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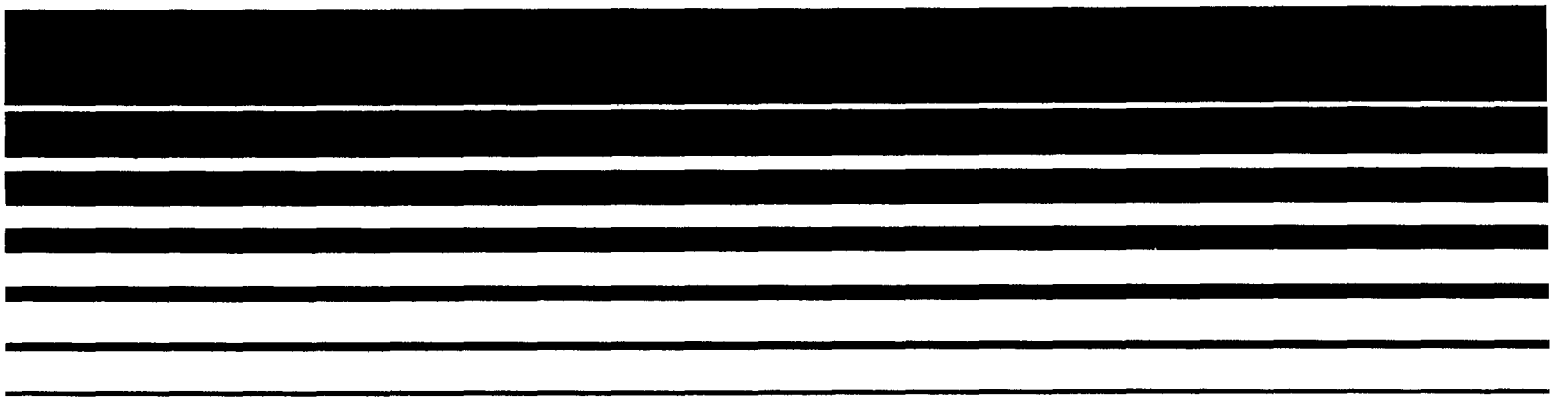
Initial Design Considerations for A Model State and Local Administrative Fines Program

Volume I

Final Report



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Initial Design Considerations for A Model State and Local Administrative Fines Program

Volume I

Final Report

by

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DISCLAIMER

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INTRODUCTION

Until recently, most air pollution control programs concentrated on bringing sources into initial compliance with Federal and state regulations. In the case of stationary sources, this effort focused on the development and installation of pollution control equipment. Now that much of this equipment is either in place or scheduled to be installed, agencies are turning their attention to the problems of continuing compliance. This effort is aimed at ensuring that the design, operation, and maintenance of pollution control equipment are sufficient to keep sources in compliance with state and local air pollution regulations.

The U.S. Environmental Protection Agency's Stationary Source Compliance Division (SSCD) has formed a Continuing Compliance Task Group to develop programs that state and local agencies can use to encourage continuing compliance. An effective enforcement strategy for ensuring continuing compliance should include provision for quickly imposed sanctions, appropriate remedies, and a means of building a record in cases involving recalcitrant sources. EPA believes that an enforcement strategy which incorporates an administrative fines component may be well suited to meeting these goals and has decided to pursue development of a model administrative fines program.

The objective of this study is to develop a list of issues that must be addressed by a model administrative fines program, and then to formulate an initial set of design criteria for such a program. To accomplish these objectives, the study analyzed the operating experience of nine state and local agencies that currently employ administrative fines programs as part of their overall air pollution enforcement effort. The discussion below briefly outlines the study's technical approach, summarizes its major findings, and provides a number of specific conclusions and recommendations.

TECHNICAL APPROACH

In order to select specific agencies for detailed study, the enforcement provisions of the air pollution laws and regulations of all 50 states were reviewed; this effort was supplemented by contacts with state, federal, and regional officials to identify agencies with ongoing administrative fines programs. This initial survey revealed that 12 states and 4 local agencies posses most of the powers needed to establish an administrative fines program for air pollution enforcement. An additional six states possess these same

powers but tailor their programs to recovering the cost savings that violators achieved by not complying with the law, i.e., they assess "noncompliance" penalties similar to those specified by Section 120 of the Clean Air Act. Two states administer both types of programs. Since EPA in this study is primarily interested in studying agencies that assess small fines (<$1000) as a continuing compliance incentive, only agencies in the first category were selected for further study. Appendix A of this volume summarizes the results of this initial survey.

Nine agencies that have actively relied on administrative fines to enforce air pollution regulations for several years were selected for further study. The nine programs examined in this report include those operated by the Puget Sound Air Pollution Control Agency and the states of Georgia, Indiana, Louisiana, Mississippi, Nevada, New Jersey, Oregon and Pennsylvania. An informal interview guide (reproduced in Appendix B) was developed to be used as the basis for a telephone survey of responsible enforcement officials in those nine agenices. The telephone interview, which were conducted in December 1981 and January 1982, each lasted approximately 45 minutes to 1 hour. Appendix C lists the officials contacted for this study. A separate volume contains brief summaries of each agency's administrative fines program including copies of the enabling legislation authorizing the agency to impose administrative fines.

FINDINGS

The following findings have been established based on discussions with agency officials and review of laws, regulations, and literature pertaining to administrative fines;

1. Eighteen states and at least four local agencies possess most of the powers needed to establish an administrative fines program. In six of these states, however, programs are restricted to the assessment of "noncompliance" penalties.

2. Several of the states that have enabling legislation authorizing administrative fines do not currently operate an active fines program. Several other states rely on administrative fines infrequently but consider them an important part of their overall enforcement strategies. States in this latter group were analyzed in this study.

3. Officials from the nine agencies surveyed felt that their programs were, for the most part, an effective and fair way to enforce air pollution regulations.

4. Agencies disagreed about the best way to design an effective administrative fines program. Three agencies tend to use civil penalties only as a last resort when other enforcement techniques fail; this approach is characterized by fewer, but larger fines, little reliance on formal penalty assessment schedules and/or policies, and highly centralized penalty assessment authority.

Three other agencies prefer a second approach: they assess penalties more frequently, rely on formal penalty schedules and/or policies, and typically exhibit fairly decentralized penalty assessment authority. The remaining three programs rely on some combination of these two approaches.

5. Several agencies indicated that a lack of resources to detect violations and collect penalties impaired the effectiveness of their programs. A few agencies also cited political or institutional constraints to strengthening and extending their programs.

6. Most agencies rely on a common set of procedures to ensure fairness in their administrative fines programs. In every case, the enabling legislation authorizing civil penalties indicates--at least in broad terms--what offenses make a source liable for an administrative fine. Most agencies provide the source with written notice of the violation and will schedule an informal conference to discuss the violation, either routinely or at the source's request. All of the agencies provide violators with the opportunity for court review of the penalty decision and most also conduct formal administrative hearings at some stage of the penalty imposition process. A few agencies have also adopted formal penalty schedules or policies to limit administrative discretion in assessing civil penalties.

7. In spite of procedural safeguards, several agencies expressed concern about the fairness of their administrative fines programs. Some officials were worried that poor penalty collection procedures permitted the most recalcitrant sources to escape paying their fines. Others indicated that the burden of the program may fall unequally on large and small sources. A few officials were concerned about inconsistencies between the penalties imposed for air pollution violations and those assessed for violation of other environmental regulations.

8. There are at least three important differences among agencies that should be analyzed and understood before developing a model administrative fines program: (1) differences in legal and institutional mechanisms for air pollution enforcement; (2) differences in enforcement philosophy; and (3) differences in enforcement case load.

9. Several agencies pointed out that most of the personnel and capabilities needed to run an administrative fines program--inspectors, legal and administrative staff, and a tribunal to resolve disputed assessments--were already in place to implement other aspects of their air pollution control program. Although no official could estimate the cost of running the administrative fines component of their enforcement program, most felt it was small relative to the costs of the agency's other air pollution control activities.

10. Officials pointed out relatively few financial or institutional constraints to the implementation of their administrative fines programs. Some officials indicated that financial constraints were partly responsible for difficulties in detecting and documenting violations and/or collecting penalties. Two officials indicated that it might improve program operations in their agencies if agency officials had greater authority to assess penalties.

CONCLUSIONS AND RECOMMENDATIONS

After talking with agency officials and reviewing the literature on administrative fines, we have reached the following conclusions about the design of a model administrative fines program:

1. A model program must contain three major structural components: (1) procedures for assessing penalties; (2) procedures for handling contested assessments; and (3) procedures for penalty collection and disposition.

2. The nine agencies rely on two different basic approaches to penalty assessment. Each of these approaches is tailored to achieve different enforcement goals: one is used primarily for deterring serious violations or recalcitrant sources, while the other is used to assess fines for routine or minor violations. Although many continuing compliance violations probably fall in this second category, the development of a model program that integrates both approaches, similar to the ones used by Nevada, Pennsylvania, and Oregon, should be seriously considered. This "two-tiered" program would offer an alternative to agencies that currently rely on only one approach, and would assist agencies in developing procedures for handling both serious and more routine continuing compliance problems.

3. Many federal agencies that impose fines through an administrative procedure rely on the courts to provide the only formal hearing if the violator wishes to dispute the penalty. Agency officials and legal commentators alike, however, seem to agree that the opportunity for an administrative, rather than judicial, hearing is an essential component of an effective administrative fines program. Of the nine agencies surveyed in this study, only New Jersey does not provide sources with the opportunity to dispute fines in an administrative hearing.

4. Most agencies ultimately rely on civil action in district courts to recover uncollected penalties. Since a number of agencies reported difficulties in collecting penalties, EPA should explore the usefulness of other penalty collection techniques (e.g., liens on violators' property) before recommending any approach for a model administrative fines program.

5. A model program should point out the drawbacks of channeling penalty revenue back into the agency budget. Most officials felt that the credibility of their fines programs could be jeopardized by such an arrangements.

The findings and conclusions of this study have a number of important implications for the development of a model administrative fines program. Many agencies already have well established procedures and preferences for enforcing their air pollution regulations. A model program will have to take into account what state and local agencies already have inplace; any recommended improvements on existing practice should draw on more detailed analysis of agency experience and performance. The findings from the nine agency survey, while useful, are largely descriptive. They reflect what an interviewer can learn over the telephone in 45 minutes to an hour by talking to one knowledgeable official in each state after reviewing that agency's existing laws and regulations. This anlaysis of agency experience can highlight key issues and important problems, but was not intended, and is not sufficient, to provide the basis for final recommendations for the detailed design of a model fines program.

In order to develop a model administrative fines program, there is a need for further analysis of the effectiveness of existing state and local programs, based on more detailed study of how these programs actually function. It is recommended that the Continuing Compliance Task Group undertake a limited number of more detailed case studies of selected agency programs, perhaps four or five at most, to study some of the key design problems raised in this report. Criteria that should be considered when selecting programs for further study include:

- Basic enabling legislative requirements;
- Enforcement caseload (number and type of violations handled);
- Agency organization (centralized, decentralized);
- Number and dollar amount of fines collected;
- Agency interest in the study.

