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Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy

ENVIRONMENTAL PROTECTION AGENCY

[FRL 1601-6]

Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy

AGENCY: Office of Enforcement, Environmental Protection Agency (EPA or the Agency).

ACTION: Notice of a policy for implementation of the Toxic Substances Control Act, with respect to the assessment of civil penalties under Section 16; interim guidance for the determination of penalties for violations of the PCB regulations.

SUMMARY: Section 16 of the Toxic Substances Control Act (TSCA or the Act) authorizes the Administrator of EPA to assess civil penalties for violations of the Act. On March 10, 1980, Jeffrey G. Miller, Acting Assistant Administrator for Enforcement, transmitted to the EPA Regional Administrators a document which implements an administrative civil penalty policy for TSCA. This document sets forth a general penalty assessment policy which will be supplemented by regulation-specific penalty assessment guidance. Together, these documents provide internal procedural guidelines to aid EPA personnel to assess appropriate penalties. They are not regulations. The penalty assessment policy establishes standardized definitions and applications of the statutory factors that the Act requires the Administrator to consider in assessing a penalty. It also provides a mechanism whereby Agency personnel may, within specified boundaries, exercise discretion in negotiating consent agreements, and otherwise adapt the proposed penalty to the exigencies of special circumstances.

Separate guidances will apply the penalty system to specific regulatory and statutory provisions. These guidances will be developed on a continuing as-needed basis.

On April 24, 1980, Richard D. Wilson, deputy Assistant Administrator for General Enforcement, transmitted to the EPA Regional Administrators the first of the regulation specific penalty policies. This document consisted of interim guidance for the determination of penalties for violations of the PCB regulations.

The TSCA civil penalty policy and the PCB penalty policy were effective on March 10, 1980 and April 24, 1980, respectively, the dates these policies were issued to the Regional Offices. Although the Agency is not required to publish these documents, EPA is doing so in order to give them the wide circulation that publication will provide.

The full text of the TSCA civil penalty policy, and the PCB penalty policy, with the appropriate transmittal memoranda, appear below in the "Supplementary Information" section.

FOR FURTHER INFORMATION CONTACT: Peter J. Niemiec, Attorney-Advisor, Pesticides and Toxic Substances Enforcement Division (EN-342), 401 M St., SW., Washington, D.C. 20460, (202) 755-9404.

SUPPLEMENTARY INFORMATION: The documents appearing below were transmitted to the EPA Regional Administrators on March 10, 1980, and April 24, 1980, respectively. The "Technical Support Document" referred to in the TSCA civil penalty document has not been reproduced, but is available upon request from the EPA address above.

Dated: July 7, 1980.

Jeffrey G. Miller,

Acting Assistant Administrator for Enforcement.

TSCA Civil Penalty System

Introduction

The Toxic Substances Control Act (TSCA), passed by Congress and signed into law in 1976, provides for increased regulation of chemical substances and mixtures. The Environmental Protection Agency is charged with carrying out and enforcing the requirements of the Act and any rules promulgated under the Act.

Section 16 of the Act provides for civil and criminal penalities for violations of TSCA or TSCA rules. Civil penalty amounts may range up to $25,000 per violation, with each day that a violation continues constituting a separate violation. Civil penalties are to be administratively imposed, after the person is given a written notice and the opportunity to request a hearing. There is a right to review in the United States Courts of Appeals after the penalty has been imposed by the Administrator.

Section 16 of TSCA requires that a number of factors be considered in assessing a civil penalty, as follows:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, and history of prior such violations, the degree of culpability, and such other matters as justice may require.

The purpose of the general penalty system is to assure that TSCA civil penalties be assessed in a fair, uniform and consistent manner; that the penalties are appropriate for the violation committed; that economic incentives for violating TSCA are eliminated; and that persons will be deterred from committing TSCA violations.

Scope of the Civil Penalty System

The penalty system described in this document provides the general framework for civil penalty assessment under TSCA. It establishes standardized definitions and applications of factors the Act requires the Administrator to consider in assessing a penalty. As regulations are developed, specific penalty guidelines will be developed adopting in detail the application of the general penalty system to the new regulation. These specific guidelines will generally be issued when enforcement strategies are issued for each new regulation.

Note.—This document does not discuss whether assessment of a civil penalty is the correct enforcement response to a given violative condition. Rather, this document focuses on determining what the proper civil penalty should be if a decision has been made that a civil penalty is the proper enforcement remedy to pursue.

Brief Description of the System

The general civil penalty system is designed to assign penalties for TSCA violations in accordance with the statutory requirements of Section 16. Penalties are determined in two stages: (1) Determination of a "gravity based penalty" (GBP), and (2) adjustments to the gravity based penalty.

To determine the gravity based penalty, the following factors affecting a violation's gravity are considered:

- The "nature" of the violation,
- The "extent" of environmental harm that could result from a given violation, and
- The "circumstances" of the violation.

