



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Enforcement Agreements

FROM: Steven A. Herman 
Assistant Administrator

TO: Assistant Administrators
Associate Administrators
Regional Administrators
General Counsel
Inspector General
Steering Committee on the State/Federal Enforcement Relationship
Enforcement Management Council

The attached revisions to the Policy Framework for State/EPA Enforcement Agreements represent a major step toward improving our national enforcement program in regard to federal and State or local penalty practices. Penalties and other sanctions for violations of environmental requirements play an essential role in our national enforcement program. They are a critical ingredient to creating the deterrence we need to encourage the regulated community to anticipate, identify and correct violations. Appropriate penalties for violators offer some assurance of equity between those who choose to comply with requirements and those who violate requirements. It also secures public credibility when governments at all levels are ready, willing and able to back up requirements with action and consequences.

These revisions have been developed in concert with the Steering Committee on the State/Federal Enforcement Relationship. It has benefitted from two rounds of comment both within EPA and among state and local environmental officials. It now enjoys substantial support within EPA and from many state and local officials who have commented. The policy revisions establish:

a common goal for penalty assessments at the federal, state and local levels, i.e., that penalties should seek to recover the economic benefit of noncompliance at a minimum where appropriate plus a portion reflecting the gravity of the violation;

- . flexibility for state and local governments to introduce alternative and supplemental sanctions and approaches for calculating economic benefit and directing penalty dollars;
- . a differential oversight approach for EPA review of state and local program implementation based upon policy, criteria or procedures which reflect the new criteria, established documentation and practice;
- . more objective criteria for the exercise of federal enforcement authority in states with delegated or approved programs; and
- . a renewed commitment by EPA to build state and local capacity to develop the necessary authorities, policies or procedures, and ability to calculate and implement these penalty criteria.

The policy revisions are consistent with the EPA General Penalty Policy and policy on Supplemental Environmental Projects in introducing these concepts into our relationship with the state and local enforcement programs.

I want to thank the many state and local officials and EPA staff who commented in detail on the numerous drafts of this policy. I also want to recognize the initial work that the Air program did in cooperation with the Associations of state and local air directors (STAPPA/ALAPCO) which formed the basis for the first drafts of these proposed revisions. This product benefitted greatly from their contributions.

Attachment

cc: Administrator
Deputy Administrator
Regional Division Directors
Regional Counsels
Richard Gold

Excerpts from the Revised Policy on "Oversight of State Civil Penalties" ___/92.

DRAFT - Revised 6/2/93

(Begins on page 14 of revised 8/25/86 Policy Framework)

CRITERION #6 Appropriate Use of Civil Judicial and Administrative Penalty and Other Sanction Authorities to Create Deterrence

1. Effective Use of Civil Penalty Authorities and Other Sanctions:

Civil penalties and other sanctions play an important role in an effective enforcement program by creating deterrence. Deterrence of noncompliance is achieved through: 1) a credible likelihood of detection of a violation, 2) a timely enforcement response, 3) the likelihood and appropriateness of the sanction, and 4) the perception of the first three factors within the regulated community. Penalties or other sanctions are the critical third element in creating deterrence. They can also contribute to greater equity among the regulated community by recovering the economic benefit that a violator gains from noncompliance over those who do comply.

Effective State³, local, and regional programs should have a clear plan or strategy for how their civil penalty or other sanction authorities will be used in the enforcement program where programs have identified that a penalty is appropriate (see Criterion # 5, "Timely and Appropriate Enforcement Response," above).

The anticipated use of sanctions should be part of the State/EPA Enforcement Agreements process, with Regions, States, or local agencies discussing and establishing how and when they generally plan to use penalties or other approaches when some sanction is required. State/local officials and EPA Regional personnel are encouraged to arrange for informal advance notification of situations that fall outside of such policies, criteria or practices of the EPA/State/local agency in order to avoid misunderstandings and/or potential subsequent overfile situations.