The agencies selected should represent each of the different approaches to organizing an administrative fines program. At least one agency without such a program should also be included in the study.

The remainder of this volume presents the results of the study. Section 2 focuses on four key issues that should be considered in a model program; effectiveness, fairness, responsiveness to agency needs and goals, and ease of implementation and administration. Section 3 outlines the key design features of a model program and discusses how the nine agencies surveyed handled important program components. Appendices A, B, and C, described above, are contained in this volume; a separate volume summarizes the key characteristics of each of the nine agency programs.

SECTION 2

MODEL PROGRAM ISSUES

To be considered successful, a model administrative fines program should be effective, fair, responsive to individual states' needs and goals, and relatively easy to implement. This section discusses each of these issues, drawing both on information supplied by state and local officials, and published material dealing with administrative fines.

EFFECTIVENESS

Proponents claim that an administrative fines program can help regulatory agencies achieve two important enforcement goals: (1) deter violations, and (2) build a record against recalcitrant violators. The discussion below attempts to provide a framework for thinking about this issue, while summarizing the insights available from state and local experience with administrative fines programs.

Effectiveness, as formally defined, implies producing a "decided, decisive, or desired effect." Most agencies agreed that their administrative fines programs produced the effect they desired: deterrence of air pollution violations. Several agencies also indicated that the program was an effective means of building a record against recalcitrant sources. Agencies disagreed, however, on how to best design an administrative fines program to maximize its effectiveness. They also cited several obstacles to effectiveness including lack of resources to detect and document violations and political or institutional constraints to strengthening and extending the program.

Use of Administrative Fines to Deter Violations

Although the threat of having to pay a penalty may be sufficient to deter some violators, commentators frequently point to the certainty that the fine will be imposed as its major advantage over harsher sanctions such as permit revocations or court injunctions. Violators realize that agencies are often unwilling to impose these harsh, time-consuming, and expensive sanctions for relatively minor violations. Administrative fines, on the other hand, can be tailored to the seriousness of the violation and do not involve the delays or difficulties inherent in scheduling a court hearing. Agencies thus can react swiftly and in a manner appropriate to the nature of the violation.

An article by the Administrative Conference of the United States[1] (pp. 928-929) summarized some of the major advantages of administratively imposed fines over those imposed by the courts. While the excerpt cited below focuses on federal regulatory enforcement, its key points apply to state and local administrative fines programs as well.

1. Cases which now languish on judicial dockets could be adjudicated quickly, efficiently and at relatively low cost.

2. Unwise settlements (from the standpoint of the public's interest in deterring or remedying violations of regulatory laws) would be avoided by eliminating the inhibitions on agencies created by the unavailability of (or inappropriateness of taking a case to) overburdened courts. Concomitantly, the availability of a forum should temper administrative inclinations towards arbitrariness.

3. Dual and overlapping efforts by an agency and the Department of Justice would be eliminated.

4. There would no longer be an opportunity for recalcitrant defendants (who will not settle and cannot easily be brought to trial) to escape the consequences of their improper acts.

5. An alleged offender would, at his or her option, be provided with procedural protections and an impartial forum in which to present a defense. No such forum or protection is available as a practical (as opposed to theoretical) matter now.

6. Fair settlements should be facilitated since neither the agency nor the alleged offender would be able to premise obstinancy on the inability or unwillingness of the other to go to court.

7. Cases which are simply inappropriate (e.g., because of their dollar magnitude and the expertise involved) would be removed from federal district courts at a time when there is general agreement that we have poured more into the courts than they can digest.

8. Substantial evidence review would be available in the courts of appeals as an ultimate (though presumably seldom used) protection against abuse.

All of the agencies GCA surveyed indicated that the primary purpose of their administrative fines program was deterring sources from committing violations that jeopardize attainment of NAAQS, as well as encouraging violators to regain compliance as quickly as possible. A few agencies also indicated that their programs accomplished secondary goals such as case-building and making sources aware that the agency had regulations that it intended to enforce. Most agencies feel their programs accomplish these goals adequately, even admirably. Pennsylvania, for example, indicated that it would be in "a tough enforcement situation" if it lacked the authority to impose civil penalties. Louisiana thought its program was effective because "companies know that the agency will not hesitate to use civil penalties if

forced to." A Mississippi official described that state's program as "an ace up our sleeve....that reduces turnaround time on violations from 6 months to within 15 days."

Several agencies indicated that sources were anxious to avoid the negative publicity associated with being fined. Two states, Indiana and New Jersey, mentioned that major sources were particularly concerned because they would have to report the fine to the Securities and Exchange Commission and were eager to avoid this type of blemish on the company's reputation. Indiana provided further evidence that companies fear notoriety more than they fear the financial pinch of a fine. In that state, large companies have hired outside attorneys to avoid fines smaller than $1000. A recent report on Puget Sound's enforcement activities also documents this tendency:[2]

> "The desire to avoid a reputation as a poor corporate citizen seems to be the most important deterrent effect of the penalty. Fines do not look well on corporate financial records, and are poor public relations for the company. Although a few companies appeared to absorb the fines, most took them more seriously than their economic value might warrant."

New Jersey noted, however, that small sources may be more motivated by the financial aspects of the penalty since the owner of a small firm "pays the penalty directly out of his wallet."

Agencies also cited speed, flexibility, and certainty as important advantages of administrative fines over other enforcement techniques. In a written response,[3] a Mississippi official stated: "We believe our capabilities are far superior to those capabilities of state and federal agencies who must get before a court with a matter. The long procedural delays we believe often lead to settlements which are not in the best interest of the public welfare." Similar sentiments were echoed by other agencies.

Two states indicated that these advantages are not necessarily confined to penalties that are assessed automatically. Both Pennsylvania and Louisiana felt that sources were much more cooperative in negotiating consent agreements knowing that the state had the authority and willingness to assess civil penalties if the source refused to cooperate.

Many agencies indicated that flexibility to set penalties appropriate to the nature of the violation was a key feature of their program. Most of these agencies were reluctant to adopt formal penalty schedules or policies for fear they would compromise this flexibility. Many of these advantages were summarized by an Oregon official who indicated why he felt administrative fines were superior to judicially-imposed sanctions. He noted that administrative penalties:

1. are easier to assess;

2. require a less stringent burden of proof;

3. are not reviewed by a jury of civilians but rather by knowledgeable people in the profession;

4. are better than criminal sanctions for maintaining control of continual compliance violations. (Criminal sanctions are costly and difficult to use because the agency would have to prove the harmful effects on the environment.);

5. are more flexible, especially for smaller problems; and

6. enable the agency to handle more cases than if they had to pay for attorney general time.

Use of Administrative Fines for Case-Building

Administrative fines are one way to build a record against sources with a long history of continuing compliance violations. A record of small fines issued to a source for minor violations may provide a more convincing and better documented case that the source is recalcitrant than would a record of letters and informal conferences designed to bring the source back into compliance. Several agencies indicated that they use administrative fines for this purpose as discussed below.

Nevada has perhaps the most formal program for using administrative fines to build a record against recalcitrant sources. The State Environmental Commission has promulgated a penalty schedule for "minor" violations of air pollution regulations. If a source has more than four minor violations within a 12 month period, any subsequent violations are classified as major and subject the violator to the possibility of a much stiffer penalty. The State Environmental Commission also keeps a record of major violations, and calls sources in for a formal quasi-judicial hearing if they commit more than one major violation for the same offense within 12 months. Nevada officials feel this systematic record keeping has improved both the effectiveness and the fairness of its administrative fines program.

New Jersey also has formal procedures for handling repeat violations. It has developed a penalty schedule, reproduced in Appendix D, that includes progressively higher fines for second and subsequent violations. After a specified number of violations, cases are automatically referred to the attorney general's office. A spokesman for the New Jersey Department of Environmental Protection indicated that administrative officials can deviate from the penalty schedule when "good and sufficient cause exists."

Other agencies that issue many small fines rely on less formal approaches to case-building. Pennsylvania, which issues small fines for "summary offenses" and civil penalties only for recalcitrant sources or serious violations, indicated that a history of small fines bolsters the agency's case when officials go before the Environmental Hearing Board seeking civil penalties against a violator. Indiana also indicated that one of the first steps enforcement officials take when an inspector discovers a violation is refer to agency records to see if they have fined the source before. Usually, the agency will be stricter with a source if this is its second or third violation.

Agencies such as those in Louisiana, Mississippi, and Georgia, that issue civil penalties primarily as a last resort when other enforcement techniques fail, do not issue enough penalties to make their program a useful way of building a record against recalcitrant sources. These agencies indicate they rely on other means, such as notices of violation, to keep track of recalcitrant sources. A Georgia official indicated that his agency keeps a compliance file containing correspondence and other information for this purpose.

Approaches to Designing Effective Administrative Fines Programs

Although there is general agreement among the agencies surveyed on the goals of an administrative fines program as well as some consensus that the programs actually accomplish these goals, agencies exhibit great diversity in the way they structure their programs to accomplish these goals. Although it is impossible to divide the nine agencies into categories, most tend to rely on one of two fundamental approaches to organizing their administrative fines programs. These approaches are summarized briefly below and outlined in more detail in Section 3 which focuses on program organization and structure.

Several agencies, including Georgia, Mississippi, and Louisiana, tend to use civil penalties only as a last resort when other enforcement techniques fail. As Section 3 indicates, this approach is characterized by larger fines, fewer penalties, little reliance on formal penalty assessment schedules and/or policies, and highly centralized penalty assessment authority. In Mississippi, for example, the Bureau of Pollution Control issues a letter of complaint and prepares for an adjudicatory hearing only if the agency is unable to bring the source into voluntary compliance. The Mississippi Commission on Natural Resources then holds a hearing and makes findings of fact and conclusions of law; it sets whatever penalty it feels is appropriate within the limits established by the state's enabling legislation. The Department of Natural Resources is not authorized to assess penalties. Mississippi typically issues two or three penalties a year for air pollution violations. Unlike Georgia and Louisiana, which often assess fines of more than $1000, the typical fine in Mississippi ranges from $500 to $1000.

The second approach, which is favored by three agencies, Indiana, New Jersey, and Puget Sound, has very different characteristics. These agencies do not view fines as a last resort and thus assess penalties more frequently. Most have developed formal penalty schedules or policies to improve efficiency and consistency and reduce administrative discretion. These penalty policies are particularly crucial because assessment authority tends to be fairly decentralized. In Puget Sound, for example, the inspectors make initial decisions about when to assess penalties, although this decision must ultimately be approved by upper level management.

The remaining three agencies rely on some combination of these two approaches to organize their administrative fines programs. Two states, Pennsylvania and Oregon, have multifaceted penalty programs that utilize both of these approaches. The third state, Nevada, has a hybrid program that blends the characteristics of the two approaches. Each of these three

programs is described briefly below. Appendix D of this report summarizes the key features of all nine agencies' programs.