These factors are incorporated on a matrix which allows determination of the appropriate gravity based penalty.

Once the gravity based penalty has been determined, upward or downward adjustments to the penalty amount are made in consideration of these other factors:

- Culpability,
- History of such violations,
- Ability to pay,
- Ability to continue in business, and
- Such other matters as justice may require.

Civil Penalty System and Its Application

This section describes in detail the

general civil penalty system, how specific penalty guidances will be developed and applied, and the reasoning behind the development of the system.

Penalty Factors

The Act requires the consideration of eight named factors in any penalty assessment, as well as "other factors as justice may require."

The first four factors—nature, circumstances, extent, and gravity—relate to the violation. Under the penalty system these four factors are charted on a matrix which yields the Gravity Based Penalty (GBP). This matrix is a *constant* throughout the penalty system. As will be seen below, however, the specific penalty guidelines will affect into which category along each axis of the matrix the violation will fall.

Once a GBP figure is reached, several adjustment factors are applied:

- An upward or downward adjustment may be made for particularly culpable or non-culpable conduct. An upward adjustment of up to 100% may be made where there is a history of such a violation.
- Two other adjustments (not specifically required by the Act, but authorized under the "as justice may require" language of § 16) are to recover cleanup costs paid by the United States, and to reduce or eliminate any financial or competitive advantage gained by the violator as a result of his failure to follow the Act, or its regulations. Other case-by-case adjustments may also be warranted under the "as justice may require" language.
- The final statutory adjustment factors are the violator's ability to pay and the effect on the violator's ability to continue to do business. For several reasons we have combined the concepts involved in these factors onto one "ability to pay" factor. This factor will often act as a limit on the amount of penalty assessed, even where other factors indicate a higher penalty is warranted.

Calculation of the Gravity Based Penalty

The gravity based penalty (GBP) is found on the following matrix:

Circumstances (probability of damages)	Extent of potential damage		
	A major	B significant	C minor
High range:			
1	$25,000	$17,000	$5,000
2	20,000	13,000	3,000
Mid range:			
3	15,000	10,000	1,500
4	10,000	6,000	1,000
Low range:			
5	5,000	3,000	500
6	2,000	1,300	200

NOTE.—Significant violations are assessed at 60–68% of major violations, while minor violations are assessed at 20% and 15% of major violations for levels 1 and 2, and 10% for levels 3–6.

The GBP incorporates nature, extent, circumstances, and gravity as follows:

1. *Nature.* The "nature" factor, as all factors in the penalty system, is used in accordance with its commonly understood meaning: "The essential character of a thing; quality or qualities that make something what it is; essence" (Webster's New World Dictionary).

In the context of penalty assessment, this factor indicates which specific penalty guideline should be used to determine appropriate matrix levels of "extent" and "circumstances" (of environmental harm surrounding the violation). Thus, the nature (essential character) of a violation is best defined by the set of requirements violated, such as the PCB rule, or the premanufacture notification requirement. Since each TXCA section, rule, or other appropriate group of requirements will have a separate specific penalty guideline that will include criteria for assigning violations to the several levels of "extent" of potential harm, and probability of harm, the specific tailoring of these operational criteria for each section or rule ensures that penalties assessed will reflect the nature of the violation.

Also incorporated in the concept of "nature" is whether the violation is of a *chemical control, control-associated data gathering,* or *hazard assessment* nature:

Chemical control: Chemical control regulations are aimed at minimizing the risk presented by a chemical substance, by placing constraints on how it is handled. Sections 6, 7, 12, 13 and subsections 5(e), and 5(f) authorize a wide variety of chemical control actions, from labeling requirements to total bans on manufacture. These requirements are variously imposed by rulemaking, administrative order, court injunction, or by the Act itself.

Control-associated data gathering: Control-associated data gathering requirements are the recordkeeping and/or reporting requirements associated with a chemical control regulation. These requirements enable the Agency to evaluate the effectiveness of the regulation, and to monitor compliance.

Hazard assessment: Hazard assessment requirements are used to develop and gather the information necessary to intelligently weigh and assess the risks and benefits presented by particular chemical substances, and to impose chemical control requirements when appropriate. The requirments include those of premanufacture notification under § 5, testing under § 4, and reporting and recordkeeping under § 8.

As discussed in the next two sections, the "nature" of the violation will have a direct effect on the measure used to determine which "extent" and "circumstances" categories are selected on the GBP matrix.

2. *Extent.* "Extent" is used to take into consideration the degree, range, or scope of the violation. The matrix provides three levels for measuring extent:

Level A (Major):
—Potential for "serious" damage to human health or for *major* damage to the environment.

Level B (Significant):
—Potential for *"significant"* amount of damage to human health or the environment.

Level C (Minor):
—Potential for a lesser amount of damage to human health or the environment.

A number of factors affect into which level of "extent" a particular violation fits. The specific application of these factors depends in large degree on the specific penalty system's treatment of a particular violation. For example, the specific penalty system will not only provide guidance for PCBs in general, but also for the type of PCB violation.