³ The term "state" includes, as appropriate, Indian Tribes, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa, and which have delegated or approved enforcement programs. The term "State" may also include a local governmental entity which has been delegated enforcement authority. The term "local" is also independently noted in the text for emphasis.

a. Administrative and Judicial Penalty Authorities

EPA strongly encourages States and appropriate local agencies to develop civil administrative penalty authority in addition to civil and criminal judicial penalty authority, and to provide sufficient resources and support for successful implementation. In general, a well designed administrative penalty authority can provide faster and more efficient use of enforcement resources, when compared to civil judicial authorities. Civil and criminal judicial and administrative penalty authorities are important, complementary, and each should be used to its greatest advantage. EPA has sought administrative penalty authority for those Federal programs which do not already have it. To support State and local agency efforts to gain additional penalty authorities, EPA will share information collected on existing State/local penalty authorities and on the Federal experience with the development and use of administrative authorities.

b. Development and Use of Civil Penalty Policies

EPA Regions are required to follow written Agency-wide and program-specific penalty policies and procedures. The advantages of using a penalty policy include:

- more consistent penalties;
- better defensibility in court;
- a stronger bargaining position for the Agency in negotiations with violators;
- improved communication and support within the administering agency and among agency officials, attorneys and judges (especially where other organizations are responsible for imposing the penalty);
- deterrence of violations based upon economic considerations and more equitable treatment between violators and nonviolators (when based on recovery of economic benefit plus a component for seriousness of the violation), and;
- a basis for penalty decisions of judges.

State and local enforcement agencies are strongly encouraged to develop written penalty policies, criteria, or procedures for penalty assessments. EPA will then review and evaluate, but not formally approve, these penalty policies, criteria or procedures for consistency with the general penalty criteria set forth in Section (3), below. This approach is intended to be flexible in recognizing State statutory language and regulations concerning penalty authority, while also seeking to achieve minimally consistent national criteria for an effective program.

2. Use of Cash Penalties and Other Sanctions

In order to ensure that violators are disadvantaged by virtue of their noncompliance, EPA policies require cash penalties, at a minimum, for recovery of the economic benefit of noncompliance plus some appreciable portion reflecting the gravity of the violation. Other sanctions, however, may be preferable to or supplemental to cash penalties in some circumstances given their deterrent and related economic effect.

Criminal sanctions including fines, penalties and/or incarceration, are among our most effective deterrents. See Criminal Enforcement Addendum. In addition to penalty assessments and injunctive relief available under federal law, States or local agencies may have a broader range of remedies than those available at the Federal level. Examples of other remedies are pipeline severance (used for underground injection control) or license revocation (used for pesticides programs) or certification requirements (used for asbestos control). National program guidance should clarify in general terms how the use of other types of sanctions fit into the program's penalty scheme at the Federal, State, and local levels. Alternative State or local sanctions should be used pursuant to agreements between States (including practices of relevant local agencies) and Regions.

Until program-specific guidance is developed to define the appropriate use of alternative civil sanctions, the Region and State or local agency should consider whether the sanction is comparable to a cash penalty in achieving compliance and deterring noncompliance.

In regard to cash penalty assessments, costs of returning to compliance will not be considered a penalty nor will costs that are deducted from tax liability. Costs that are tax deductible, however, may be considered if the final penalty liability is adjusted to eliminate the value of any such tax deduction.

Moreover, even where cash penalties are relied upon, EPA and States have used, to good effect, supplemental environmental projects (SEPs), beyond those required for compliance, to reduce monetary penalty-liability.⁴ EPA has fostered the use of SEPs in enforcement settlements in order to achieve environmental benefits and greater deterrence.

EPA/DOJ policies currently identify five (5) categories of SEPs that may potentially qualify as part of a settlement: pollution prevention, pollution reduction, environmental audits, environmental restoration, and enforcement-related public

⁴ See "Policy on the Use of Supplemental Environmental Projects in EPA Settlements," 2/12/1991.

awareness projects (which foster compliance within the regulated community through education, technical assistance and outreach). Although the use of a SEP may be warranted in a particular case, EPA limits the type of SEP that it may accept based upon both statutory constraints and policy considerations.⁵ In order to be approved by EPA, a SEP is subject to the following conditions: at a minimum, a cash penalty payable to the U.S. Treasury representing the economic benefit of noncompliance must be recovered, plus some appreciable portion representing the gravity of the violation; there must be a nexus between the environmental benefits to be derived from the proposed project and the nature of the violation; and EPA must not lower the amount it decides to accept in penalties by more than the after-tax amount the violator spends on the project.

In general, EPA will not impose upon States the same limitations on the use of SEPs as alternatives to cash payments as are established under its own policy because States are not necessarily subject to the same statutory limitations. However, it is essential that the net result of any such settlements ensure an effective deterrent to both the violator and the regulated community. First, a significant cash component generally must be preserved for deterrence.⁶ EPA will recognize limited circumstances where this is not feasible. Second, directed uses of monetary expenditures by a violator for supplemental environmental projects will be considered to be an appropriate part of State or local enforcement settlement agreements, if such projects are clearly sanctions for the violator and do not have the appearance of a goodwill gesture or charitable contribution.