Pennsylvania has three distinct "administrative" fines programs: Magistrate-issued penalties for "summary offenses," penalties contained in consent agreements, and civil penalties issued by the Environmental Hearings Board. The magistrate-issued penalties are not, strictly-speaking, "administrative" fines since they are issued by a lower-level judicial official, a magistrate. These penalties are described here, however, because they serve much the same functions as the small fines programs of Indiana, New Jersey, and Puget Sound, and many of their features could be duplicated using administrative, rather than judicial, imposition. Magistrate citations involve a nominal fine, between $100 and $1000, and are typically used for minor violations (open burning, opacity, odor) that are easily corrected. When an inspector detects a violation, he files immediately with a magistrate who then issues the fine. Records provided by Pennsylvania officials indicate that the state issued 28 magistrate citations in 1981 collecting $5500 in penalties. Only two fines exceeded $500, while most ranged from $100 to $200.

Pennsylvania prefers to use consent orders to handle most violations that cannot be resolved immediately, including such continuing compliance violations as poor operating and maintenance procedures. The Bureau of Pollution Control relies on four different types of penalties: lump-sum settlements, ongoing penalties, end-date penalties, and performance bonds. The use of each of these penalties is described in Appendix D. In the first quarter of 1981, Pennsylvania collected over $200,000 from approximately 30 consent orders or agreements. While most of these penalties were less than $1000, a few were over $50,000. Pennsylvania also uses "Letter Agreements" which are similar to consent orders except that they apply to "summary offenses" (i.e., those that would usually be handled with a magistrate citation). In the first quarter of 1981 the agency collected over $80,000 from 13 letter agreements, including one for over $67,000.

Finally, Pennsylvania does assess civil penalties. These are usually reserved for recalcitrant sources or situations when a company refuses to negotiate a consent agreement. This portion of Pennsylvania's program closely resembles that of Louisiana, Georgia, and Mississippi. Penalties are issued only as a last resort, there are no schedules or policies to limit administrative discretion in establishing the penalty amount, and assessment authority is centralized in the State's Environmental Hearings Board. The Bureau of Air Quality Control can only recommend civil penalties, it cannot assess them. In 1981, the Environmental Hearings Board assessed three civil penalties for air pollution violations totaling $265,000. A spokesman for Pennsylvania's Bureau of Air Quality Control stated that this multifaceted approach to fining sources for air pollution violations "affords the agency the kind of coverage they need to handle any type of violation."

Oregon also has two distinct penalty programs: one for "fixed" sources such as industrial plants and a second for agricultural or "field-burning" violations. According to both state officials and a recent EPA report,[4] Oregon prefers to deal with industrial sources by issuing civil penalties only

when voluntary compliance fails. This portion of its administrative fines programs thus resembles that of Georgia, Louisiana, and Mississippi. The agency does issue NOVs, or NOIs (Notices of Intent to Issue Civil Penalties) for major, chronic, or operating and maintenance problems but allows the source 5 days to establish contact with the agency and attempt to resolve the problem. In 1978, 13 major and 6 minor sources received NOIs, but no civil penalties were issued to industrial sources.[4]

The second portion of Oregon's program was established to handle violations of agricultural burning regulations by commercial grass-seed growers. Although this problem is somewhat unique to Oregon, the program the state developed exhibits many of the same characteristics as the small fines programs operated by Indiana, New Jersey, and Puget Sound:

(1) most fines are nominal,

(2) the agency has developed a penalty schedule (which is reproduced in Appendix D), and

(3) assessment authority is highly decentralized--in many cases, the penalty is assessed immediately, similar to the way a parking ticket might be issued.

As indicated above, Oregon officials are fairly pleased with the effectiveness of their civil penalties programs and cited many advantages of administrative rather than judicial imposition of fines.

Nevada has a hybrid program that blends the characteristics of the two approaches outlined above. The state issues smaller fines for minor violations and has adopted a penalty schedule to limit administrative discretion in assessing these fines. Fines for major violations are largely left to the discretion of the Environmental Commission. At some point, a source with a history of minor violations is treated as if it had committed a major violation. It appears that penalty assessment authority is highly centralized for both major and minor violations, and a representative of the State Environmental Commission indicated that in all cases the agency prefers to try voluntary or negotiated compliance before resorting to administrative fines.

Obstacles to Effective Administrative Fines Programs

The officials surveyed cited three problems that do or could undermine the effectiveness of their administrative fines programs:

(1) inadequate inspection and detection capability,

(2) poor penalty collection procedures, and

(3) lack of the necessary statutory authority or political backing to strengthen or extend the program.

To put this information in perspective, however, it should be noted again that most agencies were enthusiastic about the effectiveness of their administrative fines programs. Officials were able to point to few drawbacks or disadvantages and most were unable to suggest aspects of the program that needed improvement.

The most frequently cited obstacle to effectiveness was difficulty in adequately documenting air pollution violations. Although most agencies stressed that administrative tribunals require far less evidence than a court before assessing a penalty, several officials still indicated that providing adequate documentation that a violation exists is one of the few major problems in assessing administrative fines. Mississippi, for example, noted that it assessed more penalties for water violations, in part because air pollution violations are more difficult to prove. Before the Mississippi Commission on Natural Resources will assess a fine, the Bureau of Pollution Control must demonstrate "beyond a reasonable doubt" that a violation occurred. Several other agencies, typically those that routinely assess many small fines, were more concerned about the problems of insufficient resources to detect violations and inadequately trained inspection staff. These officials noted that once a violation was properly documented, the procedures they had established to assess penalties worked smoothly.

Several agencies also indicated that poor penalty collection procedures sometimes jeopardize the credibility of their fines programs. This problem, which is discussed in more detail in the subsection on fairness, is only an issue for agencies that assess a large number of fines. Agencies that issue relatively few fines--5 to 10 annually--did not report any difficulties in collecting the penalties assessed.

Finally, a few officials suggested that the people responsible for establishing enforcement policy are sometimes willing to sacrifice a stronger administrative fines program in favor of other state goals such as maintaining a reputation as a good place to do business. One official felt that the environmental hearing board discouraged the agency from pursuing penalty cases against large, politically sensitive companies until all other avenues had been exhausted; this same treatment was not offered to smaller sources, however. Two other officials felt that the same types of considerations would make it difficult, if not impossible, to strengthen and extend their programs.

FAIRNESS

In the past, legal scholars have expressed concern about whether administrative fines programs adequately protect accused violators from arbitrary and capricious administrative decisions. This concern prompted the American Bar Association to outline the following set of "fair procedural safeguards" for federal imposition of civil money penalties:[1] (pp. 929-930)

1. a clear statutory specification of the offense subject to the money penalty sanction;

2. provision for adequate and fair procedures, including notice to the accused and opportunity to answer prior to the imposition of the penalty; and

3. other safeguards to avoid an agency prejudgment of guilt and the imposition of double penalties for the same offense and to afford opportunity for a hearing.

The discussion below examines the procedural safeguards developed by the nine state and local agencies reviewed in this study.

Most of the nine agencies reviewed in this study rely on a common set of procedures to ensure fairness in their administrative fines programs. In every case, the enabling legislation authorizing civil penalties indicates--at least in broad terms--what offenses make a source liable for an administrative fine. Most agencies provide the source with written notice of the violation and will schedule an informal conference to discuss the violation either routinely or at the source's request. All of the agencies provide sources with the opportunity for court review of the penalty decision and most also conduct formal administrative hearings at some stage of the penalty imposition process. A few agencies have also developed formal penalty schedules or policies to limit administrative discretion in assessing civil penalties.

In spite of these safeguards, several agencies expressed some concern about the fairness of their administrative fines program. Some officials were worried that poor penalty collection procedures permitted the most recalcitrant sources to escape paying their fines. Others indicated that the burden of the program may fall unequally on large and small sources. A few officials were concerned about inconsistencies between the penalties imposed for air pollution violations and those assessed for violations of other environmental regulations. These problems are also discussed below.

Techniques Agencies Rely on to Ensure Fairness

As indicated, all nine agencies rely on similar procedures to ensure that their administrative fines programs are fair. The most basic of these procedures--and one recommended by the American Bar Association--is clear statutory language indicating what offenses are subject to administrative fines. All nine agencies have such language in the enabling legislation that authorizes their administrative fines programs. The following example taken from Georgia's legislation[5] is typical of the relatively simple language most of the nine statutes contain:

"1. Civil Penalties: Any person violating any provision of the Act or rules or regulations hereunder or any permit condition or limitation pursuant to this Act, or failing or refusing to comply with any final order of the Director issued as provided herein, shall be liable for civil penalty of not more than $25,000 per day."

Two states, Oregon and Nevada, have slightly more detailed legislation that describes varying penalties or penalty assessment procedures for different types of offenses. In addition, New Jersey, Nevada, and Oregon have adopted rules or regulations indicating the penalty amount to be assessed for specific types of violations.

Most of the nine agencies prefer to negotiate with the alleged violator prior to imposing an administrative fine. These conferences help the source understand the agency's decision and provide an opportunity for both parties to suggest reasonable solutions to the problem. Louisiana and Mississippi (and to some extent Oregon) will usually forego civil penalties if the source voluntarily eliminates the violation or agrees to a compliance order. Several other states, including Georgia and Indiana (and, except for "summary offenses," Pennsylvania) also prefer to rely on compliance agreements but often negotiate a penalty into the agreement. Nevada will hold an informal conference prior to assessing a penalty for a first violation, but automatically schedules a hearing before the Environmental Commission after the second violation for the same offense within 12 months.

A few agencies, typically those that issue a large number of fines for relatively minor offenses, usually do not hold informal conferences prior to assessing a fine. New Jersey, for example, issues administrative orders explaining the nature of the violation. If the violation is not corrected during the time period specified in the order, the agency issues a Notice of Prosecution (NOP) which contains a penalty and offer of penalty settlement. Although the source may request a hearing on the administrative order, it has no recourse but to accept the state's offer of penalty settlement or go to court. Oregon, which routinely issues small penalties for field-burning allows sources to respond to penalty assessments with a written statement contesting the penalty which is then presented to a hearing officer. If the source disagrees with the hearing officer's findings it can appeal to the Environmental Quality Commission.

Most agencies do provide the alleged violator with the opportunity for a formal administrative hearing at some stage of the penalty imposition process. These hearings, which are usually quasi-judicial in nature, allow both parties to present evidence and call and cross-examine witnesses. The hearing officer, commission, or board then makes findings of fact and conclusions of law based on this evidence. In some cases, a state administrative procedures act governs the conduct of these hearings; in others, the air pollution control law specifies how the agency will conduct hearings on civil penalties and/or other enforcement actions.

The agencies that prefer to negotiate with sources prior to imposing a fine (Georgia, Indiana, Louisiana, Mississippi, and to some extent, Oregon and Pennsylvania) usually hold formal quasi-judicial hearings only if these negotiations fail. In some of these states the agency requests a hearing when negotiations fail, and the hearing board usually imposes the fine, if any. In others, the agency or commission assesses a fine and the source may then request a hearing to appeal the assessment.

