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OVERVIEW OF EPA FEDERAL PENALTY PRACTICES

FY 1988

May 1989

Compliance Policy and Planning Branch
Office of Enforcement and Compliance Monitoring



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

MAY 19 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Penalty Report for FY 1988

FROM: Edward E. Reich 
Acting Assistant Administrator

TO: The Administrator
Acting Deputy Administrator
Assistant Administrators
Regional Administrators

Attached is the final Federal penalty report for FY 1988, entitled "Overview of EPA Federal Penalty Practices FY 1988." The report consists of two parts -- an overview report prepared by OECS and program-specific appendices prepared by the program offices and the Associate Enforcement Counsels. OECS owes much to all those in the program offices and Regions who contributed data and analyses, reviewed the draft report, and maintained accurate penalty records throughout the year.

The report shows that FY 1988 was the biggest penalty year in EPA's history. A new record was set, with \$36.8 million in civil penalties. This represents a 51 percent increase over the FY 1987 total. The last five years have brought 74 percent of all EPA penalties to date.

We hope you find this report useful and informative. If you have suggestions on how EPA could make more use of this report, please let me know.

Attachment

cc: Associate Administrator for Regional Operations
Acting General Counsel
Headquarters Compliance Office Directors
Deputy Regional Administrators
Regional Counsels
Regional Division Directors
Steering Committee on the State/Federal
Enforcement Relationship

OVERVIEW OF EPA FEDERAL PENALTY PRACTICES

FY 1988

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- A. Criminal Enforcement
- B. Clean Water Act
- C. Safe Drinking Water Act
- D. Wetlands Protection
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- F. Mobile Source Air
- G. RCRA
- H. FIFRA/TSCA

ACKNOWLEDGMENTS

This report was coordinated by the Compliance Policy and Planning Branch of the Office of Enforcement and Compliance Monitoring. The project manager and principal author was George Alderson. The following were the principal authors of the program-specific reports:

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The collection, quality control, analysis and display of these data took many long hours by these individuals and their colleagues and support staff.

I. EXECUTIVE SUMMARY

General Findings

- o EPA has obtained over \$151 million in civil penalties through FY 1988.
- o A new record was set in FY 1988, with \$36.8 million in civil penalties -- a 51 percent increase over FY 1987.¹
- o Criminal fines of over \$8.6 million were assessed in FY 1988, and 30 years of incarceration were imposed (before deducting suspended sentences). After suspension, fines of over \$1.4 million and incarceration of almost eight years were ordered by the courts.
- o Seventy-four percent of all EPA's civil penalties to date were imposed in the last five years, from FY 1984 through FY 1988. Some 24 percent of all penalties were imposed in FY 1988 alone.
- o The 51 percent growth in penalty dollars in FY 1988 can be attributed to three changes from the previous year. First, relatively new enforcement initiatives resulted in substantial penalties in FY 1988, specifically RCRA interim status judicial cases and implementation of administrative penalty authorities under the Clean Water Act and Safe Drinking Water Act (Underground Injection Control). Second, four well established programs showed major increases in penalties (the Clean Water Act, Stationary Source Air, RCRA and TSCA programs). Third, a larger percentage of the cases were in programs which obtain traditionally high-dollar penalties (most notably the Clean Water Act program).
- o Penalties were obtained in 92 percent of the cases concluded in FY 1988.

¹ This does not include the \$15-million penalty in the lodged, but not yet filed, consent decree in the Texas Eastern Pipeline case, which was still pending early in FY 1989.

Program Highlights

- o The penalty dollars were dominated by Clean Water Act (34%) and Stationary Source Air (25%) cases. These were followed by RCRA (17%), TSCA (14%) and Mobile Source Air (7%) cases.
- o The numbers of cases were dominated by four penalty programs that heavily use administrative enforcement cases -- TSCA (42%), Mobile Source Air (17%), FIFRA (13%) and RCRA (11%).
- o Four programs set new records for total dollars and number of cases -- Clean Water Act, Safe Drinking Water Act, Stationary Source Air and RCRA.
- o Two programs obtained their first penalties through administrative cases in FY 1988 -- Clean Water Act and Wetlands Protection.