Chemical control: For a chemical control violation (e.g., rules for storage

and disposal of PCBs), the *quantity* of the regulated substance involved might be the principal basis for categorizing extent. In other words, a violation involving under 10 pounds of a given substance might be Level C, 10 to 100 pounds Level B, and over 100 pounds Level A.[1] In the development of specific guidelines, environmental impact data and other analyses developed in support of the chemical control rule making will generally be the basis for determining "extent" levels.

Control-associated data-gathering: For control-associated data gathering regulations, the quantity of regulated substance involved in the recordkeeping will be used as the indicator of the extent of the violation. For example, not reporting the whereabouts of 1,000 pounds of PCBs is more serious than not reporting one pound. In general, the quantity measures used to define the "extent" of such a violation will be the same as those used to define the "extent" categories of the control violation with which it is associated. As with chemical control rules, factors other than quantity may be used when appropriate to indicate the "extent" of potential damage.

Hazard assessment: Hazard assessment data-gathering regulations require a different approach to make an "extent" determination. Unlike chemical control and control-associated data-gathering regulations, the degree of danger or "hazard" presented by the substance in question may not be known. Indeed, this lack of knowledge is the principle reason for the data-gathering. The measure of "extent" of harm will focus on the goals of the given hazard assessment regulation, and the types of harm it is designed to prevent. For example, a § 4 test violation will be of Level A extent *if* it "seriously" affects the validity of a test on a substance which is manufactured in large quantities, with lesser violations treated accordingly, whereas manufacturing a chemical without submitting a premanufacture notification form 90 days in advance, could either be treated as (1) always being of Level A or, (2) varying in level of "extent" according to the volume illegally manufactured. Thus, a great number of judgments must be made in the formulation of the specific penalty policy.

3. *Circumstances.* "Circumstances" is used in the penalty policy to reflect on the probability of the assigned level of "extent" of harm actually occurring. In other words, a variety of facts surrounding the violations as it occurred are examined to determine whether the circumstances of the violation are such that there is a *high, medium,* or *low* probability that damage will occur. The matrix provides the following levels for measuring circumstances (probability factors):

Levels 1 and 2 (High): The violation is *likely* to cause damage.

Levels 3 and 4 (Medium): There is a *significant* chance that damage will result from the violation.

Levels 5 and 6 (Low): There is a *small likelihood* that damage will result from the violation.

The probability of harm, as assessed in evaluating circumstances, will always be based on the risk inherent in the violation *as it was committed.* In other words, a violation which presented a high probability of causing harm when it was committed (and/or was allowed to exist) must be classified as a "high probability" violation and *penalized* as such, even if through some fortuity no actual harm resulted in that particular case. Otherwise some who commit dangerous violations would be absolved. Similarly, when harm has actually resulted from a violation, the "circumstances" of the violation should be investigated to calculate what the probabilities were for harm occurring at the time of the violation. The theory is that violators should be penalized for the violative conduct, and the "good" or "bad" luck of whether or not the proscribed conduct *actually* caused harm should *not* be an overriding factor in penalty assessment. However, the responsibility for clean-up attaches without regard to the probability of harm (see Adjustment Factor 3, Government Clean-up Costs). As with "extent," the specific penalty guidelines are an essential tool in characterizing the circumstances of a violation.

Chemical control: With chemical control violations, probability is determined primarily by physical factors which affect the chance of improper exposure to the chemical's effects. For example, certain types of improper storage of PCBs are more likely than others to result in release of PCBs into the environment, and actual dumping of PCBs is virtually certain to do some harm. Criteria for assessing the probability of harm resulting from a violation will whenever possible be based on information developed in support of the chemical control rule.

Data-gathering and hazard assessment: A slightly different approach is taken to evaluate circumstances of data-gathering violations. The effect on the Agency's ability to implement of enforce the Act is the principal circumstance to be considered. Thus, the matrix levels for measuring circumstances (probability) for data-gathering and hazard assessment violations are as follows:

Levels 1 and 2 (High)—Violations which seriously impair the Agency's ability to monitor (data-gathering) or evaluate chemicals (hazard assessment).

Levels 3 and 4 (Medium)—Violations which impair the Agency's ability to monitor or evaluate chemicals in a less than critical way.

Levels 5 and 6 (Low)—Violations that impair the Agency's ability to monitor or evaluate chemicals in a less than important way.

Under these criteria, a violation of a Section 4 test standard (serious enough to make a study totally unreliable) has a higher probability of resulting in harm to the public through its effect on the Agency and would probably be Level 1 or 2, while late submission of a required report might be only a Level 5 or 6 violation.