The remaining three agencies, in Nevada, New Jersey, and Puget Sound, each rely on different procedures for scheduling formal administrative hearings. Nevada automatically holds an adjudicatory hearing before the State Environmental Commission if the source has two violations for the same offense within 12 months; when this is not the case the Commission may choose to schedule a hearing, but does not have to unless the source requests one. As indicated above, New Jersey does not allow sources the opportunity for a formal administrative hearing after the state sends out a Notice of Prosecution containing an offer of penalty settlement. However, sources may request a hearing on the original administrative order that specifies the violation. Puget Sound rarely holds informal negotiations on penalty assessments, but state law allows the source to request either a formal or informal hearing on the penalty before the State Pollution Control Hearing Board. According to a recent study[2] about 20 percent of the penalties that Puget Sound levies are appealed to this Board.

All nine administrative fines programs rely on court review of penalty assessments as an ultimate safeguard against abuse of administrative discretion. Most agencies indicated that sources very rarely avail themselves of the opportunity to appeal the hearing officer's final decision to the courts. Even in New Jersey, where sources do not have the opportunity to contest the penalty assessment in an administrative hearing, only about 5 percent of the penalty cases ultimately go to trial.[4]

Recent articles on civil penalties[1,6] also stress the need for penalty assessment schedules or policies to guide agency officials in deciding when to assess a fine and how large the fine should be. Over half of the agencies reviewed rely primarily on the penalty ceilings specified in the enabling legislation, and then follow informal policies to limit administrative discretion in assessing fines. In a few cases, the enabling legislation also specifies factors that the agency or hearing board should consider in setting the fine, such as the seriousness of the violation and the good faith of the source in eliminating the violation. Only New Jersey, Nevada, and Oregon have formally adopted rules or regulations to guide officials in establishing the appropriate fine for specific offenses, while Indiana has developed internal policy guidance to assist officials in assessing penalties for three of the most common violations: open burning, construction without a permit, and operating without a permit. One state, Pennsylvania, is considering establishing a more formal policy to guide officials in assessing penalties. Section 3 describes penalty assessment procedures in more detail.

Problems in Achieving Fairness

Most of the agencies surveyed felt that their administrative fines programs were both effective and fair. A few agency officials, when asked to describe drawbacks or disadvantages of their programs, mentioned the problems discussed below. Most of these officials felt these problems were either minor, or had plagued the program in the past but were now under control.

One official, representing an agency that assesses many small fines, noted that difficulties in collecting penalties may create the impression among some violators that fines can be safely ignored. Although he felt that this problem was not as serious as some critics claimed, he was concerned about the unfairness that results: companies that violate the law with impunity may escape paying penalties while more conscientious companies pay their fines promptly. Nevada indicated that it had experienced similar problems in assessing and collecting penalties for recalcitrant sources until it improved its recordkeeping and established a policy of holding automatic hearings whenever a source is charged with two violations for the same offense within 12 months. According to Nevada officials, the uneven penalty assessment and collection procedures had "created problems with the credibility of the enforcement program and resulted in lots of bad feelings."

Two agency officials felt that their programs sometimes resulted in large and small sources being treated unequally. One official felt that small sources could escape paying their fines more easily because the agency, which lacked the resources to follow up on all penalty assessments, concentrated its efforts on the larger sources. An official from another agency, however, felt that small sources often end up paying more than their fair share of fines because they are less likely to hire an attorney and contest the penalty. Both these officials represent agencies that tend to assess many small ($1000) fines.

Finally, a few officials were concerned about inconsistencies in the way fines are assessed for air, water, and hazardous waste violations. Agencies that have separate enforcement programs for each type of pollutant worry about the inequities that sometimes result from this arrangement. According to a Pennsylvania official, for example, one advantage of adopting formal penalty assessment policies is to promote more uniformity in the way the state assesses penalties for air and water violations. Agencies that rely on a single administrative fines program to enforce all types of environmental regulations are also concerned about inconsistencies, however; Mississippi, for example, must prove that a violation existed "beyond a reasonable doubt" before assessing a penalty. According to one official, one reason the state assesses more penalties for water pollution violations is that water violations are easier to prove than air pollution violations.

RESPONSIVENESS TO AGENCY NEEDS, GOALS, AND CHARACTERISTICS

As Section 1 indicated, the nine agencies reviewed in this report were selected for detailed study because they possess a common set of characteristics. Upon further examination, however, the most striking characteristic of these nine administrative fines programs is their diversity. This diversity must be analyzed and understood before it is possible to design a model program that agencies will find attractive.

There are at least three types of important differences among agencies that should be considered in the development of a model administrative fines program:

(1) differences in legal and institutional mechanisms for air pollution enforcement,

(2) differences in enforcement philosophy, and

(3) differences in enforcement caseload.

Although the discussion below focuses on agencies that currently have an administrative fines program, the same issues are also relevant in evaluating whether a model program would appeal to agencies that do not currently use administrative fines.

Differences in Legal and Institutional Characteristics

Two key legal/institutional factors shape agencies' administrative fines programs: the enabling legislation that authorizes the agency to assess fines, and the existing organizational structure for carrying out air pollution regulation and enforcement. These important influences on agency programs are often the most visible response to the more fundamental differences in enforcement philosophy and caseload discussed later.

Enabling legislation provides the basic ground rules for any administrative fines program: it authorizes the environmental agency or commission to assess fines for air pollution violations and spells out minimum requirements that the program must satisfy. The enabling legislation for the nine programs reviewed in this report varies greatly: some statutes do little more than convey the essential authority in one or two paragraphs, while others spell out very detailed conditions for program operation. The examples below illustrate the different approaches states have used in developing legislation for administrative fines programs and also indicate the options available to the designer of a model program.

As the following example from Indiana's air pollution control statute indicates, some states have very brief enabling legislation that does little more than convey the authority to assess civil penalties:[7]

> "Civil Penalties: (a) Any person who violates any provision of this article, or any regulation or standard adopted pursuant to this article, or who violates any determination or order of the board or any agency made pursuant to this article, shall be liable to a penalty not to exceed $25,000 per day of any violation which may be recovered in a civil action commenced in any court of competent jurisdiction by the board or any agency..."

This simplicity can be somewhat deceiving since other portions of the law governing orders and hearings also influence the assessment of civil penalties. Nevertheless, this enabling legislation allows administrative officials great latitude in establishing many of the key features of a civil penalties program.

Louisiana's enabling legislation,[8] reproduced below, is more typical of that reviewed in this study. It limits the penalty that can be assessed, indicates who has the authority to assess penalties, provides safeguards for alleged violators, and spells out factors to be considered in determining the penalty amount.

> "(1) Except as otherwise provided by law, any person to whom a compliance order or a cease and desist order is issued pursuant to R.S. 30:1073(C), who fails to take corrective action within the time specified in said order, may be liable for a civil penalty, to be assessed by the commission, or assistant secretary, or court, of not more than $10,000 for each day of continued noncompliance and the commission, in order to enforce the provisions of this Chapter, may suspend or revoke any permit, compliance order, license, or variance which had been issued to said person.
>
> (2) No penalty shall be assessed until the person charged shall have been given notice and an opportunity for a hearing on such charge. In determining whether or not a civil penalty is to be assessed and in determining the amount of the penalty, or the amount agreed upon on compromise, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation, shall be considered..."

Although Oregon's legislation is more detailed than most states, it also illustrates two characteristics found in much simpler legislation: (1) incorporation of other state laws--such as Administrative Procedures Acts--by reference, and (2) language specifying how the agency should dispose of any penalties collected. The excerpt below does not include a lengthy section indicating which violations are subject to civil penalties or the rules and regulations promulgated in response to the law.[9]

> "468.130 Schedule of civil penalties; factors to be considered in imposing civil penalties. (1) The commission shall adopt by rule a schedule or schedules establishing the amount of civil penalty that may be imposed for a particular violation. Except as provided in subsection (3) of ORS 468.140, no civil penalty shall exceed $500 per day. Where the classification involves air pollution, the commission shall consult with the regional air quality control authorities before adopting any classification or schedule.
>
> (2) In imposing a penalty pursuant to the schedule or schedules authorized by this section, the commission and regional air quality control authorities shall consider the following factors:
>
> (a) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.

(b) Any prior violations of statutes, rules, orders and permits pertaining to water or air pollution or air contamination or solid waste disposal.

(c) The economic and financial conditions of the person incurring a penalty.

(3) The penalty imposed under this section may be remitted or mitigated upon such terms and conditions as the commission or regional authority considers proper and consistent with the public health and safety.

(4) The commission may by rule delegate to the department, upon such conditions as deemed necessary, all or part of the authority of the commission provided in subsection (3) of this section to remit or mitigate civil penalties.

468.135 Procedures to collect civil penalties. (1) Subject to the advance notice provisions of ORS 468.125, any civil penalty imposed under ORS 468.140 shall become due and payable when the person incurring the penalty receives a notice in writing from the director of the department, or from the director of a regional air quality control authority, if the violation occurs within its territory. The notice referred to in this section shall be sent by registered or certified mail and shall include:

(a) A reference to the particular sections of the statute, rule, standard, order of permit involved;

(b) A short and plain statement of the matters asserted or charged;

(c) A statement of the amount of the penalty or penalties imposed;

(d) A statement of the party's right to request a hearing.

(2) The person to whom the notice is addressed shall have 20 days from the date of mailing of the notice in which to make written application for a hearing before the commission or before the board of directors of a regional air quality control authority.

(3) All hearings shall be conducted pursuant to the applicable provisions of ORS 183.310 to 183.500.

(4) Unless the amount of the penalty is paid within 10 days after the order becomes final, the order shall constitute a judgment and may be filed in accordance with the provisions of ORS 18.320 to 18.370. Execution may be issued upon the order in the same manner as execution upon a judgment of a court of record.

(5) All penalties recovered under ORS 468.140 shall be paid into the State Treasury and credited to the General Fund, or in the event the penalty is recovered by a regional air quality control authority, it shall be paid into the county treasury of the county in which the violation occurred."

Two key organizational variables also influence the design of the nine agencies' administrative fines programs. Agencies with separate enforcement programs for air, water, and solid waste pollution often develop an administrative fines program specifically tailored to the unique characteristics of air pollution violations. Agencies that have consolidated environmental enforcement activites seem to prefer more flexible administrative fines programs that are suitable for a variety of environmental violations. Existing institutional arrangements for handling environmental disputes--hearing boards, commissions, etc.--also shape the design of agencies' administrative fines programs. Some agencies can rely on an elaborate and well-established structure to resolve contested penalty assessments while other agencies must use less formal existing procedures or develop new arrangements specifically for their administrative fines program.