Third, SEPs must always be in addition to full regulatory compliance and the cost of undertaking the project should be commensurate with the monetary reduction of the penalty or

⁵ See Miscellaneous Fees Act, 33 U.S.C. § 3302.

⁶ In determining what would constitute a "significant cash component," EPA/States/local officials should generally consider: 1) the proportion of cash payment to the entire penalty liability, and 2) whether the cash component at least recovers the economic benefit of noncompliance, where appropriate as defined in section 3(a) below. Maintaining a significant cash component to penalty assessments is important given the difficulties EPA/State/local officials have had in placing a value on environmental projects, establishing their deterrent effect, and/or monitoring their completion when used in lieu of payments.

penalty liability.⁷ Additionally, in order to avoid delay in the implementation of the SEP, the project may be funded or conducted prior to the entry of the settlement agreement, so long as the SEP is a result of the settlement negotiation and meets the other objectives of this section.

Cash payments resulting from State or local enforcement settlements may be directed either to general revenues or to special funds, if authorized by state law, provided the desired deterrent impact upon the violator is preserved and so long as such payments also do not have the appearance of a goodwill gesture or charitable contribution.

3. Criteria for Assessment of Monetary Penalties

a. Economic Benefit of Noncompliance

To remove economic incentives for noncompliance and establish a firm foundation for deterrence, EPA, the States, and local agencies shall endeavor, through their civil penalty assessment practices, to recoup at least the economic benefit the violator gained through noncompliance.⁸

In order to preserve deterrence, it is EPA policy not to settle for less than the amount of the economic benefit of noncompliance, where it is possible to calculate it, unless the benefit component is a de minimis amount⁹, the violator demonstrates inability to pay, there is a compelling public

⁷ The final penalty amount should be adjusted upward to account for any tax savings the violator may have benefitted from by using a SEP.

⁸ The emphasis on recovery of economic benefit of non-compliance is in-no way intended to create a bias in favor of end-of-pipe controls for which costs are easier to assess than process changes.

⁹ The de minimis policy recognizes situations where the magnitude of the economic benefit component is likely to be small, and substantially disproportionate resources would be required to determine the economic benefit in attempts to recover it. See "EPA General Enforcement Policy # GM-22, A Framework for Statute Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties," 2/16/84.

concern¹⁰, or there are litigation-related reasons for such settlement. State and local enforcement agencies should calculate and assess the economic benefit of noncompliance in negotiations and litigation except under these circumstances. Where state or local statutory authority would not specifically authorize recovery of economic benefit, EPA still expects States to make a reasonable effort to calculate economic benefit and to attempt to recover this amount in negotiations and litigation using the State's own statutory criteria. In addition to these factors, EPA recognizes that some State statutes do not support the equivalent of the collection of the full economic benefit of noncompliance because of limitations imposed, such as penalty caps. In such instances, EPA will work closely with the States to assist them in overcoming these limitations.

States and local agencies are encouraged to use the Agency's computerized model (known as BEN) for calculating economic benefit but may use different approaches to calculating economic benefit, as discussed in the differential oversight section below.

b. Gravity, Equity and Deterrence

An additional amount reflecting the seriousness of the violation should also be assessed. This gravity component should be based primarily on the risk of the harm to public health, the environment, and the regulatory scheme and/or the actual harm resulting from the violation. This is especially important for violations which may not have a readily calculated economic benefit but which are critical to program integrity, such as monitoring, reporting, recordkeeping and testing violations.

Policy and practice should take into account the degree of harm caused by a violation but also encourage positive and discourage negative compliance behavior. To ensure equitable treatment of violators and deterrence appropriate to the violators' current and past behavior, other factors such as a violator's history of compliance, violators' inability to pay, degree of willfulness or negligence, efforts to comply, degree of cooperation with governmental officials in resolving the violation, and other unique factors may be considered in setting penalty amounts.

¹⁰ Compelling public concern includes factors such as substantial risk of adverse precedent, settlement to avoid or terminate an imminent risk to human health or the environment where injunctive relief is unavailable, and the need to avoid damaging an important public interest in continuing operation of a plant or business where alternative penalties are unavailable. This policy is intended to be invoked only when it is absolutely necessary to preserve the countervailing public interest.

4. Oversight of Penalty Practices. Differential Oversight

EPA Headquarters will oversee Regional penalties to ensure Federal penalty policies are followed. This oversight will focus both on individual penalty calculations and regional penalty practices and patterns.