Whenever possible, the specific penalty system will attempt to classify certain types of violations according to probability of damage. For example, certain types of violations of a disposal rule might always involve a high probability of damage. But other types of violations might involve such a large range of probability of harm that each case would have to be evaluated individually. In the latter case, the specific penalty guideline will include criteria to guide the evaluation of each violation. It is difficult to estimate the probability of harm presented by given situation, particularly in light of the many variables that make up "circumstances." However, "circumstances" can be evaluated for guideline purposes by comparing situations. For example, it is clear that, as a general rule, there is a greater probability of a falsified laboratory test leading to *actual damage,* than to have such damage resulting from minor errors in test report formatting.

The specific guidelines will also address the range of probabilities within each of the six "circumstances" classifications. For some violations, any probability of causing harm of over 10% might be in the "high" range, while other violations might be classified quite differently. One particular factor that may affect probability determinations is the length of time during which the violation presents a threat to health or the environment. Dumping PCBs in an unapproved landfill may not cause harm immediately but may inevitably cause harm as it leaches into nearby

[1] Other criteria, such as number of people exposed or potentially exposed, could have been utilized here, but (1) those factors are difficult and expensive to quantify for individual violations, and (2) these factors are already considered, to some extent, under "circumstances."

groundwater. But where only temporary improper *storage* is intended, and
val is planned, the probability of
would be decreased accordingly.

Gravity. "Gravity" refers to the overall seriousness of the violation. As used in this penalty system, "gravity" is a dependent variable, i.e., the evaluation of "nature," "extent," and "circumstances" will yield a dollar figure on the matrix that determines the gravity based penalty.

The Adjustment Factors

The gravity based penalty reflects the seriousness of the violation's threat to health and environment. The Act also requires the Agency to consider certain factors in assessing the violator's conduct: Culpability, history of such violations, ability to pay, and ability to continue in business. In addition, the Act authorizes the Agency some discretion to consider "other factors as justice may require." Under this last authorization, two additional factors are considered and balanced: the cost of the violation to the government, and the benefits received by the violator due to his non-compliance. In order to compute penalty adjustments in a logical fashion, these adjustment factors are considered
e following sequence:
) Culpability;
(2) History;
(3) Cost to the government;
(4) Benefits from non-compliance; and
(5) Ability to pay/ability to continue in business.

1. *Culpability.* Since the law only requires the Agency to consider the culpability of the violator as an adjustment factor, the existence of a violation can be established without relying solely on this "blameworthiness" factor. In other words, the Agency may pursue a policy of strict liability in penalizing for a violation, though some allowance must be made based on the extent of the violator's culpability.[2] Under this penalty system, the gravity based penalty may be increased or decreased, or may remain the same depending on the violator's "culpability."

The two principal criteria for assessing culpability are (a) the violator's *knowledge* of the particular TSCA requirement, and (b) the degree of the violator's *control* over the violative condition.

(a) *The violator's knowledge:* The lack of knowledge of a particular requirement would not necessarily reduce culpability, since the Agency has no intention of encouraging ignorance of TSCA and its requirements. The test under TSCA will be whether the violator knew or should have known of the relevant TSCA requirement *or* of the general hazardousness of his actions. This latter point will allow the Agency to find a violator fully culpable even if he has no knowledge of a particular regulatory requirement when he does have knowledge that the particular substance he was dealing with was hazardous. For example, lack of knowledge of the PCB rules would not reduce culpability if the violator had knowledge that the dumping of PCBs creates a serious threat to human health. Thus, a reduction in the penalty based on lack of knowledge could only occur where a reasonably prudent and responsible person in the violator's position would not have known that the conduct was hazardous or violative of TSCA. It is anticipated that such situations and attendant reductions will be rare.

(b) *Degree of control over the violation:* There may be situations where the violator may be less than fully responsible for the violation's occurrence. For example, another company may have had some role in creating the violative conditions and thus must also share in the legal responsibility for the resulting consequences. Or an employee whose conduct caused the violation may have been disobeying his employer's instructions. Such situations would probably warrant some reduction in the penalties.

(c) *Initial culpability determination:* For penalty assessment purposes, three levels of culpability have been assigned, as follows:

Level I: The violation is willful, i.e., the violator intentionally committed an act which he knew would be a violation or would be hazardous to human health or the environment.
—Adjust the GBP *Upward* 25%.
Level II: The violator either had sufficient knowledge to recognize the hazard created by his conduct, or significant control over the situation to avoid committing the violation.
—No adjustment to the GBP.
Level III: The violator lacked sufficient knowledge of the potential hazard created by his conduct, and also lacked control over the situation to prevent occurrence of the violation.
Adjust the GBP *downward* 25%.

It is anticipated that most cases will present Level II culpability. Level I situations, in many instances, could be treated as criminal violations (and often will be so treated). However, the decision to file a criminal action has no effect on civil penalty calculations and is a totally separate issue.

(d) *Attitude of the violator:* In assessing the violator's "attitude," the Agency will look at the following factors: Whether the violator is making "good faith" efforts to comply with the appropriate regulations; the promptness of the violator's corrective actions; and any assistance given to EPA to minimize any harm to the environment caused by the violation.