Regional Highlights

- o Regions I, II and III displayed relatively high penalty dollars compared to their number of cases.
- o Regions II, V and VI were the highest in total penalty dollars and numbers of cases. These same Regions also exhibited the top dollars or cases in two or more programs.
- o Region II had the largest total of penalty dollars with \$6.7 million, or 20 percent of the national total for FY 1988. Regions III, V and VI also obtained more than 10 percent of the national total.
- o Region V had the largest number of cases with penalties -- 228 cases, or 19 percent of the national total. Regions II, VI, VII and VIII also had more than 10 percent of the national total.
- o Regions I and II showed notable increases in their share of the national penalty dollars compared to FY 1987.

II. PURPOSE, SCOPE AND LIMITATIONS OF THIS REPORT

This overview report summarizes the penalty practices of EPA Regions and Headquarters offices in FY 1988 in civil judicial, civil administrative, and criminal enforcement actions. The program-specific penalty reports used as the basis for this overview are attached to this report as appendices. A report on criminal penalties forms a separate appendix. Except where specifically noted, the term "penalties" is used in this overview to refer only to civil (administrative and judicial) penalties, not criminal penalties.

Programs Covered

Nine EPA penalty programs are addressed in this report. The following list gives their names, the types of enforcement cases each uses, and any acronyms by which they are cited in this report:

<u>Program</u>	<u>Types of cases</u>
Criminal Enforcement	Judicial
Clean Water Act - NPDES (CWA)	Judicial Administrative
Safe Drinking Water Act (SDWA)	Judicial Administrative
Wetlands Protection	Judicial Administrative
Stationary Source Air	Judicial Administrative
Mobile Source Air	Judicial Administrative
Resource Conservation and Recovery Act (RCRA)	Judicial Administrative
Toxic Substances Control Act (TSCA)	Administrative
Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)	Administrative

Cases Covered

The penalties discussed in this report are cash amounts assessed in EPA enforcement cases that were concluded in FY 1988. They reflect final judgments by a court, consent decrees and consent orders reflecting settlements, and final administrative orders.

This report does not include "proposed penalties" or other amounts under discussion prior to the conclusion of a case, and it does not include penalties paid to entities other than the Federal Government. Contempt enforcement actions (cases seeking to invoke sanctions for a failure to comply with a prior court order, decree, or administrative order) are not included, because those cases are not concerned purely with violations of the environmental regulations. "Stipulated penalties" also are not included in this report; they are penalties stipulated in an administrative or court order that are due only if the violator fails to carry out certain other requirements of the order.

This report also does not reflect "credits," "benefit projects," or other non-monetary actions which parties in enforcement cases often agree to carry out as part of a settlement. Such actions may yield large environmental benefits of substantial dollar value, as is the case with a two-million-dollar mitigation project in FY 1988 in the Boston Harbor case, under a Clean Water Act judicial case.

One element of this report is an analysis of the extent to which EPA used penalties in its enforcement cases. Some cases did not obtain penalties. The cases without penalties included in this report are enforcement actions in which a penalty is authorized by the statutes and regulations on which the case is based. If Congress did not authorize EPA to assess a penalty for a given type of violation, an enforcement action for such a violation would not be counted as a case in this report.

Penalties are counted in this report as assessed in a final administrative action or in a court order; appeals and collection of penalties are not considered here. The word "obtained" is used in this report as a general term referring to penalties that were assessed by a court or by EPA administrative orders. Its meaning is the same as "assessed" or "imposed."

Purposes and Limitations

This overview report is not an evaluation of practices by EPA programs or Regions, and it should be viewed in the context of the total enforcement effort. The report may illuminate both individual characteristics of programs and Regions and provide a

helpful comparison among programs and among Regions. Identifying differences may stimulate further thinking about penalties in general, advancing the goal of more effective use of penalties as part of an overall enforcement program.

The reader should bear in mind that the data presented here are historical in nature, and do not necessarily represent present penalty practices. Nothing in this report may be used as a defense or guide to future settlements of Federal cases involving penalties.

The specific penalty data used in this report were obtained from several Federal data systems. The quality and completeness of the data are not known and may vary among the programs discussed here.

III. GENERAL OVERVIEW

1. General Profile

Highlights

EPA has obtained over \$151 million in cash penalties from FY 1974 through FY 1988 in 8,085 civil judicial and administrative cases.

In addition, in the two years EPA's criminal enforcement program has been tracking penalty data (FY 1987-1988), \$12 million in criminal fines and over 112 years of incarceration have been imposed, before deduction of suspended sentences. Incarceration sentences after suspension totaled 33 years.

