



**Background paper for the
"Seminar on Strengthening the Enforcement and
Administration of Environmental law in North America."
PANEL 2.- Procedural and Evidentiary Challenges for Effective
Environmental Law Enforcement. (F) Penalties.
Author: Thomas Swegle, U.S. Department of Justice.**

Most environmental statutes requiring compliance with environmental standards or requiring or prohibiting certain types of actions also include provisions allowing for regulatory agencies or the courts to impose sanctions for violations of these requirements. In the United States, many environmental statutes, such as the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act (imposing requirements for treatment, storage, and disposal of solid and hazardous wastes), allow either the Environmental Protection Agency (EPA) to impose administrative monetary penalties, or the courts to impose civil or criminal penalties. Courts may also require injunctive relief, so that defendant complies with the statute and addresses the impact of its violations.

This paper, and the panel discussion at the judicial symposium, will focus on the factors that courts and administrative agencies such as EPA consider in imposing monetary penalties. It will also address alternatives to penalties, such as requirements that violators perform supplemental environmental projects, that may be included in settlements of civil enforcement actions.

Statutory Factors for Determining Monetary Penalties for Violations of U.S. Environmental Statutes

In the United States, a number of the environmental statutes allow EPA (in an administrative enforcement action) or the courts (in judicial enforcement actions) to impose civil penalties up to a certain amount for each day of each violation. For example, the Clean Air Act allows EPA or the courts to impose civil penalties of up to \$32,500.00 for each day of violation of the Act. 42 U.S.C. § 7413(b) and (d). The Clean Water Act allows the United States to bring a civil action on behalf of EPA for violations of the Act and to seek penalties of up to \$32,500 per day. 33 U.S.C. § 1319(b) and (d).

These statutes also specify the factors that EPA or the court should consider in imposing a civil penalty. The Clean Air Act provides:

In determining the amount of any penalty to be assessed under this section . . . the Administrator [of EPA] or the court, as appropriate, shall take into consideration (in addition to such factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violators of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.



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42 U.S.C. §7413(e)(1). The Clean Water Act specifies similar factors for courts to consider in imposing a civil penalty for violations of water pollution laws. 33 U.S.C. §1321(b)(8).

The Clean Air Act also includes a provision that assists the enforcement agency in establishing that air pollution violations are often continuing in nature and that penalties should be imposed on a daily basis until a defendant proves that it has brought itself into compliance. The Act states:

[W]here [EPA or a local air pollution control agency] has notified the source of the violation, and the plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

42 U.S.C. § 7413(e)(2).

EPA Guidance Documents for Calculating Penalty Amounts to Include in Enforcement Settlements

EPA has prepared guidance documents for use in administrative and civil judicial enforcement actions under several environmental statutes to provide assistance in determining the appropriate penalties that should be imposed on defendants for violations of those environmental statutes. While these guidance documents are not binding, EPA and DOJ make use of these guidance documents to calculate an appropriate penalty to be recovered in settlement of an administrative or judicial enforcement action. These guidance documents are also publicly available on EPA's website at <http://cfpub.epa.gov/compliance/resources/policies/civil/penalty/>. These guidance documents are not binding on the courts that preside over judicial enforcement actions; in judicial cases, the use of guidance documents is limited to pre-trial settlement of enforcement actions. However, the guidance documents do elaborate on the factors set forth in the statute for determining the appropriate civil penalty to be imposed, so they assist the government in framing arguments for imposition of a particular civil penalty amount.




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Factors in Determining an appropriate penalty

1. Capturing Economic Benefit of Noncompliance. EPA's general civil penalty guidance document states that the first goal of penalty assessment is to deter people from violating the law. "[T]he penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence)." Furthermore, "[i]f a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied [with the law] in a timely fashion." EPA's penalty policy explains that deterrence will not be achieved if the violator of environmental laws achieves an overall advantage from noncompliance. Thus, EPA's general penalty guidance states that, at a minimum, the penalty should remove any significant economic benefits resulting from failure to comply with the law.

