Applicable Sections
of the
Clean Air Act
Stationary Source Civil Penalty
(October 25, 1991)

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The general policy applies to most Clean Air Act violations. There are some types of violations, however, that have characteristics which make the use of the general policy inappropriate. These are treated in separate guidance, included as appendices. Appendix I covers violations of PSD/NSR permit requirements. Appendix II deals with the gravity component for vinyl chloride NESHAP violations. Appendix III covers the economic benefit and gravity components for asbestos NESHAP demolition and renovation violations. The general policy applies to violations of volatile organic compound regulations where the method of compliance involves installation of control equipment. Separate guidance is provided for VOC violators which comply through reformulation (Appendix IV). Appendix VI deals with the gravity component for volatile hazardous air pollutants violations. Appendix VII covers violations of the residential wood heaters NSPS regulations. Violations of the regulations to protect stratospheric ozone are covered in Appendix VIII. These appendixes specify how the gravity component and/or economic benefit components will be calculated for these types of violations. Adjustment, aggravation or mitigation, of penalties calculated under any of the appendixes is governed by this general penalty policy.

This penalty policy contains two components. First, it describes how to achieve the goal of deterrence through a penalty that removes the economic benefit of noncompliance and reflects the gravity of the violation. Second, it discusses adjustment factors applied so that a fair and equitable penalty will result. The litigation team[2] should calculate the full economic benefit and gravity components and then decide whether any of the adjustment factors applicable to either component are appropriate. The final penalty obtained should never be lower than the penalty calculated under this policy taking into account all appropriate adjustment factors including litigation risk and inability to pay.

All consent agreements should state that penalties paid pursuant to this penalty policy are not deductible for federal tax purposes under 28 U.S.C. § 162(f).

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[2] With respect to civil judicial cases, the litigation team will consist of the Assistant Regional Counsel, the Office of Enforcement attorney, the Assistant United States Attorney, the Department of Justice attorney from the Environmental Enforcement Section, and EPA technical professionals assigned to the case. With respect to administrative cases, the litigation team will generally consist of the EPA technical professional and Assistant Regional Counsel assigned to the case. The recommendation of the litigation team must be unanimous. If a unanimous position cannot be reached, the matter should be escalated and a decision made by EPA and the Department of Justice managers, as required.

there is a likelihood of continued harmful noncompliance.

- The economic benefit component may also be mitigated in enforcement actions against nonprofit public entities, such as municipalities and publicly-owned utilities, where assessment threatens to disrupt continued provision of essential public services.

c. Concurrent Section 120 administrative action

EPA will not usually seek to recover the economic benefit of noncompliance from one violation under both a Section 113(b) civil judicial action or 113(d) civil administrative action and a Section 120 action. Therefore, if a Section 120 administrative action is pending or has been concluded against a source for a particular violation and an administrative or judicial penalty settlement amount is being calculated for the same violation, the economic benefit component need not include the period of noncompliance covered by the Section 120 administrative action.

In these cases, although the Agency will not usually seek double recovery, the litigation team should not automatically mitigate the economic benefit component by the amount assessed in the Section 120 administrative action. The Clean Air Act allows dual recovery of the economic benefit, and so each case must be considered on its individual merits. The Agency may mitigate the economic benefit component in the administrative or judicial action if the litigation team determines such a settlement is equitable and justifiable. The litigation team should consider in making this decision primarily whether the penalty calculated without the Section 120 noncompliance penalty is a sufficient deterrent.

B. THE GRAVITY COMPONENT

As noted above, the Policy on Civil Penalties specifies that a penalty, to achieve deterrence, should recover any economic benefit of noncompliance, and should also include an amount reflecting the seriousness of the violation. Section 113(e) instructs courts to take into consideration in setting the appropriate penalty amount several factors including the size of the business, the duration of the violation, and the seriousness of the violation. These factors are reflected in the "gravity component." This section of the policy establishes an approach to quantifying the gravity component.

Assigning a dollar figure to represent the gravity of the violation is a process which must, of necessity, involve the consideration of a variety of factors and circumstances. Linking the dollar amount of the gravity component to these objective factors is a useful way of insuring that violations of approximately equal seriousness are treated the same way. These

objective factors are designed to reflect those listed in Section 113(e) of the Act.

The specific objective factors in this civil penalty policy designed to measure the seriousness of the violation and reflect the considerations listed in the Clean Air Act are as follows:

- Actual or possible harm: This factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in the emission of a pollutant in violation of the level allowed by an applicable State Implementation Plan, federal regulation or permit.