Seventy-four percent of all civil penalty dollars in EPA's history were obtained in the last five years (FY 1984-1988). Fifty-four percent of the civil penalty dollars (\$82 million of \$151 million) and fifty percent of the cases with penalties (4,024 of 8,085) were obtained in the last three fiscal years.

The historical picture is shown in Figure 1, displaying total penalties by fiscal year.

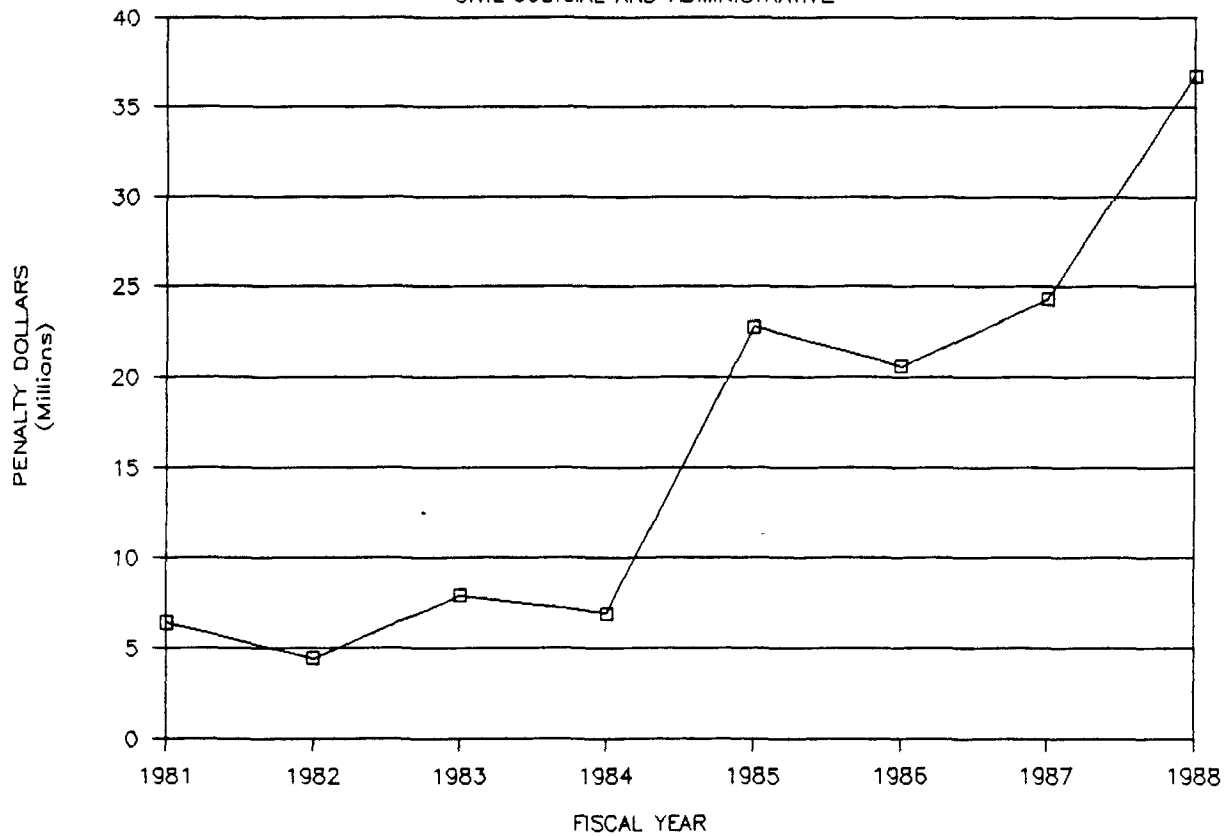
The contributions of the different EPA programs to the FY 1988 totals of penalty dollars and number of cases with penalties are shown in Figures 2 and 3.

Four programs set new records in FY 1988 for both total dollars and total number of cases with penalties: Clean Water Act with \$12,427,658 and 125 cases, Stationary Source Air with \$9,062,497 and 75 cases, RCRA with \$6,236,892 and 158 cases, and SDWA with \$472,630 and 46 cases.

The largest penalty obtained in FY 1988 was \$2 million, in a judicial action in the Clean Water Act program. Individual penalties over \$1 million were also obtained in judicial cases by the Stationary Source Air and RCRA programs, and in administrative cases by the Mobile Source Air and TSCA programs.

