

Your Questions Answered:

A Citizen's Guide to the Administrative Process and Penalty Calculation under the Resource Conservation and Recovery Act

Why was this pamphlet developed?

The Environmental Protection Agency (EPA) prepared this pamphlet to answer questions frequently asked by the public on how the administrative enforcement process works when the EPA takes an enforcement action against hazardous waste facilities. It will also answer some common questions regarding how EPA enforcement personnel determine appropriate civil penalties for hazardous waste regulatory violations.

What, exactly, is the EPA and how does it administer hazardous waste laws?

EPA was established as an independent executive agency in 1970. EPA's mission is to protect human health and the environment from pollution risks. The Agency achieves its mission by administering laws designed to control and abate pollution, promoting environmental research into such areas as how to prevent or minimize pollution, setting pollution control standards, monitoring regulated persons to determine whether they are following the law, and helping persons to comply with environmental standards through a variety of technical assistance programs. In addition, EPA enforces against violations of the law, as discussed in this pamphlet.

Among the most important laws administered by EPA is the Resource Conservation and Recovery Act (RCRA). Congress enacted RCRA to create a national system for ensuring that hazardous wastes are managed safely. Building on its statutory mandate, EPA has issued RCRA rules regulating many activities associated with creating (i.e., generating), transporting, storing, treating and disposing of hazardous wastes.

EPA's compliance monitoring, compliance assistance, and enforcement functions are critical components of the Agency's overall strategy for protecting human health and the environment from pollution risks. EPA inspects hazardous waste facilities, both where the Agency has reason to believe violations have occurred and randomly, to determine whether regulated persons are obeying RCRA's requirements.

How does my State Environmental Agency work with EPA?

Through RCRA, Congress offered the States the opportunity to assume primary responsibility for hazardous waste regulation by becoming "authorized" to implement the program. In practice, EPA and the States cooperate closely to ensure effective regulation and enforcement. Often, it is the States that initially determine whether facilities are complying with the authorized state law and how best to respond to violations. Thus, while this pamphlet focuses on the federal government's administrative enforcement processes, many States employ similar procedures. These procedures vary state-by-state and you should contact your State environmental protection agency to find out more information.

What are the enforcement options available to the EPA?

When EPA finds that a violation has occurred, EPA's enforcement options range from simply notifying a facility that minor violations exist and granting a reasonable time for the facility to come into compliance to criminal sanctions for persons who willfully disregard the law. Another option is for EPA to file an enforcement action before an Administrative Law Judge (ALJ). This is a common type of RCRA enforcement response. Finally, EPA may ask the U.S. Department of Justice to file a civil judicial lawsuit before a United States District Court. While the procedures used in these enforcement responses differ, the

overriding goals are the same: to return the violator to compliance, prevent future infractions, and send a message to the full regulated community that persons who fail to comply with RCRA will receive swift and appropriate enforcement responses.

EPA and the States are increasingly implementing programs to help companies to comply with RCRA, as well as to move beyond minimal compliance to true environmental excellence, these programs cannot succeed without an enforcement foundation. This foundation creates a level playing field for all companies and is especially important for environmentally-conscientious firms. Many businesses have invested considerable time, effort, and resources to comply with the law. These good citizens would experience competitive disadvantages were violators permitted to reap illegal gains by not meeting their legal obligations to protect the environment.

How does the administrative enforcement process actually work?

The formal RCRA enforcement response EPA uses most frequently is the "administrative enforcement action." Administrative actions are usually based on information obtained through inspections and/or responses to "information request letters" mailed by EPA to regulated persons. Inspections or information requests can result from citizen "tips" suggesting that a facility has failed to comply with the law. Where EPA believes violations exist, the EPA may develop formal legal "complaints" to address the violations. The complaints allege facts which, if proven, would represent RCRA violations, proposes the assessment of specific penalty amounts, and includes proposed "compliance orders."

It is important to understand that the complaints, proposed penalties, and proposed compliance orders do not, in and of themselves, establish any liabilities. EPA must file each administrative complaint before an independent Administrative Law Judge (ALJ). The party named in the complaint (the "respondent") has the right to contest the complaint by filing an "answer" with the ALJ replying to EPA's allegations. Most administrative actions are settled by the parties. Cases which cannot be settled are adjudicated by the ALJs, who may hold evidentiary hearings, issue decisions, and assess penalties, as described below.

Specific rules have been promulgated to govern, procedurally, how administrative proceedings are conducted. Termed the "Consolidated Rules of Practice," the rules are printed at 40 C.F.R. Part 22. C.F.R. stands for the Code of Federal Regulations. All the regulations governing the administration and implementation of federal laws appear in the C.F.R.. EPA's rules are codified in Volume 40. Most law libraries, and some public libraries, maintain copies of the C.F.R., as do federal bookstores and federal government depositories.