- Importance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goals of the Clean Air Act and its implementing regulations. For example, the NSPS regulations require owners and operators of new sources to conduct emissions testing and report the results within a certain time after start-up. If a source owner or operator does not report the test results, EPA would have no way of knowing whether that source is complying with NSPS emissions limits.

- Size of violator: The gravity component should be increased, in proportion to the size of the violator's business.

The assessment of the first gravity component factor listed above, actual or possible harm arising from a violation, is a complex matter. For purposes of determining how serious a given violation is, it is possible to distinguish violations based on certain considerations, including the following:

- Amount of pollutant: Adjustments based on the amount of the pollutant emitted are appropriate.

- Sensitivity of the environment: This factor focuses on where the violation occurred. For example, excessive emissions in a nonattainment area are usually more serious than excessive emissions in an attainment area.

- Toxicity of the pollutant: Violations involving toxic pollutants regulated by a National Emissions Standard for Hazardous Air Pollutants (NESHAP) or listed under Section 112(b)(1) of the Act are more serious and should result in larger penalties.

- The length of time a violation continues: Generally, the longer a violation continues uncorrected, the greater the risk of harm.

- Size of violator: A corporation's size is indicated by its stockholders' equity or "net worth." This value, which is calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings, corresponds to the entry for "worth" in the Dun and Bradstreet reports for publicly traded corporations. The simpler bookkeeping methods employed by sole proprietorships and partnerships allow determination of their size on the basis of net current assets. Net current assets are calculated by subtracting current liabilities from current assets.

The following dollar amounts assigned to each factor should be added together to arrive at the total gravity component:

1. Actual or possible harm

a. Level of violation

Percent Above Standard[3]	Dollar Amount
1 - 30%	$ 5,000
31 - 60%	10,000
61 - 90%	15,000
91 - 120%	20,000
121 - 150%	25,000
151 - 180%	30,000
181 - 210%	35,000
211 - 240%	40,000
241 - 270%	45,000
271 - 300%	50,000
over 300%	50,000 + $5,000 for each 30% or fraction of 30% increment above the standard

This factor should be used only for violations of emissions standards. Ordinarily the highest documented level of violation should be used. If that level, in the opinion of the litigation team, is not representative of the period of violation, then a more representative level of violation may be used. This figure should be assessed for each emissions violation. For example, if a source which emits particulate matter is subject to both an opacity standard and a mass emission standard and is in violation of both standards, this figure should be assessed for both violations.

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[3] Compliance is equivalent to 0% above the emission standard.

A penalty range is provided for work practice violations to allow Regions some discretion depending on the severity of the violation. Complete disregard of work practice requirements should be assessed the full $15,000 penalty. Penalty ranges are provided for incomplete notices, reports, and recordkeeping to allow the Regions some discretion depending on the seriousness of the omissions and how critical they are to the regulatory program. If the source omits information in notices, reports or records which document the source's compliance status, this omission should be treated as a failure to meet the requirement and assessed $15,000.

A late notice, report or test should be considered a failure to notify, report or test if the notice or report is submitted or the test is performed after the objective of the requirement is no longer served. For example, if a source is required to submit a notice of a test so that EPA may observe the test, a notice received after the test is performed would be considered a failure to notify.

Each separate violation under this section should be assessed the corresponding penalty. For example, a NSPS source may be required to notify EPA at startup and be subject to a separate quarterly reporting requirement thereafter. If the source fails to submit the initial start-up notice and violates the subsequent reporting requirement, then the source should be assessed $15,000 under this section for each violation. In addition, a length of violation figure should be assessed for each violation based on how long each has been violated. Also, a figure reflecting the size of the violator should be assessed once for the case as a whole. If, however, the source violates the same reporting requirement over a period of time, for example by failing to submit quarterly reports for one year, the source should be assessed one $15,000 penalty under this section for failure to submit a report. In addition, a length of violation figure of $15,000 for 12 months of violation and a size of the violator figure should be assessed.

3. Size of the violator

Net worth (corporations); or net current assets (partnerships and sole proprietorships):

Under $100,000	$2,000
$100,001 - $1,000,000	5,000
1,000,001 - 5,000,000	10,000
5,000,001 - 20,000,000	20,000
20,000,001 - 40,000,000	35,000
40,000,001 - 70,000,000	50,000
70,000,001 - 100,000,000	70,000
Over 100,000,000	70,000 + $25,000 for every additional $30,000,000 or fraction thereof

In the case of a company with more than one facility, the size of the violator is determined based on the company's entire operation, not just the violating facility. With regard to parent and subsidiary corporations, only the size of the entity sued should be considered. Where the size of the violator figure represents over 50% of the total preliminary deterrence amount, the litigation team may reduce the size of the violator figure to 50% of the preliminary deterrence amount.