States that prefer a more flexible administrative fines program may be reluctant to adopt a model program tailored specifically to the needs of air pollution enforcement. Although it should be possible to develop a model program that will be suitable for other types of pollutants as well, officials mentioned several factors that may make this more difficult. Louisiana recently raised the minimum fine from $100 to $2500. The official contacted believed that the reason for this change was to ensure consistency with RCRA requirements. A few agencies with combined programs also indicated that air pollution violations are harder to prove or are not perceived as serious or threatening to public health and therefore receive less attention in combined programs that focus on the most blatant or serious violations. The two-tiered approach outlined later, in Section 3, may help address this problem by providing streamlined and somewhat less demanding procedures for minor violations. As the discussion below indicates, however, some states seem philosophically opposed to the use of small fines.

Agencies appear to vary greatly in the extent to which they rely on a formal hearing board to handle contested assessments. New Jersey, for example, rarely, if ever, holds hearings on disputed assessments, relying instead on courts to provide a forum for violators who wish to contest their penalties. Nevada, on the other hand, insists on scheduling a formal quasi-judicial hearing whenever a violator has more than one violation for the same offense within 12 months. The discussion here and later in Section 3 points to the need for an administrative hearing at some point in the penalty assessment process. A model program should recognize that some agencies can draw on already established procedures in designing their programs while others have to develop a new set of procedures specifically for their administrative fines program. Section 3 discusses the advantages and disadvantages of many of the common approaches of holding hearings for contested assessments.

Differences in Enforcement Philosophy

The nine agencies surveyed have very different philosophies about the role administrative fines ought to play in enforcing air pollution regulations. As the discussion on effectiveness indicates, many agencies prefer to use negotiations and compliance orders as their principal

enforcement technique; these agencies usually feel that the primary role of administrative fines is to reinforce or strengthen their bargaining position, hence they only assess fines as a last resort when negotiations fail. Other agencies feel that assessing small fines for many or most violations is the most effective way to discourage sources from violating air pollution regulations.

Unlike Pennsylvania, which has both a small fines program for minor violations and a civil penalties program that focuses on recalcitrant sources, many agencies that prefer to use administrative fines primarily as a last resort are philosophically opposed to "parking ticket" type fines. An official from Louisiana, for example, indicated that the State Environmental Commission, which assesses most penalties, is "just not excited about little bits of money." To back up this contention, he pointed out that in 1979, Louisiana raised the minimum penalty from $100 to $2500; the lowest fine he remembers for air pollution violations was $7500. This official also felt that allowing inspectors to hand out "traffic ticket" type fines might compromise their credibility with sources by detracting from their primary function of "writing neutral, factual reports about violations."

Other agencies echoed these sentiments as well as expressing strong preferences for negotiated settlements rather than penalties. An official from Nevada stated that they "try to use everything except a 'hammer' to handle violations; they consider a fine a 'hammer' and avoid it whenever possible." This official stressed that a notice, followed by informal conferences and negotiation, allows sources to find out what the problem is and provides an opportunity to explain extenuating circumstances and propose corrective action. Even Oregon, which runs what it considers a successful "parking ticket" program for agricultural burning violations, indicated that it believes administrative fines are primarily a short run solution to enforcing regulations. The agency would like to rely more on voluntary controls as it does with fixed sources, and feels that, in the long run, enforcement will be more effective if the agency tries to improve its relationship with commercial grass-seed growers through better communication and understanding.

Two of the agencies surveyed, New Jersey and Puget Sound, share a very different enforcement philosophy. According to a recent study,[2] the Puget Sound Air Pollution Control Agency (PSAPCA) believes that most stationary sources have had ample time to become familiar with the requirements imposed by the agency's regulations. Thus, PSAPCA always issues fines unless: the inspector did not gather sufficient evidence; the incident really was unavoidable and the source has a good history; or it was a minor, first-time violation. A New Jersey official indicated that "twenty years ago, the 'conference, conciliation, persuasion approach' was the order of the day in New Jersey." He believes that now, however, the increased sophistication and costs of regulation make penalties necessary since sources "are no longer in such a conciliatory posture."

Differences in Enforcement Caseload

The differences in legal/institutional arrangements and enforcement philosophy discussed above are often a response to differences in the nature and size of agencies' enforcement caseload. Two enforcement variables seem to play the greatest role in shaping administrative fines programs: (1) the number of sources/violations the agency handles, and (2) the nature of these violations.

Some of the examples scattered throughout this section hint at this relationship. Both New Jersey and Oregon, for instance, have tailored or changed their programs to respond to the size and nature of the sources they regulate. Oregon has developed special arrangements to deal with the unique enforcement problems that agricultural burning by commercial grass-seed growers presents. The climatic conditions of Oregon's principal agricultural areas require that burning restrictions fluctuate with the weather. To enforce these violations, which are fleeting in duration, Oregon has developed a "parking ticket" approach to issuing fines for agricultural burning. As indicated above, New Jersey has also changed its enforcement philosophy to respond to changes in the size and nature of its caseload.

The enforcement caseload of an agency can also shape its program in less subtle ways. It would almost certainly be impossible for an agency that handles as many violations as New Jersey--approximately 1600 a year according to a recent study[4]--to adopt procedures that mandate a hearing for every source before penalties can be assessed. Even a program like Nevada's, which only requires a hearing for recalcitrant sources, would probably strain the resources of a large, heavily industrialized and regulated state such as Pennsylvania, Indiana, or New Jersey. The following section indicates how a larger volume of penalty assessments--due to changes in either the number of sources or the frequency of assessments--forces agencies to modify the structure of their administrative fines programs.

EASE OF IMPLEMENTATION AND ADMINISTRATION

A model administrative fines program cannot be successful if it makes unrealistic demands on the capabilities or resources of the agencies that try to implement it. The purpose of the remainder of this section is to highlight financial and other constraints that hamper the implementation of administrative fines programs by the nine agencies surveyed.

Most officials were unable to point out problems or difficulties in implementing their administrative fines programs. Several officials indicated they were pleased with the way their programs were structured, and that all of the personnel and capabilities needed to run the program-inspectors, legal, administrative, and clerical staff, as well as some sort of tribunal to resolve disputed cases--were already in place to implement other aspects of their air pollution control programs. Because of the interrelationships between various components of the agencies' pollution control programs, no official was able to provide an estimate of how much the administrative fines program cost to run. Officials from agencies that issued few penalties tended

to believe that the cost was small relative to other aspects of the air pollution control program, while officials that issued many penalties were divided over whether the penalty revenues were sufficient to cover program costs.

As discussed earlier, however, some agencies cited problems that can be traced, in part, to financial constraints. Several officials felt that the effectiveness of their administrative fines programs was undermined by the lack of resources devoted to detecting and documenting violations. Although a few officials indicated that the nature of air pollution violations inherently makes them difficult to prove, others stressed that this problem is aggravated by an insufficient or poorly trained inspection staff. Several agencies also mentioned that they had difficulty collecting penalties; at least one of these agencies felt that the lack of sufficient resources to follow up on penalties contributed to this problem. New Jersey, which depends heavily on the judicial system to review contested penalty assessments, also indicated that the rising importance of other environmental issues, such as hazardous waste, has squeezed the already scarce legal resources available for air pollution enforcement.

Surprisingly few agencies felt that the program structure itself contributed to implementation problems. An official from Pennsylvania speculated that perhaps fewer penalties were assessed because only the Environmental Hearings Board or the courts actually have the authority to assess a penalty, but he did not seem to feel that this situation caused serious problems. A similar issue was raised by Louisiana where recent legislative changes provided the agency with greater flexibility in assessing fines. The official contacted felt it was too early to evaluate whether this change will actually improve program implementation.

SUMMARY OF NINE ADMINISTRATIVE FINES PROGRAMS SURVEYED

Table 1 indicates how the nine agencies surveyed in this study have designed administrative fines programs that meet their enforcement needs. The table is organized around the three functional components that any administrative fines program must contain: penalty assessment procedures, procedures for handling contested assessments, and procedures for penalty collection and disposition. Section 3 presents recommendations about the most appropriate way to handle each of these functions. The information in Table 1 provides a rough sketch of each program; Appendix D, which is contained in Volume 2 of this report, provides a more detailed description of each of the nine programs and also includes enabling legislation and regulations for each.

TABLE 1. SUMMARY OF NINE AGENCIES' PROGRAMS AND PROCEDURES

	Georgia	Indiana	Louisiana	Mississippi	Nevada	New Jersey	Oregon		Pennsylvania		Puget Sound
							Field-burning	Fixed sources	Summary offenses	Civil penalties	
Type of Program											
1. Size of "Typical" Fine[a] (Small <$1000; Moderate $1000–$5000, Large >$5000)	Moderate	Small	Large	Small	Small to Moderate	Small	Small to Moderate		Small	Large	Small
2. Enforcement Philosophy; Use Penalties Only as Last Resort (Yes/No)	Yes	No	Yes	Yes	Yes	No	No	Yes	No	Yes	No
3. Separate Program/Procedures/ Legislation for Air Pollution Violations (Yes/No)	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Penalty Assessment Procedures											
1. Enabling Legislation Specify Criteria to be Used in Determining Penalty (Yes/No)	Yes	No	Yes	No	No	Yes	Yes	Yes	No	Yes	No
2. Formal Penalty Assessment Schedule or Policies (Yes/No)	No	Yes	No	No	Yes	Yes	Yes	Yes	No	No	No
3. Locus of Penalty Assessment Authority:											
Inspector/Junior Enforcement Official							X				
Senior Enforcement Official/ Agency Director					X	X		X			X
Environmental Board or Commission		X	X	X	X					X	
Other or Not Specified	X	X	X						X		
Procedures for Contested Assessments											
1. Informal Conferences/Negotiations (Usually/Sometimes/Rarely) to Discuss Violation and/or Penalty Assessment	Usually	Usually	Usually	Usually	Usually	Rarely	Rarely	Usually	Rarely	Usually	Sometimes

(continued)

TABLE 1 (continued)

	Georgia	Indiana	Louisiana	Mississippi	Nevada	New Jersey	Oregon		Pennsylvania		Puget Sound
							Field-burning	Fixed sources	Summary offenses	Civil penalties	
2. Hold Formal Administrative Hearing.											
Automatically or at Agency's Request		X		X	X					X	
At Source's Request	X		X		X		X	X			X
Seldom or Never						X			X		
3. Court Review.											
De Novo											
On the Hearing Record				X	X		X	X		X	
Other or Not Specified	X	X	X			X			X		X
Penalty Collection/Disposition Procedures											
1. Penalty Collection Techniques:											
Civil court suit		X	X	X		X		X			X
Lien on property										X	
Other or not specified	X				X				X	X	
2. Penalty Disposition:											
Agency Budget											X
Special Environmental Fund		X		X					X	X	
General Treasury	X					X	X	X			
Other or not specified			X		X						

[a]Some legislation defines each day a violation continues as a separate offense so total fine on any particular source can be quite large.

SECTION 3

MODEL PROGRAM DESIGN

The previous section highlighted some important issues that should be considered in the development of a model administrative fines program; this section focuses on the actual design of such a program. It outlines the three major structural components that any administrative fines program must contain:

(1) procedures for assessing penalties;

(2) procedures for handling contested assessments; and

(3) procedures for penalty collection and disposition.