How does this quickly and ultimately protect me?

EPA's official policy is to encourage settlement of an administrative case at any time if settlement is consistent with the provisions and objectives of RCRA. If EPA and the respondent agree to settle, the parties will negotiate a "Consent Agreement and Consent Order." Most settlements provide for the respondent to pay a compromise civil penalty amount and, if it hasn't already done so, come into compliance. The most important goal of any order issued by the EPA under the authority of RCRA is to make certain that a hazardous waste facility is in compliance with the regulations designed to protect the public and environment from the risks associated with hazardous waste. This is accomplished through "injunctive relief." That is, specific actions that the facility is legally ordered to undertake to protect the public.

If the parties are unable to negotiate a settlement, the ALJ assigned to the case will decide the matter. The ALJ can hold a hearing, or determine some or all of the issues based on written arguments submitted by the parties. If a hearing is held, the parties will be required to exchange witness lists and evidence that each side expects to use during the hearing. This "prehearing exchange" helps the hearing to run smoothly and eliminates unfair surprises. The hearing itself is formal and "on the record."

Witnesses may be cross-examined, and a court stenographer will record the entire proceeding. Any member of the public may attend the hearing.

Following the hearing, the ALJ renders his/her findings in an "Initial Decision." Any party may appeal an adverse ALJ ruling or order by filing an appeal with the Environmental Appeals Board (EAB), a three-Judge administrative panel created by the EPA Administrator in 1992. If there is no appeal, the Initial Decision becomes final automatically in 45 days. The EAB's Final Decision becomes the official ruling of the EPA Administrator. However, the respondent has a further right to appeal an adverse EAB final decision to a U.S. District Court of Appeals. Either party may petition the U.S. Supreme Court, as the final arbiter of law, to review an adverse Court of Appeals ruling. Such review is granted only rarely.

How does EPA determine the penalty amount?

When EPA issues an administrative complaint under RCRA, it is required by the consolidated Rule of Practice to propose a specific penalty amount. This amount is calculated by using the Agency's RCRA Civil Penalty Policy and any other applicable Agency-wide policies. EPA's proposed penalty for each case is based on the case-specific facts known to EPA on the filing date. As the filing date is still early in the development of a case, the facts known to EPA may not be complete and the Agency may draw reasonable inferences to fill-in any factual gaps.

The RCRA statute requires that penalties assessed in RCRA cases be substantial enough to promote compliance with the law. EPA has interpreted this requirement to mean that the penalties must recoup any "economic benefits of noncompliance" the violator gained from its illegal activities, plus an additional "gravity-based" amount to deter future noncompliance. At the same time, the proposed penalties must be fair and reflect the unique circumstances of each case.

To achieve these goals, EPA developed the 1990 RCRA Civil Penalty Policy. This policy, which is publicly available, guides EPA staff in calculating proposed penalties in complaints, and settlement penalties in the final consent agreement and consent order. In legal terms, the policy provides a framework for interpreting Section 3008(a) of RCRA. Section 3008(a) provides simply that RCRA penalties must reflect "the seriousness of the violation" and "any good faith efforts to comply" with the law. It authorizes penalties of up to \$27,500 per day for each RCRA violation. The penalty policy picks up where the statute leaves off by putting "meat" on RCRA's "bare bones." The ALJs, being independent adjudicators, are not required to follow the policy, but they must consider it and explain any deviations from it in their decisions.

Step 1: Determining the extent of the harm caused by the violation

This component is intended to address the seriousness of the violation. In determining the "gravity," EPA determines each violation's "potential for harm," and the extent to which the respondent deviated from the applicable legal requirements. A violation's "potential for harm" is a function both of the potential risk it poses to human health or the environment, and its impact on the integrity of the RCRA program. The "extent of deviation" is a measure of the degree of noncompliance. As one might expect, when compared with one another, not all violations are equal. The policy recognizes this, and so, a violation where a facility has totally disregarded a requirement presents a "major" extent of deviation; where a violator complies with most but not all of a regulation, the extent of deviation may be "minor." This influences the amount of the penalty. In addition, RCRA authorizes separate penalties for each distinct violation. Where multiple violations are alleged in a complaint, EPA will engage in a similar penalty calculation exercise for each. In practice, however, EPA may "compress" similar violations into one count for penalty purposes where the violations all resulted from a single mistake.

Step 2: Determining the number of days the violation continued

Penalties may be assessed for each day a violation of the same requirement continued over time. In most cases, EPA "caps" the number of days at 179. EPA believes that 180 days of penalties are adequate in many cases to deter future violations, but reserves the right to seek multi day penalties for subsequent days of violation, as well.