EPA's specific penalty policies for violations of particular environmental statutes provide detailed information on factors to consider in determining the economic benefit of noncompliance and how to calculate the monetary benefit that the violator achieved because of its noncompliance. For example, the Clean Air Act penalty policy describes various benefits that violators achieve through delayed costs and avoided costs resulting from a violation. Delayed costs might include a company's failure to install equipment to meet emission control standards; failure to effect process changes needed to reduce pollution; failure to perform required tests; or failure to install required monitoring equipment. Avoided costs might result from disconnecting or failing to properly operate and maintain existing pollution control equipment; failure to employ a sufficient number of trained staff; removal of pollution control equipment resulting in process, operational, or maintenance savings; or failure to establish or follow precautionary methods required by regulations or permits. EPA has created a computer model (known as the BEN Model) that allows EPA to calculate the economic benefit of noncompliance based on a detailed economic analysis of such delayed and avoided costs.

2. Gravity Component of Penalty. Besides capturing the economic benefit of noncompliance, the general penalty policy provides that the penalty should also include an additional amount that reflects the seriousness of the violation to ensure that the violator is worse off than had it obeyed the law. Inclusion of a penalty component to reflect the seriousness or "gravity" of the violation is consistent with the statutory penalty criteria in the Clean Air and Clean Water Acts and other environmental statutes. EPA guidance documents for calculating a penalty for violations of specific statutes provide detailed information on analyzing the gravity component of various types of violations. For example, the Clean Air Act guidance considers such factors as actual or possible harm, importance of the requirement violated to the regulatory scheme, size of violator, amount and toxicity of the pollutant emitted, sensitivity of the environment where the

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violation occurred, and the length of time the violation occurred. The penalty guidance documents specify monetary amounts that should be included for each of these factors.

2. Additional Factors to Ensure Penalty is Fair and Equitable. Besides recovering economic benefit and including a gravity component in a penalty, EPA's general penalty guidance states that another goal of penalty assessment should be the fair and equitable treatment of the regulated community. While penalties should display consistency, the penalty policy must have enough flexibility to make adjustments to reflect legitimate differences between similar violations. Therefore, EPA's penalty guidance calls for increasing or mitigating the preliminary deterrence amount based on such factors as:

- Degree of willfulness and/or negligence by the violator
- History of noncompliance
- Ability to pay
- Degree of cooperation or noncooperation
- Other unique factors specific to the case.

Supplemental Environmental Projects

EPA mandates that settlements of enforcement actions require violators to achieve and maintain compliance with environmental laws and to pay a civil penalty. However, to further EPA's goals to protect and enhance public health and the environment, in certain instances environmentally beneficial projects, or supplemental environmental projects (SEPs), may be included as part of a settlement. Where defendants agree to perform a SEP as part of a settlement, penalty amounts may be mitigated to some extent. While penalties play an important role in deterring violations and leveling the playing field, SEPs can play an additional role in securing significant environmental or public health protection or improvements.

EPA has issued a guidance document that sets forth the types of projects that are permissible as SEPs, as well as the amount of penalty mitigation appropriate for different types of SEPs. EPA's SEP guidance provides that in order to include a SEP in a settlement, it cannot be inconsistent with the underlying statute, it must advance an objective of the statute, and there must be an adequate "nexus" between the violation and the proposed project. Nexus exists if the project is designed to reduce the likelihood that similar violations will occur in the future, if the project reduces the adverse impact to public health or the environment to which the violation at issue contributes, or if the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.



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EPA's SEP guidance describes several categories of projects that might qualify as a SEP. Examples include projects to prevent or reduce pollution from other sources in the environment affected by the violation, projects to provide diagnostic, preventative or remedial assistance to human health which are related to the actual or potential damage to human health caused by the violation, environmental restoration in the affected area, or performance of assessments or audits of a violator's facilities that are not required by the statute.