It indicates why these components are essential, evaluates the advantages and disadvantages of the various approaches the nine agencies used in designing their programs, and, whenever possible, recommends the best approach to be used in a model program.

PENALTY ASSESSMENT

Penalty assessment procedures are the most basic element of any administrative fines program. These procedures address three key questions:

(1) when are penalties assessed?;

(2) how is the penalty amount determined?; and

(3) who has responsibility for making these decisions?

The answers to these questions shape the character of the fines program and influence the design of the other two program components discussed later in this section.

Articles on administrative fines consistently recommend that agencies develop formal penalty assessment policies or schedules to guide officials in deciding when a fine is appropriate and how large it should be. Most arguments in support of this position focus on the protection that policies or schedules provide violators. Penalty schedules, for example, play a large role in curbing the arbitrary and capricious use of administrative power by indicating in advance what violations the agency assesses fines for, which of

these violations it considers the most serious, and what fine is most appropriate for each type of violation. Policies and schedules also help ensure fairness by promoting consistency in penalty assessments for similar violations. Commentators have also pointed out that there are benefits to the agency in adopting penalty assessment policies and schedules. Agencies that have made explicit decisions about which violations are most serious can allocate their enforcement resources more effectively. Penalty schedules can also strengthen an agency's bargaining position when it negotiates penalties with violators: in adopting a schedule, the agency has already achieved some consensus that the penalty amount in question is reasonable and fair. Finally, penalty schedules can reduce the time it takes for officials to determine an appropriate penalty, thus promoting efficient operations in agencies that assess many penalties.

Although many agency officials confirmed some or all of these advantages, only four of the agencies surveyed--Indiana, Nevada, New Jersey and Oregon--actually use penalty assessment policies or schedules in their administrative fines programs, while a fifth state--Pennsylvania--is considering this possibility. Most of the remaining agencies assess penalties only for the most serious and flagrant violations and prefer to retain a great deal of discretion to tailor the penalty amount to the individual circumstances of the violation.

A few agencies also incorporate formal or informal rebate policies into their penalty assessment procedures. New Jersey's penalty schedule (which is reproduced in Appendix A) lists the amount of the penalty that can be rebated for various types of violations. Other agencies indicated that they are willing to negotiate penalty rebates under some circumstances. Law review commentators and enforcement officials generally agreed that a rebate policy, if applied judiciously, can reduce the number of contested penalty assessments without undermining the effectiveness of an administrative fines program.

A recent law review article on the assessment of civil penalties by federal agencies[6] discusses administrative officials' ambivalence about penalty assessment policies and suggests that rigid penalty schedules which specify the precise amount of the fine for each type of violation are more appropriate under some circumstances than under others. This article distinguishes three penalty assessment scenarios: (1) a small-penalty case (fines $200) where "the dominant constraint is, of course, the amount of the penalty itself;" (2) a moderate-penalty case (fines range from $200-$2,000) where violations "require some degree of individuation;" and (3) a large-penalty case where "attainment of the regulatory objective may require a penalty finely tuned to the precise circumstances of the case." The author suggests that written penalty schedules that specify a penalty amount are most appropriate for the first two cases. For the third case, he recommends that the agency centralize penalty assessment authority and develop "penalty-determination criteria" rather than "mathematical formulae."

The evidence from law review articles and agency experience supports the recommendation presented in Section 1 that a model program contain a "dual-approach" to penalty assessment. The first approach would be reserved

for serious violations or recalcitrant sources where it is important to tailor the penalty to the specific circumstances of each violation. Since a rigid penalty schedule is inappropriate under these circumstances, a model program should recommend that penalty assessment authority be centralized in the hands of either a few senior agency officials or an environmental hearing board to promote consistency in penalty assessments. Extra procedural safeguards, discussed below, are also necessary to ensure that the administrative discretion inherent in this arrangement is not abused. Agencies that prefer to use fines only as a last resort may choose to adopt only this portion of the model program.

The second approach would be used to assess small or moderate-size fines for relatively minor violations. Since this portion of the program may cover a large number of the violations an agency handles, a penalty schedule that specifies the appropriate amount of the fine (or a narrow range) for each type of violation would improve both the efficiency and the fairness of the program. Penalty assessment authority can be fairly decentralized since the penalty schedule limits the administrative discretion exercised in any specific case.

The discussion below illustrates how the penalty assessment procedures of the nine agencies surveyed compare with the approaches recommended for a model program. As Section 2 indicated, the nine agencies already tend to rely on these two approaches to penalty assessment. Several agencies prefer to assess fines only when other enforcement techniques fail. Since fines are reserved for handling serious or flagrant violations and for recalcitrant sources, the amount of the fine tends to be large. The decision to assess a penalty is usually made by a senior agency official or environmental hearing board that has broad discretion to tailor the penalty to the individual circumstances of the violation. Other agencies routinely assess penalties even for "minor" violations. In these cases, penalty assessment authority tends to be rather decentralized, and most agencies have established formal policies and/or penalty schedules to assist officials in deciding when to assess a penalty and how large the fine should be. A few agencies rely on some combination of these two approaches; both Pennsylvania and Nevada, for example, have small fines programs for minor violations and more individualized procedures to handle serious violations or recalcitrant sources.

Louisiana's civil penalties program clearly illustrates the first approach to penalty assessment. The Louisiana Department of Natural Resources believes that compliance orders are the most appropriate way to handle all but the most serious or flagrant violations. Civil penalties are usually assessed only if the violation either poses an immediate and serious danger to public health or indicates complete disregard for the law, e.g., failure to report a major upset. Between October 1980 and June 1981, Louisiana imposed only three civil penalties for air pollution violations.[10]

The Louisiana enabling legislation authorizing civil penalties[8] specifies that the agency consider "the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance" in determining "whether or not a civil penalty is to be assessed

and in determining the amount of the penalty, or the amount agreed upon on compromise." In January of 1980, Louisiana raised the ceiling on civil penalties from $10,000 to $25,000 for each day of continued noncompliance. Louisiana also has a limit of $2,500 on the minimum penalty that can be assessed. Officials have broad discretion to assess penalties within these basic constraints.

The Louisiana statute limits assessment authority to the Environmental Control Commission, the Assistant Secretary of the agency, or the District Court. According to Louisiana officials, all of the penalties to date have been assessed by the Commission. The state is reluctant to take violators to court unless it feels that this is the only way the company will pay attention to the violation. Court procedures are expensive and it can easily take years before a case is resolved. Until recently, the Assistant Secretary had not assessed any penalties because he lacked the authority to hold adjudicatory hearings. Since Louisiana law ensures the violator the opportunity for a hearing, it was impossible for the Assistant Secretary to assess penalties unless he was sure that the violator would not request a hearing.

The Louisiana Environmental Control Commission, which is composed of seven individuals who run large state departments, acts on the recommendation of the Assistant Secretary and the Program Administrators of the Air Quality, Water Pollution Control, and other Divisions. The Commission abides by the Uniform Administrative Procedures Act in conducting hearings, but, as outlined above, is subject to few constraints in setting the penalty amount. The Commission decides whether it will assess the penalty or refer the case to the district court.

Mississippi's program is very similar to Louisiana's. When the Bureau of Pollution Control is unable to bring a source into voluntary compliance, it issues a Letter of Complaint and prepares for an adjudicatory hearing before the Mississippi Commission on Natural Resources. The Commission makes findings of fact and conclusions of law, then sets the penalty it believes is appropriate within the limits established by state enabling legislation.[11] Only the Commission - not the Bureau of Pollution Control - is authorized to assess penalties. According to a Mississippi official, the state typically assesses two or three civil penalties a year for air pollution violations with fines usually ranging from $500 to $1000.

Georgia also imposes penalties only if voluntary compliance fails but prefers to negotiate penalties into consent orders. Under the state's enabling legislation,[5] the Director of the Agency "may cause a hearing to be conducted before a hearing officer appointed by the Board." The hearing officer is empowered to impose penalties. The enabling legislation limits civil penalties to not more than $25,000 per day and instructs the hearing officer to consider relevant factors such as the nature of the violation, good faith of the violator in correcting the violation, and injury to public health, safety, or welfare. The typical fine ranges from $1000 to $2500. Last year Georgia collected $46,500 from 12 assessments.

Three agencies, Indiana, New Jersey, and Puget Sound, tend to rely on the second approach to penalty assessment outlined above. These agencies do not view fines as a last resort and thus assess penalties more frequently for both major and minor violations. Two of the three agencies have adopted penalty assessment policies or schedules to improve efficiency, promote consistency, and reduce abuses of administrative discretion. Penalty assessment authority tends to be fairly decentralized.

Perhaps the most striking characteristic of these agencies is their higher frequency of penalty assessment. Indiana, which has written policies governing penalty assessment, tries to resolve most violations through consent orders. Records supplied by the State Board of Health indicate that almost half of the consent agreements signed by the State's Air Pollution Control Division between January 1979 and July 1981 contained penalty provisions. A recent study[2] indicates that Puget Sound has levied civil penalties in conjunction with more than half of the NOVs issued between 1977 and 1979. The New Jersey Department of Environmental Protection issues fines for a smaller, but still significant, percentage of violations. According to data compiled by the Environmental Law Institute,[4] slightly under 20 percent of all violations result in a Notice of Prosecution (NOP) accompanied by an offer of penalty settlement. In 1981, New Jersey issued 354 NOPs for air pollution violations.[12]

All three agencies tend to assess relatively small fines. Indiana's records reveal that fewer than 20 percent of all fines issued between January 1979 and July 1981 exceeded $1000; over half were for $500 or less. In Puget Sound, state enabling legislation limits the fine to $250 per violation per day.[13] Although no information is available about the typical fine actually assessed in New Jersey, the penalty schedule reproduced in Appendix D[14] recommends penalties of less than $1000 for most violations. Both New Jersey and Indiana have adopted penalty assessment policies or schedules to guide officials in setting the penalty amount.

New Jersey's penalty schedule for air pollution violations, which is contained in the State's Administrative Code, indicates appropriate penalties for 13 types of violations. The schedule outlines progressively more severe penalties for second, third, and subsequent offenses and indicates when a violation should be referred to the attorney general's office for prosecution. It also indicates how much of the penalty the agency can rebate if the violation is corrected promptly. The schedule does not entirely eliminate administrative discretion. The regulations explicitly allow the Commission, Division Director, or Bureau Chief to deviate from the schedule when "good and sufficient cause exists." These officials are still bound by the statutory provision that limits penalties to $2500 per day.[15]

Indiana has less formal procedures for assisting officials in deciding when to assess fines or how large those fines should be. The Enforcement Branch has developed written policies and/or penalty schedules to cover three common violations: construction without a permit; operating without a permit; and open burning violations. Broader discretion is permitted for other types of violations. State enabling legislation[7] limits penalties to $25,000 per day.

