



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY


WASHINGTON, D.C. 20460

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OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

SUBJECT: Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies

FROM: Granta Y. Nakayama   
Assistant Administrator

TO: Regional Federal Facility Senior Managers  
Regional Counsels

Based upon the decisions of the EPA Chief Administrative Law Judge (“Chief ALJ”) and the EPA Environmental Appeals Board (“EAB”) in the case involving the United States Department of the Army Alaska Garrison-Fort Wainwright (“U.S. Army Alaska Garrison-Fort Wainwright”), the Office of Enforcement and Compliance Assurance (“OECA”) is reaffirming the existing *Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies* issued on September 30, 1999.

Generally, EPA calculates the economic benefit of noncompliance using the Agency’s “BEN” computer model. For most Federal facility cases, the proper evaluation of economic benefit will involve an application of the BEN Model. Unusual case-specific facts may militate against an application of the BEN Model, especially if the benefit arose from enhancing revenues instead of lowering costs. Before any alternative approaches are attempted or an economic benefit amount is determined in any Federal facility case, however, EPA enforcement personnel must first consult with the OECA Federal Facilities Enforcement Office (Bernadette Rappold, 202/564-4387). Enforcement personnel should also contact the financial issues helpline at 888/326-6778.<sup>1</sup>

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<sup>1</sup> This helpline is staffed by Industrial Economics, Incorporated and is available from 8:30 AM to 6:00 PM Eastern time.

## **Background**

The U.S. Army Alaska Garrison-Fort Wainwright case involved questions of law regarding the applicability of statutory penalty criteria to Federal agencies; specifically whether Federal agency civil penalties should recapture the economic benefit of noncompliance (which the Agency's "BEN" computer model calculates). The Chief ALJ ruled that the penalty assessment criteria of the Clean Air Act ("CAA"), which include the economic benefit of noncompliance, can be applied to a Federal facility such as U.S. Army Alaska Garrison-Fort Wainwright. The EAB upheld the Chief ALJ's determination that as a matter of law the "economic benefit of noncompliance" penalty criterion of CAA Section 113(e)(1), 42 U.S.C. § 7413(e)(1), may be considered in determining an appropriate penalty against a Federal facility.<sup>2</sup> The EAB also upheld the Chief ALJ's conclusion that fiscal law precludes U.S. Army Alaska Garrison-Fort Wainwright from both borrowing funds and earning income on investments.

One of the primary goals of recapturing economic benefit is the removal of cost savings associated with delayed or avoided pollution control expenditures. For this reason, the minimum penalty is the amount of economic benefit *plus* a non-trivial gravity component. EPA's BEN computer model provides a realistic calculation of the economic savings that a federal facility generates when it delays and/or avoids compliance expenditures. The BEN model's primary purpose is for settlement calculations; any benefit calculation (derived via BEN or other computational means) should be considered in light of the applicable civil penalty calculation components.

Generally, Federal agencies are subject to unique Federal fiscal laws which preclude them from investing appropriated funds or borrowing additional funds.<sup>3</sup> While this may be true, facilities usually create an economic benefit by delaying and/or avoiding pollution control expenditures. Economic benefit to a Federal agency may include budgetary flexibility, the actual avoided and/or delayed compliance costs adjusted for inflation, and benefits received via enhancing outside revenues from providing services to the private sector.<sup>4</sup>

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<sup>2</sup> Before the Environmental Appeals Board United States Environmental Protection Agency, *In re: U.S. Army, Fort Wainwright Central Heating and Power Plant*, Remand Order on Interlocutory Appeal (June 5, 2003, pg. 1)(hereinafter "EAB Decision").

<sup>3</sup> "Briefly, applicable fiscal law prohibits Federal agencies from spending funds without appropriation of money from Congress, and it restricts the authority of a military department to undertake a major military construction project that costs more than \$1.5 million without specific authorization from Congress." EAB Decision, 13.

<sup>4</sup> See ALJ discussion on budgetary flexibility, "...even if compliance costs are merely deferred, a Federal entity, funded through appropriations, may realize an economic benefit, namely budgetary flexibility to spend on other projects of its choice the amount that timely

Penalties are critical to level the playing field among all regulated entities, including Federal agencies, and to convince them that it is in their best interest to pay the cost of compliance on time rather than delay compliance and then pay the cost of compliance plus the cost of the penalty. For the regulated community to understand this, including Federal agencies, it must cost more in real dollars to delay compliance *than to comply on time*. Including the calculation of economic benefit in the penalty calculation is critical to achieving deterrence. For the part of the benefit calculation that involves measuring the present value of past costs or revenues, the Federal government's cost of funds is the relevant rate.

cc: Regional Federal Facilities Program Managers  
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Regional Enforcement Directors and Coordinators

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compliance would have cost. By avoiding the costs during that time period, the facility avoids the displacement of other O&M ["operation and maintenance"] activities during that time period, and avoids the costs of operating and maintaining the facility or equipment that would be required for compliance during that period." *In the Matter of: U.S. Army, Fort Wainwright Central Heating & Power Plant*, Accelerated Decision as to the Application of Economic Benefit of Noncompliance and Size of Business Penalty Factors, Before the Administrator (April 30, 2002, pg. 19).