The process by which the gravity component was computed must be memorialized in the case file. Combining the economic benefit component with the gravity component yields the preliminary deterrence amount.

4. Adjusting the Gravity Component

The second goal of the Policy on Civil Penalties is the equitable treatment of the regulated community. One important mechanism for promoting equitable treatment is to include the economic benefit component discussed above in a civil penalty assessment. This approach prevents violators from benefitting economically from their noncompliance relative to parties which have complied with environmental requirements.

In addition, in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Yet it still must produce consistent enough results to ensure similarly-situated violators are treated similarly. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for how to adjust the gravity component amount when those facts occur. The application of these adjustments to the gravity component prior to the commencement of negotiation yields the initial minimum settlement amount. During the course of negotiation, the litigation team may further adjust this figure based on new information learned during negotiations and discovery to yield the adjusted minimum settlement amount.

The purpose of this section is to establish adjustment factors which promote flexibility while maintaining national consistency. It sets guidelines for adjusting the gravity component which account for some factors that frequently distinguish different cases. Those factors are: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. These adjustment factors apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose. The gravity component may be mitigated only for degree of

cooperation as specified in II.B.4.b. The gravity component may be aggravated by as much as 100% for the other factors discussed below: degree of willfulness or negligence, history of noncompliance, and environmental damage.

The litigation team is required to base any adjustment of the gravity component on the factors mentioned and to carefully document the reasons justifying its application in the particular case. The entire litigation team must agree to any adjustments to the preliminary deterrence amount. Members of the litigation team are responsible for ensuring their management also agrees with any adjustments to the penalty proposed by the litigation team.

a. Degree of Willfulness or Negligence

This factor may be used only to raise a penalty. The Clean Air Act is a strict liability statute for civil actions, so that willfulness, or lack thereof, is irrelevant to the determination of legal liability. However, this does not render the violator's willfulness or negligence irrelevant in assessing an appropriate penalty. Knowing or willful violations can give rise to criminal liability, and the lack of any negligence or willfulness would indicate that no addition to the penalty based on this factor is appropriate. Between these two extremes, the willfulness or negligence of the violator should be reflected in the amount of the penalty.

In assessing the degree of willfulness or negligence, all of the following points should be considered:

- The degree of control the violator had over the events constituting the violation.
- The foreseeability of the events constituting the violation.
- The level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology-forcing nature of the statute, where applicable.
- The extent to which the violator in fact knew of the legal requirement which was violated.

b. Degree of Cooperation

The degree of cooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. In some cases, this factor may justify aggravation of the

gravity component because the source is not making efforts to come into compliance and is negotiating with the agency in bad faith or refusing to negotiate. This factor may justify mitigation of the gravity component in the circumstances specified below where the violator institutes comprehensive corrective action after discovery of the violation. Prompt correction of violations will be encouraged if the violator clearly sees that it will be financially disadvantageous to litigate without remedying noncompliance. EPA expects all sources in violation to come into compliance expeditiously and to negotiate in good faith. Therefore, mitigation based on this factor is limited to no more than 30% of the gravity component and is allowed only in the following three situations:

1. Prompt reporting of noncompliance

The gravity component may be mitigated when a source promptly reports its noncompliance to EPA or the state or local air pollution control agency where there is no legal obligation to do so.

2. Prompt correction of environmental problems

The gravity component may also be mitigated where a source makes extraordinary efforts to avoid violating an imminent requirement or to come into compliance after learning of a violation. Such efforts may include paying for extra work shifts or a premium on a contract to have control equipment installed sooner or shutting down the facility until it is operating in compliance.

3. Cooperation during pre-filing investigation

Some mitigation may also be appropriate in instances where the defendant is cooperative during EPA's pre-filing investigation of the source's compliance status or a particular incident.

c. History of Noncompliance

This factor may be used only to raise a penalty. Evidence that a party has violated an environmental requirement before clearly indicates that the party was not deterred by a previous governmental enforcement response. Unless one of the violations was caused by factors entirely out of the control of the violator, the penalty should be increased. The litigation team should check for and consider prior violations under all environmental statutes enforced by the Agency in determining the amount of the adjustment to be made under this factor.