As Section 2 indicated the remaining three states surveyed in this study rely on some combination of the two approaches to penalty assessment outlined above. Both Pennsylvania and Nevada have developed a small fines approach for handling minor violations and a more discretionary approach for major violations or recalcitrant sources. Nevada's enabling legislation classifies air pollution violations as either minor or major. The Environmental Commission has promulgated regulations[16] specifying penalties for minor violations. This penalty schedule, which is reproduced in Appendix D, specifies fines for five types of violations: open burning, incinerator burning, fugitive dust, organic solvents, and odor. The fines for a first offense are fairly low, however, the fines double if the source commits a second or third violation. All minor violations become major violations upon the occurrence of the fourth violation in any 12 consecutive months. There is no penalty schedule for major violations although state enabling legislation[17] does limit the fine to no more than $5000. The State Environmental Commission has established a policy of requiring a quasi-judicial hearing for any source that commits two major violations of the same provision within any 12-month period.

Officials from both Pennsylvania and Nevada indicated that a dual approach to assessing administrative fines enabled them to enforce air pollution violations more effectively. The Pennsylvania official, for example, felt that his state's multifaceted program "affords the agency the kind of coverage they need to handle any violation." The Executive Secretary of the Nevada Environmental Commission believes that the State's new policy of holding automatic hearings for recalcitrant sources improved both the effectiveness and the fairness of its administrative fines program.

CONTESTED ASSESSMENTS

The second necessary component of a model administrative fines program is a set of procedures for handling contested assessments. These procedures ensure that violators who wish to dispute the appropriateness of their penalty assessment have the opportunity for a fair and impartial hearing of their case. The discussion below outlines the type of hearing procedures and court review recommended by legal scholars and indicates how the experience of the nine states surveyed in this study reinforces these recommendations.

Many legal commentators feel that the fairest and most effective way to handle contested penalty assessments is to provide the violator with the opportunity for a quasi-judicial administrative hearing rather than a trial de novo (i.e., anew, from the beginning) in district court. Violators that wish to dispute the findings of the administrative hearing would be permitted to appeal to the courts, for a trial on the hearing record, rather than a trial de novo. Most of the nine agencies surveyed for this study handle contested assessments this way. Only New Jersey uses the approach, more common at the federal level, of making the violator an offer of penalty settlement which he then must accept or else contest in a de novo trial. As the following excerpt from a report of the Administrative Conference of the United States[1] (pp. 889-900) indicates, this latter approach of relying on a de novo trial has serious drawbacks for both the agency and the violators.

"Agencies now settle well over 90 percent of cases by means of a compromise, remission or mitigation device. Settlements are made because civil penalty cases generally involve relatively small amounts of money (an average of less than $1,000 per case), and most adjudications would require substantial inputs of time and effort, familiarity with specialized vocabularies and other matters of expertise, and meaningful litigation expense.

Settlements are not wrong per se. But the quality of the settlements being made under the present money penalties system is of real concern. Those who suggest that it 'is probably of little significance' which system is used are surprisingly far from the mark. The most significant finding in this report is that settlements reached under the present system are, as a rule, substantially inferior to those that would occur under an administrative imposition scheme.

There is evidence that under the present system regulatory needs, at times, are being sacrificed for what is collectable; i.e., agencies are settling for what the traffic will bear. Agency administrators suggest that unwise settlements are being made principally because 'the Department of Justice presents an immovable roadblock; we cannot get our cases into court.' Manifestly, a knowledgeable defendant may have undue leverage and may ultimately be able to force an unwise settlement (from the standpoint of the public interest) as a result of his situation....

The present system may also be allowing some of the worst offenders (who will not settle and cannot feasibly be brought to trial) to get away. Even when cases are carried forward, serious enforcement problems are often created by excessive delay....

From the standpoint of alleged offenders, the present system is unsatisfactory because, as a practical matter, they are often denied procedural protections and an impartial forum, and may be forced to acquiesce in unfair settlements because of the lack of a prompt and economical procedure for judicial resolution. When, for example, the Bureau of Customs seizes $1,000 worth of goods can be alleged offender - no matter how much he believes in his case - afford to litigate in federal district court rather than settle for $1,200?"

A more recent article on federal assessment of civil penalties contains a lengthy discussion of the various design options available for handling contested penalty assessments.[6] This article also advocates that agencies provide violators with trial-like administrative hearings to avoid de novo court review but recognizes that some agencies' enabling legislation either mandates de novo review or is ambiguous about the authority of the court to review penalty decisions. Even in these cases, however, the author argues that providing violators the opportunity for a trial-type hearing, although expensive for the agency, may reduce the number of cases that require judicial intervention. As the following quotation indicates,[6] (pp. 1490-1491) this same article advocates the use of informal, prehearing conferences to improve the fairness and efficiency of the penalty imposition process:

"The opportunity for a judicial or, in some cases, administrative trial is not, by itself, a sufficient process for the disposition of contested assessments. A trial procedure alone may not fully satisfy the twin objects of fairness and efficiency that a disposition process should serve; the expense of a trial-type hearing can nullify its practical utility. The very decision to make a formal charge, moreover, may impose a kind of injury - a psychological anxiety or a weakening of credit position - that generates a legitimate demand for more immediate explanatory and participatory procedures. Informal prehearing procedures can resolve a dispute on a more economical and expeditious basis than is possible by trying the case. In the absence of a powerful countervailing interest, then, an agency should provide a structured opportunity to pursue consensual prehearing resolution of a disputed assessment case."

As Section 2 indicates, most of the agencies surveyed have already adopted the procedures recommended by these legal commentators. Many officials indicated that the opportunity for an administrative rather than judicial hearing was central to the success of their administrative fines programs and cited many of the same advantages touted in the law review articles: administrative hearings enable the agency to resolve cases quickly; administrative tribunals usually have a better understanding of the technical issues that underlie air pollution violations than do judges and juries; and agencies do not have to rely as heavily on the scarce and expensive resources of their attorney general's office.

Agencies that issue many small fines tend to have more streamlined procedures for handling contested assessments than agencies that only assess fines for serious violations or recalcitrant sources. Several of the agencies surveyed for this study have developed two sets of procedures for contested assessments: one for minor "small-fine" violations and another for more serious violations. Nevada, for example, holds hearings at the violator's request when the penalty is for a minor violation or the first major violation, but automatically schedules a quasi-judicial hearing whenever a source is cited for a second major violation of the same offense within 12 months. Oregon, which has a small-fines program for agricultural burning, requires violators that wish to contest their penalties to reply in writing only. Violators have the right to appeal the decision of the hearing officer who reviews this reponse. The state is required by law to rely on somewhat more elaborate procedures to handle other types of violations.

Although a model program should afford all violators the opportunity for a trial-like administrative heaing at some point in the penalty imposition process, EPA should consider developing procedures like those used in Oregon or Nevada that distinguish between minor and major violations. This recommendation is consistent with the one advanced earlier that EPA consider developing separate penalty assessment procedures for minor and major violations. In many ways, these two recommendations reinforce each other. A detailed penalty schedule that specifies small fines for minor violations reduces the possibilities for arbitrary and capricious use of administrative discretion. Thus, agencies can rely on somewhat less elaborate procedures,

like the ones used in Oregon for agricultural burning violations, without compromising the fairness of their administrative fines program as long as dissatisfied sources can request a more formal administrative hearing. More elaborate procedural safeguards should be developed for sources that wish to contest penalty assessments for major violations since fines for these violations would tend to be larger and the agency would have more discretion in deciding when a fine should be assessed. A model program should suggest that agencies routinely schedule informal conferences with violators, and if the agency's enforcement caseload and resources permit, follow the example of Mississippi and Nevada and hold formal adjudicatory hearings prior to penalty assessment.

PENALTY COLLECTION/DISPOSITION

The final essential component of a model administrative fines program is a set of procedures for penalty collection and the disposition of the revenues collected. These procedures are critical to the success of an administrative fines program: an inability to collect penalties or any suggestion that the primary purpose of the program is to raise revenue rather than deter violations can undermine an otherwise effective, fair and well-designed program. In spite of their importance, these aspects of program design have been somewhat neglected by both legal commentators and environmental officials and lawmakers. As the discussion below indicates, the most common approach for collecting overdue penalties--initiating a civil court suit against the violator--appears to be most effective for agencies that assess only a few large penalties. Further study is needed before a model program can recommend more effective penalty collection techniques for agencies that assess many small fines. Although there is also little agreement about the best way to dispose of the penalty revenues collected, only two options-depositing the money in the general fund or earmarking it for a nonenvironmental purpose--guarantee that the agency will not be accused of using its administrative fines program to enrich or supplement its own coffers.

As Section 2 indicated, a few agencies had experienced some problems collecting penalties. One state that assesses many small fines for air pollution and other environmental violations, recently reviewed its penalty collection practices; officials were concerned that there might be a backlog of uncollected penalties. Further study indicated that the number and amount of uncollected penalties were not as large as first suspected. Although the official contacted does not believe the problem is serious, he did indicate that the agency has difficulty following up on the penalties it assesses. Nevada indicated that it had experienced similar problems until it improved its recordkeeping and established a policy of holding automatic hearings whenever a source is charged with two violations for the same offense within 12 months. Puget Sound, which assesses over 400 civil penalties a year, indicated that it collects most penalties within 60 days of the violation but a few "require years."

It should not be surprising that only a few of the agencies surveyed reported problems collecting penalties. Many of the nine agencies assess fewer than 10 civil penalties a year or else negotiate penalties with

violators and then include them in consent agreements. Penalty collection appears to be a problem primarily for the agencies that assess many small fines.

Most of the agencies ultimately rely on civil action in district court to collect penalties. When the penalty involved is small, this technique is almost worthless because of the time and expense involved in litigating a case. State and local agencies may wish to examine the usefulness of less drastic techniques to collect penalties. One possible approach is to place liens on violators' property if they do not pay their penalties promptly. In some states, new enabling legislation may be necessary to give agencies the authority to use liens to collect administrative fines. Other states, such as Pennsylvania, already have the authority to use liens to collect large civil penalties. Further study is needed to assess the effectiveness of this approach in collecting small penalties.

The enabling legislation authorizing civil penalties usually indicated how the agencies surveyed should dispose of the revenues collected: three statutes specified that revenues should be credited to the State treasury; three others allocated the revenues to a special fund to be used for pollution abatement; the remaining states either allocated the revenues to the agency budget, specified that they be used for a designated nonenvironmental program, or did not place any restrictions on the use of penalty revenue.

Many officials believed that the credibility of their fines program would be jeopardized if the penalty revenues were channeled into the agency budget. A Georgia official indicated that he would oppose any plans to transfer revenues to the agency's budget because he does not want the agency "to have a pecuniary incentive to collect penalties." A New Jersey official felt that industry might perceive a penalty program as a fundraising operation if the revenues collected went to the agency budget rather than the State treasury. Agencies that use penalty revenues to support environmental programs see no harm in this arrangement; however, many of these agencies only collect penalties as a last resort, and are thus less vulnerable to charges that they use their administrative fines program as a revenue-raising program.