Step 3: Review possible reasons to adjust the penalty

The policy establishes several adjustment factors to be considered when proposing penalties and settling cases. These factors are based not only on legal considerations, but also on common sense and fairness. They may result in a penalty being increased or decreased. Any factors that justice might require may be considered by EPA. Those factors most commonly considered include:

- o Whether the facility made good faith efforts to comply with the applicable regulatory requirements, but for some reason could not. And, whether they lacked such good faith.
- o Whether the facility wilfully or negligently disregarded its regulatory obligations.
- o Whether the facility has a history of not complying with applicable environmental requirements.
- o Whether the environmental harm will be made worse if the facility pays a penalty amount that will probably put it out of business and render it unable to afford its environmental obligations, such as, cleaning up spilled hazardous waste.
- o Whether the facility has demonstrated a cooperative attitude in working with EPA to resolve the violations.

Step 4: Make certain that the penalty maintains a "level playing field"

The penalty policy requires that any significant economic benefits gained by the facility through not complying with the regulations be recouped as part of the penalty. The fundamental premise here is that if violators are permitted to profit through their violations, there is little incentive to comply. Also, as discussed previously, allowing violators to benefit from noncompliance places good citizens who comply with the law at an unfair competitive disadvantage. The penalty policy is sufficiently flexible, however, for the Agency to settle occasional cases for below the economic benefit of noncompliance figure, e.g., where the violator has demonstrated a clear inability to pay the full proposed penalty. The EPA performs a detailed financial analysis of all claims of this sort.

Why does the penalty amount fluctuate from the time the EPA first declares the amount and final settlement?

Facilities that EPA takes enforcement action against often provide the Agency with information during litigation, or in settlement negotiations, that was not available to the government prior to filing the complaints. This information may lead the EPA to raise or lower the penalty. The percentage of any given adjustment depends on the significance of the new information. For example, a facility may demonstrate to EPA's satisfaction that one or more alleged violations really didn't occur, or presented a lower potential for harm than at first predicted. Additionally, if the facility can show that it made good faith efforts to comply with RCRA, further reductions may be warranted. A facility may also argue that it cannot afford to pay the full penalty amount. In such cases, the penalty policy permits the Agency to reduce or even eliminate the penalty to avoid putting the violator out of business. Finally, even if EPA is unconvinced of the merits of a defense, the Agency may offer to reduce settlement penalties to reflect legitimate litigation risks which suggest it would be contrary to the public interest to hold a hearing.

Are there any other EPA policies that I should know about?

The EPA recognizes that if there is a choice between bringing facilities into compliance quickly, thereby lowering the risk of harm to your community, and collecting a penalty, we will opt for quick compliance. Several new policies have recently been established to do just that. Understandably, then, these new EPA policies may influence proposed or final RCRA penalties. The most important of them are:

Voluntary Environmental Self-Policing and Self-Disclosure Policy: This policy is designed to encourage companies to voluntarily discover, disclose, and correct their violations. Under certain conditions, it allows EPA to waive up to the entire "gravity" component of a penalty (that is, all of the penalty except for the money the violator saved by avoiding its legal responsibilities).

Small Business Policy: This policy provides incentives for small businesses, defined as a company employing 100 or fewer individuals, to participate in government-sponsored compliance assistance programs. Companies which participate in such programs may be eligible to have penalties reduced or waived.

Small Community Compliance Assistance Policy: The Policy Supporting Flexible State Enforcement Responses to Violations Addressed By State Small Community Environmental Compliance Assistance Programs (SCECAP) expresses EPA's support for States' use of enforcement flexibility to provide compliance incentives for small communities. Specifically, EPA encourages States to develop formal SCECAPs for the purpose of assessing and improving the environmental compliance of small communities. EPA will exercise its discretion and refrain from initiating enforcement actions seeking civil penalties against communities participating in formal State SCECAPs.

Supplemental Environmental Projects Policy: Under this policy, EPA may reduce a settlement penalty in return for a violator's agreement to undertake a Supplemental Environmental Project (SEP) as part of its overall settlement of the case. SEPs, by definition, are projects that go beyond what is required by the law to protect, improve, and enhance the people or ecosystems put at risk by the violations. Some SEPs even result in the permanent elimination of the underlying pollution source.

CONCLUSION

The information presented in this pamphlet summarizes the administrative enforcement process, including how RCRA penalties are determined by the Agency. It creates no rights in and of itself. For more information on administrative practice and procedure, see 40 C.F.R. Part 22. Persons interested in learning more about the RCRA Civil Penalty Policy or the other EPA policies discussed in this pamphlet may write to your local EPA Regional Office or call the RCRA Hotline toll free on (800) 424-9326 or, in the Washington, D.C. area, (703) 412-9810. The Hotline hours of operation are Monday through Friday from 9:00 a.m. to 6:00 p.m. EST, closed for Federal holidays.

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