ignorance of the law, fails to determine the concentration of meth below painted-over surfaces as required by 6 CCR 1014-3, part 1, section 6.2.15, as a consequence it may run afoul of the numerous other regulatory requirements imposed on it by 6 CCR 1014-3. 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, 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.