Since "attitude" is already reflected in Level I culpability, and since it is largely irrelevant to Level III culpability, this adjustment will really only be utilized where "knowledge" and "control" result in a Level II culpability finding. While Level II normally yields no reduction or increase in penalty, the attitude of the violator may justify a penalty adjustment of up to 15% of the GBP in either direction. Objective evidence, such as statements or actions of the violator, should be used to justify such adjustments.

2. *History of prior such violations.* The gravity based penalty matrix is designed to apply to "first offenders." Where a violator has demonstrated a similar history of "such violations," the Act requires the penalty to be adjusted upward. The need for such an upward adjustment derives from the violator's not being sufficiently motivated to comply (deterred from non-complying) by the penalty assessed for the previous violation, either because of economic factors consciously analyzed by the firm, or because of negligence. Another reason for penalizing repeat violators more severely than "first offenders" is the increased enforcement resources that are spent on the same violator.

The Agency's policy is to interpret "prior *such* violations" as referring only to prior violations of *TSCA*, even though it would seem "such" could refer to *any* violations of EPA statutes, or remedial statutes in general (e.g., OSHA, CPSC). However, since Congress did not *explicitly* state it wanted the Agency to go beyond TSCA in determining violation history, the Agency is using this narrower interpretation. The penalty system distinguishes between previous TSCA violations in general, and previous violations of the same set of regulatory requirements.

The following rules apply in evaluating history of prior such violations:

(a) In order to constitute a prior violation, the prior violation must have resulted in a *final order*, either as a result of an uncontested complaint, or as a result of a contested complaint which

[2] There are certain circumstances where an "act God" or some other circumstance totally out of a mpany's control may not result in assessment of a iolation (no legal liability). For examply where PCBs are *properly* stored, and a plane crashes into the storage facility, causing a spill, there will probably be no violation.

is finally resolved against the violator. Violations litigated in the Federal courts, under the Act's imminent hazard (§ 7), specific enforcement and seizure (§ 17), and criminal (§ 16(b)) provisions, are part of a violator's "history" for penalty assessment purposes, as are violations for which civil penalties have been previously assessed. However, a notice of non-compliance does *not constitute* a *"prior* such *violation"*, since no violation has formally been found, and no opportunity to contest the notice has been given.

(b) To be considered a "prior such violation", the violation must have occurred within five years of the present violation. This five year period begins when the prior violation becomes a final order. Beyond five years, the prior violative conduct becomes too distant to require compounding of the penalty for the present violation.

(c) Generally, companies with multiple establishments are considered as one when determining history. Thus, if one establishment of a company commits a TSCA violation, it counts as history when another establishment of the same company, anywhere in the country, commits another TSCA violation However, two companies held by the same parent corporation do not necessarily affect each other's history if they are in substantially different lines of business, and they are substantially independent of one another in their management, and in the functioning of their Boards of Directors. In the case of wholly- or partly-owned subsidiaries, the violation history of a parent corporation shall apply to its subsidiaries, and that of the subsidiaries to the parent.

(d) If the prior such violation is of a different TSCA provision or regulation, the penalty should be upwardly adjusted 25 percent for a first repetition and 50 percent for a second repetition of the violation. If the prior "such" violation is of the same, or closely similar provision or regulation, the penalty should be upwardly adjusted 50 percent for the first repetition and 100 percent for the second repetition.

For these purposes, a prior such violation is the "same or closely related" if it is *similar* to the present violation. Each TSCA rule or regulation is considered a separate entity for "closely related" purposes. Thus the identical provision does *not* have to be violated both times for this higher adjustment to be made. For example, *two separate* unlawful disposals of PCBs may be "closely similar" if the PCBs were unlawfully dumped on the highways in the first instance, and in the second instance, PCBs of over 500 ppm were burned in a facility that did not comply with the PCB incinerator standards.

The specific guidelines will give some guidance on what violations are "closely similar" to others, and may set up a sliding scale of upward adjustment percentages rather than the 50 percent or 100 percent figures provided here.

3. *Government clean-up costs.* An adjustment factor not specified in the statute, but which the Agency feels "justice * * * require[s]," is reimbursement to the government for funds expended to investigate, clean-up, or otherwise mitigate the effects of a violation.

Generally, the clean-up expense of a violator is to be borne by the violator as a necessary cost of violation in addition to any civil penalty assessed. The government may seek a Federal district court injunction under §§ 7 or 17 to require the violator to clean-up, but there will almost certainly be situations where the government will have to clean-up the violation to quickly alleviate any hazards created. Where these latter situations happen, the government could probably file a non-statutory suit in Federal district court to recover funds which it expended, but it could even more easily assess these costs, when they are sufficiently low, in an administrative proceeding under § 16, particularly where a § 16, particularly where a § 16 action is going to be filed anyway.