EPA will review and evaluate state penalties in the context of the State's overall enforcement program and environmental compliance goals. While individual cases will be discussed, the program review will more broadly evaluate how penalties and other sanctions can be used most effectively. The evaluation will consider whether penalties or other sanctions are sought in appropriate cases, whether the relative amounts of penalties or use of sanctions reflect the assessment and recovery of the economic benefit of noncompliance (as applicable) plus a gravity penalty, and whether they also reflect increasing severity of the violation, recalcitrance, or recidivism, and whether they are successful in contributing to a high rate of compliance and deterring noncompliance. EPA may also review the extent to which State penalties have been upheld and collected.

State or local enforcement agencies which adopt a sound penalty policy, or another type of consistent internal criteria or procedures implementing these penalty criteria and demonstrate adherence to it will receive less EPA oversight, with a focus on periodic audits, generally limiting discussion of penalties in ongoing cases to major matters or unusual situations.

Note that use of EPA's BEN model is not mandatory and States and local agencies may use their own method to calculate economic benefit. States which use the BEN computer model or a consistent alternate method to calculate economic benefit will receive less intensive EPA case-specific oversight following a one time review of any alternate method to determine its consistency with federal enforcement objectives. EPA will continue to provide technical assistance to States and local agencies for calculating the economic benefit of noncompliance, and will make the BEN computer model available to States and local agencies.¹¹

EPA staff will place particular emphasis on working with States where penalty authorities are inadequate to meet the criteria specified in section 3 above and will serve as an information clearinghouse for authorities and successful legislative efforts in other states.

¹¹ Information on BEN training may be obtained by contacting the National Environmental Training Institute (NETI).

CRITERION #7 Accurate Recordkeeping and Reporting

A quality program maintains accurate and up-to-date files and records on source performance and enforcement responses that are reviewable and accessible. EPA asks that a State or local agency make case records available to EPA upon request and during an EPA audit of State performance. All recordkeeping and reporting should meet the requirements of the quality assurance management policy and follow procedures established by each national program consistent with the Agency's Monitoring Policy and Quality Assurance Management System. Reports from States to Regions, and from Regions to Headquarters must be timely, complete, and accurate to support effective program evaluation and priority setting.

State and local recordkeeping should include documentation of the penalty sought, including the calculation of economic benefit where appropriate. It is important that accurate and complete documentation of economic benefit calculations be maintained to support defensibility in court, enhance Agency's negotiating posture, and lead to greater consistency. In cases in which penalties have been adjusted downward due to an inability of the violator to pay, documentation is especially important and should reflect the preliminary penalty assessment in relation to the reduction in penalty and include a notation that the reduction occurred due to an inability of the violator to pay. As noted in Criterion #6 above, in situations where States keep complete documentation of penalty calculations and comply with penalty criteria that meet national goals, oversight will focus on periodic audits, limiting discussions of penalties in ongoing cases to major matters or unusual circumstances. These records should be in the most convenient format for administration of the State's penalty program to avoid new or different recordkeeping requirements.

(Begins on page 21 of revised 8/25/86 Policy Framework)

D. CRITERIA FOR DIRECT FEDERAL ENFORCEMENT IN DELEGATED OR AUTHORIZED STATES¹²

This section addresses criteria defining circumstances under which approved State programs might expect direct Federal or joint Federal/State enforcement action and how EPA will carry out such actions so as to support and strengthen State programs.

1. When Might EPA Take Direct Enforcement Action in Approved States?

A clear definition of roles and responsibilities is essential to an effective partnership, since EPA has parallel enforcement authority under its statutes where a State or local agency has an approved or delegated program. As a matter of policy in delegated or approved programs, primary responsibility for action will reside with State or local governments. EPA will take action principally where a State or local agency is "unwilling or unable" to take "timely and appropriate" enforcement action. Many States view it as a failure of their program if EPA takes an enforcement action. This is not necessarily the approach or view adopted here. There are circumstances in which EPA may want to support the broader national interest in creating an effective deterrent to noncompliance. This support may embrace measures beyond which a State may need to undertake to achieve compliance in an individual case or to support its own program.