In determining the size of this adjustment, the litigation team should consider the following points:

- Similarity of the violation in question to prior violations.

- Time elapsed since the prior violation.
- The number of prior violations.
- Violator's response to prior violation(s) with regard to correcting the previous problem and attempts to avoid future violations.
- The extent to which the gravity component has already been increased due to a repeat violation. (For example, under the Asbestos Demolition and Renovation Penalty Policy in Appendix III.)

A violation should generally be considered "similar" if a previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts indicating a "similar violation" are:

- Violation of the same permit.
- Violation of the same emissions standard.
- Violation at the same process points of a source.
- Violation of the same statutory or regulatory provision.
- A similar act or omission.

For purposes of this section, a "prior violation" includes any act or omission resulting in a State, local, or federal enforcement response (e.g., notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative and judicial order) under any environmental statute enforced by the Agency unless subsequently dismissed or withdrawn on the grounds that the party was not liable. It also includes any act or omission for which the violator has previously been given written notification, however informal, that the regulating agency believes a violation exists. In researching a defendant's compliance history, the litigation team should check to see if the defendant has been listed pursuant to Section 306 of the Act.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a prior violation by the parent corporation should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, the litigation team should ascertain who in the organization exercised or had authority to exercise control or oversight responsibility over the violative conduct. Where the parent corporation exercised or had authority to exercise control over the violative conduct,

the parent corporation's prior violations should be considered part of the subsidiary or division's compliance history.

In general, the litigation team should begin with the assumption that if the same corporation was involved, the adjustment for history of noncompliance should apply. In addition, the team should be wary of a party changing operations or shifting responsibility for compliance to different groups as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance should apply unless the violator can demonstrate that the other violating corporate facilities are under totally independent control.

d. Environmental Damage

Although the gravity component already reflects the amount of environmental damage a violation causes, the litigation team may further increase the gravity component based on severe environmental damage. As calculated, the gravity component takes into account such factors as the toxicity of the pollutant, the attainment status of the area of violation, the length of time the violation continues, and the degree to which the source has exceeded an emission limit. However, there may be cases where the environmental damage caused by the violation is so severe that the gravity component alone is not a sufficient deterrent, for example, a significant release of a toxic air pollutant in a populated area. In these cases, aggravation of the gravity component may be warranted.

III. LITIGATION RISK

The preliminary deterrence amount, both economic benefit and gravity components, may be mitigated in appropriate circumstances based on litigation risk. Several types of litigation risk may be considered. For example, regardless of the type of violations a defendant has committed or a particular defendant's reprehensible conduct, EPA can never demand more in civil penalties than the statutory maximum (twenty-five thousand dollars per day per violation). In calculating the statutory maximum, the litigation team should assume continuous noncompliance from the first date of provable violation (taking into account the five year statute of limitations) to the final date of compliance where appropriate, fully utilizing the presumption of Section 113(e)(2). When the penalty policy yields an amount over the statutory maximum, the litigation team should propose an alternative penalty which must be concurred on by their respective management just like any other penalty.

Other examples of litigation risks would be evidentiary problems, or an indication from the court, mediator, or Administrative Law Judge during settlement negotiations that he or she is prepared to recommend a penalty below the minimum settlement amount. Mitigation based on these concerns should consider the specific facts, equities, evidentiary issues or legal problems pertaining to a particular case as well as the credibility of government witnesses.

Adverse legal precedent which the defendant argues is indistinguishable from the current enforcement action is also a valid litigation risk. Cases raising legal issues of first impression should be carefully chosen to present the issue fairly in a factual context the Agency is prepared to litigate. Consequently in such cases, penalties should generally not be mitigated due to the risk the court may rule against EPA. If an issue of first impression is litigated and EPA's position is upheld by the court, the mitigation was not justified. If EPA's position is not upheld, it is generally better that the issue be decided than to avoid resolution by accepting a low penalty. Mitigation based on litigation risk should be carefully documented and explained in particular detail. In judicial cases this should be done in coordination with the Department of Justice.

IV. ABILITY TO PAY

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability to pay a penalty in adjusting the preliminary deterrence amount, both gravity component and economic benefit component. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially-troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might contribute to a company going out of business.

For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The litigation team should assess this factor after commencement of negotiations only if the source raises it as an issue and only if the source provides the necessary financial information to evaluate the source's claim. The source's ability to pay should be determined according to the December 16, 1986 Guidance on Determining a Violator's Ability to Pay a Civil Penalty (GM-56) along with any other appropriate means.