The major limitation to seeking reimbursement of government investigatory and clean-up costs is the limit of $25,000 for each violation. However, since each day a violation continues constitutes a separate violation for which a $25,000 penalty may be assessed, in many instances clean-up and investigatory costs can be recovered where the violation is a continuing one. However, where a penalty would be in the area of $25,000 for the violation even before government investigatory and clean-up costs are considered, a § 16 action would be of little value in recovering these additional costs.

In adjusting the penalty, the government investigatory and clean-up cost should be added to the penalty calculated thus far. Where the total penalty under this method exceeds $25,000, the penalty should be cut back to $25,000. As will be discussed later, this type of situation lends itself to utilization of the continuing violation provisions of § 16.

It is important to note that consideration of government investigatory and clean-up costs in the penalty assessment is *not* intended to in any way affect the *right* of the government to *recover investigatory and clean-up costs* in a separate court action. A violator may argue that investigatory and clean-up costs have been abrogated by settlement of the penalty. Thus, if there is a reasonable possibility that the Agency will seek to recover such costs in a separate suit, this factor should *not* be utilized in assessing the § 16 penalty. Thus the investigatory and clean-up costs will *not* be included twice in calculating a penalty for a violation.

4. *Gains from noncompliance.* Another adjustment factor which "justice * * * require[s]" is that the violator not profit from its violative acts. TSCA's ability to prevent harm to public health and the environment is severely weakened whenever an economic incentive exists to violate the law. The penalty system attempts to eliminate, or at least reduce, these economic incentives, by adding to the base penalty an estimate of the economic gains obtained by the violator as a result of his noncompliance.

Among such economic gains would be money saved by not investing in new equipment, or by not following more costly operating procedures, or profits gained through the sale of illegal products. Removing such gains not only protects the public by deterring violations, but also prevents violators from gaining unfair competitive advantage over those who are complying with the law. For example, a company which manufactures a new chemical without submitting a premanufacture notice, pursuant to § 5, may gain a strong competitive advantage over another company who intends to manufacture the same chemical, but follows the § 5 procedure. The violator should be penalized at least to the extent of the economic gains achieved through his noncompliance. Any other result would put a premium on noncompliance.

The specific penalty guidelines should, where possible, indicate the types of economic gains from noncompliance, and include either standard estimates of such gains (e.g., the purchase price of required new equipment or facilities), or a procedure for estimating the gain. In cases where economic gains resulted from the company's failure to make required capital and operation and maintenance expenditures, those gains must be calculated in accordance with the Agency's September 27, 1978, "Technical Support Document" for computing civil penalties under the April 11, 1978, Civil

Penalty Policy. The resulting economic savings figure must be reviewed by the Civil Penalty Policy Panel for ·ency with that policy. In many .es, the CBP will be sufficiently hi.. without adjustment for this factor. In other situations where there is no economic motive or benefit from noncompliance, or when the cost of cleaning up a violation outweighs any economic benefits received, this adjustment factor need not be applied.

5. *Ability to pay and ability to continue in business.* (a) *Usage of these terms.* The Act lists "ability to pay" and "ability to continue in business" as two adjustment factors, but for the purposes of the penalty system the distinctions between the two are so narrow and artificial that they are treated as one. In making this determination it was considered that "ability to pay" might be limited (in the extreme sense) to such indicators as the market value of the violator in liquidation, the profits accrued by the firm over a given time period, the net sales or income generated over a given time period, the value of cash and other liquid assets held by the firm, and the value of all liquid assets plus borrowable cash. Essentially, however, a firm can pay up t· · point where it can no longer do ·s.[3] However, it is evident that ·· ·ess, by inserting these two factors into the Act, for *most* cases did not intend that TSCA civil penalties present so great a burden as to pose the threat of destroying, or even severely impairing, a firm's business.

Measuring a firm's ability to pay [4] a cash penalty, without ceasing to be operable, can be extremely complex. The focus is on the solvency of the firm. Rather than performing extensive financial analysis of a firm, which would take an unreasonable effort on the part of both the Agency and the firm, it is believed that a year's net income, as determined by a fixed percentage of total sales, will generally yield an amount which the firm can afford to pay. The average ratio of net income to sales level for U.S. manufacturing in the past five years is approximately five percent (*1978 Economic Report of the President*). Since small firms are generally slightly less profitable than average-sized firms, and since small firms are the ones most likely to have difficulty paying TSCA penalties, the guideline is reduced to four percent.

Even where the net income is negative, four percent of gross sales should still be used as the "ability to pay" guideline, since companies with high sales will be presumed to have sufficient cash to pay penalties even where there have been net losses.

For purposes of calculating the ability to pay, figures for the current year and the prior three years should be averaged. Four percent of the average sales will serve as the guideline for whether the company has the ability to pay.