Nevada has developed an interesting alternative to the more commonly used approaches of placing the money in either the agency or the state's general fund. Revenues from Nevada's administrative fines program are deposited in the county school district fund of the county where the violation occurred. This arrangement does not jeopardize the credibility of the fines program but provides some reassurance to both violators and agency officials that the revenues collected are used for a worthwhile purpose. Nevada has considered changing this system, but is reluctant to tamper with it because it "works so well."

SUMMARY

Table 2 summarizes the recommended components of a model administrative fines program. The table distinguishes between the two penalty approaches discussed earlier in this section: small or moderate fines assessed for relatively minor violations, and large fines reserved for serious violations or recalcitrant sources.

TABLE 2. RECOMMENDED COMPONENTS FOR A MODEL DMINISTRATIVE FINES PROGRAM

	Small or moderate fines	Large fines
Penalty Assessment Procedures		
1. General Policies or Assessment Criteria	Optional	X
2. Formal Penalty Assessment Schedule	X	Optional
3. Decentralized Penalty Assessment Authority (Inspectors, Junior Enforcement Officials)	X	
4. Centralized Penalty Assessment Authority (Senior Agency Officials, Hearing Ex. or Board)	Possible for agency with small caseload or for oversight only	X
Procedures for Contested Assessments		
1. Informal Pre-penalty Conference:		
Automatic		X
At source or agency request	X	
2. Formal Administrative Hearing:		
Automatic		Optional
At source or agency request	X	X
3. Court Review on Hearing Record at Source or Agency Request	X	X
Penalty Collection/Disposition		
1. Penalty Collection Techniques:		
Civil court suit	X	X
Lien on property	X	X
Other (to be developed)	X	
2. Penalty Disposition:		
Agency budget		
Special environmental fund		
General state or county treasury	X	X

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13. Washington Clean Air Act, Chapter 70.94, RCW, Section 431.

14. New Jersey Administrative Code, 7:27A-1.5, Penalties and rebates.

15. New Jersey Air Pollution Control Laws, 26:2C-19.

16. Nevada Air Quality Regulations, Article 2.8, Administrative Fines.

17. Nevada Revised Statutes, Title 40, Chapter 445 - Water Control; Air Pollution, Section 445.601.

APPENDIX A

REVIEW OF STATES' ENFORCEMENT LAWS AND REGULATIONS PERTAINING TO ADMINISTRATIVE FINES

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To Michael Randall, DSSE Date 25 September 1981

From Neil Collins, Planning & Analysis Department

Subject Administrative Fines Study

This memorandum outlines the findings of GCA's review of the enforcement provisions of the laws and regulations of the 50 states. The states have been categorized into three principal groupings with the general characteristics of each group delineated. Those states listed in the first group will comprise the states to be studied in the model administrative fines project. Three local government agencies have been included in that grouping as candidate study agencies.

Those states with enabling legislation clearly and fully delineating administrative civil penalties powers are listed first. The remainder of the states are listed according to decreasing clarity as to their administrative penalties powers or the increasing clarity of the lack of such powers.

Group 1. This grouping of states includes those with the clear power to establish an administrative civil penalties air pollution enforcement program. Such a program generally includes: (1) the power for an administrative official to assess a fine against a violator, (2) the right of the accused violator to an administrative hearing, (3) a listing of criteria to be considered by the administrative agency in establishing the amount of the fine, (4) the right of a fined violator to appeal the fine, (5) the limitation that an appeal to a state court shall be based on the administrative hearing record, as opposed to a new trial, (6) the ability of the administrative hearing body to file its judgment with a state court and, if not appealed, to collect on its judgment as if the judgment were a judgment of the state court, and (7) the ability to use collected penalties for the operating budget of the air pollution control program.

The states most clearly possessing most of these powers are:

Georgia	Mississippi
New Jersey	Oregon
Pennsylvania	Tennessee
Hawaii	Nevada

States that possess eighty percent of the civil penalty program factors listed above include:

Louisiana	Montana
Indiana (but see letter)	Washington

Local government with administrative civil penalties programs include:

Puget Sound	Chicago
Louisville	New York City

Group II. A number of states have the power to administratively assess "non-compliance" penalties similar to the non-compliance penalties of Section 120 of the Clean Air Act. Under these laws the elements of the administrative assessment program are virtually identical to the civil penalties program discussed in the group one above. The principal difference is that the assessment must be based in part on the cost savings to the violator for not complying with state law. The state non-compliance penalties programs often include mitigation clauses allowing the agency to reduce the penalty amount after considering specified criteria.

The states in this group include:

Connecticut	Ohio
Colorado	Tennessee
Georgia	Virginia
Montana	Utah

Group III. A large number of state laws include a penalties section for violation of a state air pollution control law or regulation. Such laws often simply provide that the violation of an air pollution regulation can subject the violator to a penalty of up to twenty-five thousand dollars per day, collectable in a civil court action. Some state laws specifically require that all court actions for penalties must be initiated by the state attorney general's office. Some specify that a penalty amount shall be determined by the court. Some specify that penalties collected shall go to the air pollution control agency, others that the money shall go to the general state funds.

Those states which allocate money collected to the state air agency, and therefore can be considered as having a somewhat stronger agency orientation than the others, are:

Alabama	Delaware
California	Wisconsin

Those states with a strong court orientation in this category include:

Alaska	Iowa
Kansas	Maryland
Michigan	Missouri
New Mexico	North Carolina

Those states in this category which seem not to favor either the state agency or the state court system include:

Arizona	Arkansas
Idaho	Kentucky
Maine	New Hampshire
Massachusetts	Oklahoma
New York	South Dakota
Rhode Island	Washington, D.C.
Texas	
West Virginia	

Group IV. The final grouping of states encompasses those for whom no civil money penalties provisions could be found. These include:

Florida	Nebraska
Minnesota	Vermont
South Carolina	Wyoming

Neil Collins

NC/ss

APPENDIX B

TELEPHONE INTERVIEW GUIDE

ADMINISTRATIVE FINES
TELEPHONE INTERVIEW GUIDE

PERSON INTERVIEWED _____

TITLE _____

AGENCY _____

LOCATION _____

BACKGROUND

1. When did the agency begin to assess administrative fines (civil penalties) for air pollution enforcement? How did the program originate?

2. Has the program changed since it started?

3. What are (were) the program's goals?

4. In the last 3 years, how many penalties were collected? For what types of violations?

5. How many air pollution violations does the agency handle each year?

PROCEDURE

Allegation

1. How are air pollution violations discovered? Does the administrative fines program cover the following types of violations: failure to report malfunctions? violation of permit conditions? control equipment maintenance?

2. Who alledges the violation: inspector? agency head? other?

3. Is there a recordkeeping system--NOVs, fines, inspections? Is this record used in building cases against recalcitrant sources?

Penalty Assessment

4. Are there written goals or policy statements affecting penalty assessment or collection? Is there any penalty amount schedule?

5. Who sets the penalty amount? For what type of cases?

6. Is there a log or precedent system for establishing appropriate fines?

7. What is the typical penalty amount? limited by practice or legislation?

Review Procedures

8. Under what circumstances are sources entitled to an administrative review of their penalty assessment?

9. What regulations or policies govern the conduct of the hearing?

10. What percentage of the penalty cases actually involve an administrative hearing?

11. Can all fines by appealed to the courts? How frequently does this happen?

12. Is a court appeal based on the record or does the court conduct a de novo trial?

Penalty Collection and Disposition

13. What penalty collection powers does the agency possess?

14. What is the typical time period between the identification of a violation and penalty recovery?

15. Is collection affected by the penalty amount? by other factors?

16. Do the funds collected go into the air agency budget?

PROGRAM EFFECTIVENESS

1. What role do administrative fines play in the agency's air pollution enforcement strategy? How effective are they compared to consent agreements, or NOVs followed by informal negotiations?

2. What aspects of an administrative fines program are critical to its success?

3. Are there any drawbacks or disadvantages to the agency's current program organization? What steps, if any, could be taken to make the program more effective?

4. How much does it cost the agency to run the program? Are there any aspects of program operation that could be improved if more funds were available?

APPENDIX C

LIST OF STATE AND REGIONAL CONTROL AGENCY OFFICIALS CONTACTED

AGENCY CONTACTS

Name	Agency Address
Georgia	
Marvin Lowry Chief-Air Quality Control Section Environmental Protection Division	Department of Natural Resources 270 Washington Street, S.W. Atlanta, Georgia 30334
Indiana	
Sue A. Shadley Attorney Air Pollution Control Division	Indiana State Board of Health 1330 West Michigan Street Indianapolis, Indiana 46206
Louisiana	
George Eldredge Deputy Counsel Legal Division	Department of Natural Resources P.O. Box 44396 Baton Rouge, Louisiana 70804
Mississippi	
John W. Harper Chief of Law Enforcement Dwight Wylie Chief, Air Division	Department of Natural Resources Bureau of Pollution Control P.O. Box 10385 Jackson, Mississippi 39209
Nevada	
James Hannah Executive Secretary	Nevada Environmental Commission 201 South Fall Street, Room 104 Carson City, Nevada 89710
Dick Serdoz Air Quality Officer Division of Env. Protection	Department of Conservation and Natural Resources Capitol Complex Carson City, Nevada 89710
New Jersey	
Thomas A. Pluta Chief, Division of Environmental Quality, Bureau of Enforcement	Department of Environmental Protection John Fitch Plaza, CN 027 Trenton, New Jersey 08625

Oregon

Van Kollias	Department of Environmental Quality
Supervisor-Investigation and Compliance	522 S.W. Fifth Avenue
Regional Operations Division	Portland, Oregon 97207

Pennsylvania

Morris S. Malin	Department of Environmental Resources
Chief, Division of Abatement and Compliance	P.O. Box 2063
Bureau of Air Quality Control	Harrisburg, Pennsylvania 17120

Puget Sound

Harry Twomey	Puget Sound Air Pollution Control Agency
Supervisor One-Enforcement	P.O. Box 9863
	Seattle, Washington 98109

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13 SUPPLEMENTARY NOTES

16 ABSTRACT

EPA has determined that an effective enforcement strategy for ensuring continuing compliance with air pollution regulations must provide quickly imposed sanctions, appropriate remedies, and a means of building a record in cases involving recalcitrant sources. EPA believes that an enforcement strategy which incorporates an administrative fines component may be well suited to meeting these goals and has decided to pursue development of a model administrative fines program. This report develops a list of issues that must be addressed by a model administrative fines program, and then formulates an initial set of design criteria for such a program. This analysis is based on the operating experience of nine state and local agencies that currently employ administrative fines programs as part of their overall air pollution enforcement effort.

KEY WORDS AND DOCUMENT ANALYSIS

a. DESCRIPTORS	b. IDENTIFIERS/OPEN ENDED TERMS	c. COSATI Field/Group
Air Pollution Enforcement Administrative Fines Continuing Compliance		

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