Because States or local agencies have primary responsibility and EPA clearly does not have the resources to take action on or to review in detail all violations, EPA will limit its actions to the areas listed below and address other issues concerning State or local enforcement action in the context of its broader oversight responsibilities. The following are four types of cases in which EPA may consider taking direct enforcement action where EPA has parallel enforcement authority:

- a. State or local agency requests EPA action
- b. State or local enforcement response is not timely and

¹² EPA recognizes that in some cases local and not state entities are the appropriate enforcement agencies, and therefore, "state" as used in this section also means "local agency" where appropriate. Where "local agency" language is used in this section, it is used for emphasis and is not intended to exclude local agencies where appropriate in other contexts.

appropriate

- c. National precedents (legal or program)
- d. Violation of EPA order or consent decree

In deciding whether to take direct enforcement action in these types of cases, EPA will take into account available federal resources and consider the following factors:

- Cases specifically designated as nationally significant (e.g., significant noncompliers, explicit national or regional priorities)
- Significant environmental or public health damage or risk involved
- Significant economic benefit gained by violator
- Interstate issues (multiple States or Regions)
- Repeat patterns of violations and violators

How these factors are applied for various types of cases is discussed below.

a. State or Local Agency Requests EPA Action

The State or local agency may request EPA to take the enforcement action for several reasons including but not limited to: where State or local authority is inadequate, interstate issues involving multiple States which the States cannot resolve by themselves, or where State or local resources or expertise are inadequate, particularly to address the significant violation/violators in the State in a timely and appropriate manner.

EPA should honor requests by States or local agencies for support in enforcement. EPA will follow its priorities in meeting any such requests for assistance, considering significance of environmental or public health damage or risk involved, significant economic benefit gained by a violator, and repeat patterns of violations and violators. Based on this general guidance, each program office may develop more specific guidance on the types of violations on which EPA should focus. Regions and States are strongly encouraged to plan in advance for any such requests for or areas needing EPA enforcement assistance during the State/EPA Enforcement Agreements process.

b. State or Local Enforcement is not "Timely and Appropriate"

The most critical determinant of whether EPA will take direct enforcement action in an approved State is whether the State or local agency has or will take timely and appropriate enforcement action as defined by national program guidance and State/Regional agreements. EPA will defer to State or local action if it is "timely and appropriate" except in very limited

circumstances: where a State or local agency has requested EPA action (a, above), there is a national legal or program precedent which cannot be addressed through coordinated State/Federal action (c, below), EPA is enforcing its own administrative order or consent decree (d, below) or in the case of a repeat violator, after notice and consultation, where the State response is likely to prove ineffective given the pattern of repeat violations and prior history of the State's success in addressing past violations.

(i) Untimely State or Local Enforcement Response:

If a State or local action is exceeding target timeframes for action¹³, EPA Regions must determine after advance notification and consultation with the State or local agency, whether the State or local agency is moving expeditiously to resolve the violation in an "appropriate" manner.

(ii) Inappropriate State or Local Action:

EPA may take direct action if the State or local enforcement action falls short of that agreed to in advance in the State/EPA Enforcement Agreements as meeting the requirements of a formal enforcement response (See Section B, page 13) where a formal enforcement response is required. EPA may also take action if the content of the enforcement action is inappropriate, for example, if remedies are clearly inappropriate to correct the violation, if compliance schedules are unacceptably extended, or if there is no appropriate penalty or other sanction.

(iii) Inappropriate Penalty or Other Sanction:

For types of violations identified in national program guidance as requiring a penalty or equivalent sanction, EPA may take action to recover a penalty, after notice and consultation with the State or local agency, if a State or local agency has not assessed a penalty or other appropriate sanction where national guidance indicates it is essential for deterrence, or if an assessed penalty is inappropriate.

In making a determination of whether to use federal enforcement authority to "overfile" a pre-existing state or local agency enforcement action solely to recover additional penalties, EPA will take into account both 1) policy considerations, i.e. if

¹³ Target timeframes are program-specific goals for timely and appropriate enforcement response tailored to state-specific circumstances as appropriate, case specific targets for multi-media cases, or the schedules for relevant enforcement case cluster filings or issuance.

a penalty does not recover the economic benefit of noncompliance gained by the violator (where applicable), or fails to reflect the seriousness of the violation otherwise and 2) the impact on the effectiveness of the national, state, or local program. EPA will give due consideration to the State's or local agency's own penalty policies and the effectiveness of its overall enforcement program to achieve deterrence in making overfiling decisions.

While this policy provides the basis for deciding whether to take direct Federal action on the basis of an inadequate penalty, this issue should be discussed in more detail during the agreements process. State-specific circumstances and procedures established to address generic problems in specific cases should be addressed at that time. Where identified in national guidance and agreed to between the Region and State, other sanctions may be acceptable as substitutes or mitigation of penalty amounts.

This policy will be operative in the absence of program-specific national guidance on more specific expectations for State penalty assessments. Such guidance may be developed in consultation with the States and applied accordingly when determining adequacy of penalty amounts following the general principles articulated in the Policy Framework.