(b) *Application of ability to pay.* While it would be possible for an inspector to utilize Dunn and Bradstreet, or to inquire during the course of the inspection to ascertain sales data, the firm should be presumed to have the ability to pay at the time the complaint is issued. This is preferable not only for purposes of administrative convenience, but also because many firms will not have their sales information in Dunn and Bradstreet or similar publications, and because the Act indicates that financial and sales data are only subject to inspection when "the nature and extent of such data are described with reasonable specificity in the written notice (of inspection)," § 11(b)(2). This singling out by Congress of these factors indicates that they are not to be routinely asked for in every inspection, and since any alleged violator can raise the issue of ability to pay in his answer to the complaint, both the Agency and the inspected firm will save time and resources by using this approach. Of course, if such information can easily be obtained prior to or during the inspection, there is no harm in doing so.

If the firm raises the issue of inability to pay in its answer, or in the course of settlement discussions, the four percent guideline discussed above should be the model to follow. The firm should be asked to bring appropriate documentation to indicate what their sales have been, such as tax returns, financial statements, etc. If the proposed penalty exceeds four percent of total sales, the penalty may be reduced to an affordable level.

There may be some cases where a firm argues that it cannot afford to pay even though the penalty as adjusted does not exceed four percent of sales. A variety of factors, too complex to discuss here, might require such further adjustment to be made. In complex cases, the agency may need to rely on a management division economist or an accountant to analyze the firm's ability to pay and, on a case-by-case basis, to further reduce the proposed penalty.[5]

6. *Other factors of justice may require.* While two "other factors" have been incorporated as adjustment factors, other issues might arise, on a case-by-case basis, which should be considered in assessing penalties. Among these factors are:

- *Money spent by the violator in cleaning up or otherwise mitigation the harm caused by the violation.* Normally there should be no reduction for these costs, since it is part of the cost of violation. However, there may be instances where the cost of penalty, plus cost of cleanup, are excessive for the particular violation, so that some credit for these expenditures should be given.
- *New ownership for "history of violations."* It may be unfair in some cases to burden new ownership with the previous owner's history.
- *National defense.*
- *Foreign policy.*
- *Conflict or ambiguity vis-a-vis other Federal statutes and regulations* (e.g., OSHA, USDA, DOE).
- *Environmentally beneficial expenditure.* Circumstances may arise where a violator will offer to make expenditures for environmentally beneficial purposes above and beyond those required by law, in lieu of paying civil penalties. The Agency, in penalty actions in the U.S. District Courts under the Clean Air and Water Acts, has determined that crediting such expenditures is consistent with the purpose of civil penalty assessment. Although civil penalties under TSCA are administratively assessed, the same

·hnically, a firm would often be able to pay ·mposing a penalty would cause it to file for ·ptcy, since a reorganization might still leave ·· ·usiness in operation.

[4] Henceforth "ability to pay" will be used to include "ability to continue in business".

[5] The analyst must keep several particular points in mind. First, small firms often report no taxable income, and instead provide a return of their owner/operators through salaries and benefits such as automobiles, medical plans, and so forth. When reconstructing the firm's cash flow, owner/operators should receive as payment for services only that amount which they could obtain for prov·ding similar services in the general labor market. The rest of their compensation should properly be assigned to profit for the company. The second point to keep in mind in examining tax returns is that small, privately-owned plants often have several corporations set up to handle various aspects of the business. If one or more of these corporations is culpable for some part of the TSCA violation, the tax returns for all involved corporations should be examined and a combined cash flow prepared. Once the firm's historical cash flows have been assembled, the analyst must make some assessment of the likely future path of the company. In so doing, the analyst must consider the firm's ability to earn cash from its operations, its ability to liquidate assets to meet penalty amounts (and still remain in business), and its ability to raise additional cash from lenders and its owners. The analyst must judge these factors without expending excessive resources on the analysis. Such a process can be assisted through discussions with individuals knowledgeable in the particular industry, such as local bankers, consultants, and others, if appropriate.

rational applies. This adjustment, which constitutes a credit against the actual penalty amount, will normally be discussed only in the course of settlement negotiations. The criteria for acceptable credits are discussed in detail in section VIII of the April 11, 1978 Civil Penalty Policy. Before proposed credit amounts can be incorporated into a settlement, the complainant must assure himself that the penalty (with credit adjustment) is consistent with the April 11, 1978, Civil Penalty Policy, and that the company has not already received credits in another enforcement action for the same environmentally beneficial expenditures. The settlement agreement incorporating such an adjustment should make clear what the actual *penalty* assessment is, after which the terms of the reduction should be spelled out in detail and in a clearly enforceable manner.

• *Significant-minor borderline violations.* Occasionally a violation, while of significant extent, will be so close to the borderline separating minor and signficant violations that the penalty may seem disproportionately high. In this situation, additional reduction of up to 25% off the GBP may be applied before the other adjustment factor are considered.

Continuing Violations

Since the Act provides not only that civil penalties may be assessed up to $25,000 for each violation, but that each day a violation continues constitutes a separate violation for which additional penalties may be assessed, there is a potential for very large penalties to be assessed in many situations. In some cases, such large penalties will be appropriate for continuing violations, while for others, such as late inventory reporting, assessing an additional penalty for each day of violation would yield a penalty assessment for greater than the violation merits. The specific penalty guidelines will discuss the types of continuing violations which should be assessed on a per-day basis. This discussion should indicate how criteria such as this will be applied, e.g., which continuing violations should never be penalized on a per-day basis, and which should usually or always be so penalized.

When a penalty is assessed on a per-day basis for a continuing violation, care must be taken to assure that the adjustment factors, "government clean up costs", and "economic benefits from non-compliance" are spread over the entire penalty, since these figures are calculated by looking at the entire violative situation. For example, if a continuing violation lasted four days and generated $40,000 in government clean-up costs, these $40,000 in costs should be added to the daily penalties (although each day would still be limited to a maximum $25,000 penalty).

Continuing violations are distinguished from multiple violations and violations which occur several separate times. These latter violations will generally be separately assessed.

Settlement

This guidance does not prescribe a specific percentage guideline for penalty reductions in the course of settlement. While, as a general rule, penalties may be altered in the course of settlement, there should always be some substantive reason given, which is to be incorporated in any settlement agreement and consent decree and final order for any penalty reduction. Other aspects of settlement are discussed in the context of particular penalty factors.

Designing and Applying a Specific Penalty Guidance

Designing a Specific Penalty Guidance

The specific penalty guidance, which will usually be developed as part of the enforcement strategy for a particular regulation, will provide the detailed information needed to fit particular violations in the overall civil penalty system. Each specific penalty guidance will address:

• To the extent possible, the types of violations that can occur;

• How to evaluate the nature (i.e., whether chemical control or information gathering) of a violation;

• How to determine and classify the extent of possible harm posed by a given violations;

• Special considerations in using the adjustment factors, particularly including means of estimating government clean-up costs and economic benefits from non-compliance;

• How and when to utilize the concept of multi-day violations;

• Any "other matters as justice may require" which may particularly apply to the given regulation; and

• Anything else necessary to effectuate enforcement of the regulation and the Act's penalty policy.

Applying a Specific Penalty Guidance

This section briefly summarizes the steps necessary to calculate a proposed penalty assessment.

Step 1: Utilizing the specific penalty guidances, determine the nature, extent, and circumstances of the violation.

Step 2: Find the appropriate extent and circumstances levels on the gravity based penalty matrix to determine the gravity based penalty (GBP).

Step 3: Determine the percentage adjustment for culpability, if any.

Step 4: Determine the percentage adjustment for history, if any.

Step 5: Add the adjustment percentages from steps 3 and 4 and apply the GBP. If the amount is in excess of $25,000, reduce the penalty to $25,000.

Step 6: Multiply the step 5 figure by the number of days of violation.

Step 7: Apply government cleanup costs adjustment, if applicable. Add to the step 6 figure.

Step 8: Apply economic gains from non-compliance adjustment, if applicable. Add to the step 6 figure.

Step 9: Make other adjustments "as justice may require."

Step 10: Issue formal complaint proposing the penalty.

Step 11: Discuss settlement any time before a final administrative law judge's decision (unless the complaint is not contested and becomes final as a matter of law). If applicable, determine violator's ability to pay. If appropriate, reduce penalty to amount violator can afford to pay. Penalties may be reduced as a condition of settlement.

Step 12: Issue Final order.

Civil Penalty Assessment Worksheet

Name of Respondent: _____
Address of Respondent: _____

(1) Complaint I.D. Number: _____
(2) Date Complaint Issued: _____
(3) Date Answer Received: _____
(4) Date Default Order Sent: _____
(5) Date Consent Agreement Signed: _____
(6) Date Final Order Sent: _____
(7) Date Remittance Received: _____

1. Gravity Based Penalty (GBP) from matrix. $——.
2. Percent increase or decrease for culpability. %——.
3. Percent increase for violation history. %——.
4. Add lines 2 and 3. %——.
5. Multiply GBP by percentage total on line 4. $——.
6. Add lines 1 and 5 (subtract line 5 from line 1 if negative percentage). $——.
7. Enter line 6 amount or $25,000, whichever is *less*. $——.
8. Multiply line 7 by the number of days of violation. $——.
9. Government clean-up costs, if any. $——.
10. Economic gains from non-compliance, if appropriate. $——.
11. Add lines 8 through 10. $——.
12. Total of other adjustments as justice may require. $——.
13. If line 12 represents a net *increase* to the penalty add line 12 to line 11. $——.

or

If line 12 represents a net *decease* to the penalty subtract line 12 from line 1. $——.

Note.—Line 13 should be the proposed penalty for a given violation. This procedure is repeated for each violation.

PCB Penalty Policy

Introduction

Background

On March 10, 1980, the Agency issued a TSCA Civil Penalty Policy memorandum. That document