Figure 1
TOTAL PENALTIES BY FISCAL YEAR

CIVIL JUDICIAL AND ADMINISTRATIVE



TOTAL PENALTY DOLLARS BY FISCAL YEAR

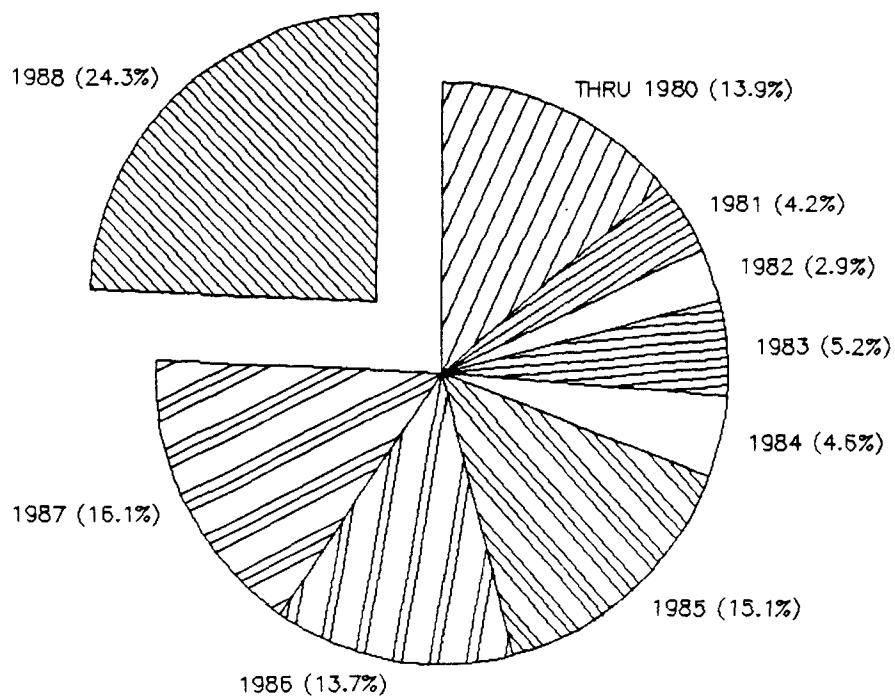


Figure 2

PERCENT PENALTY DOLLARS BY PROGRAM

FY 1988

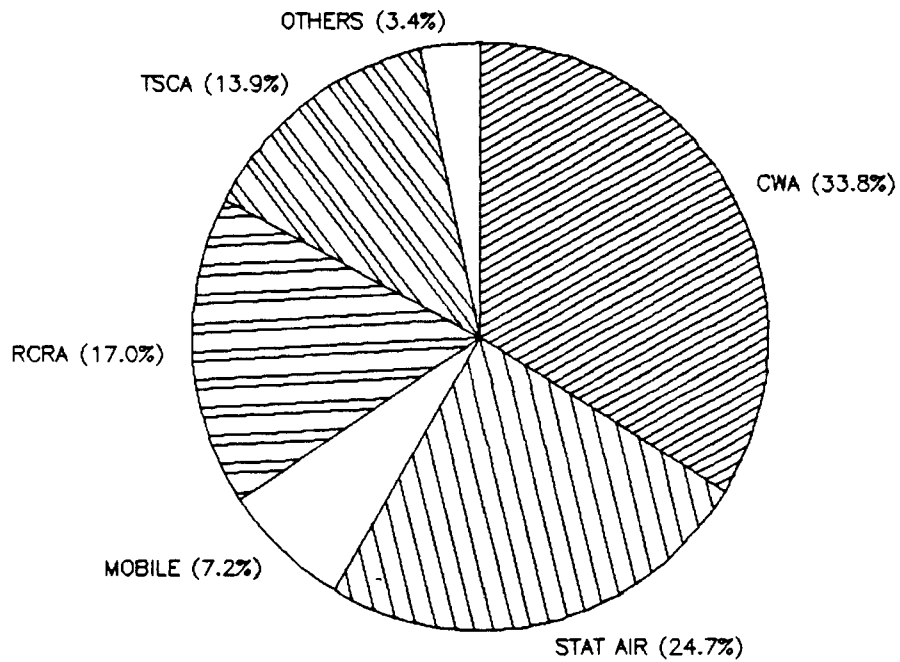


Figure 3

PERCENT PENALTY CASES BY PROGRAM

FY 1988

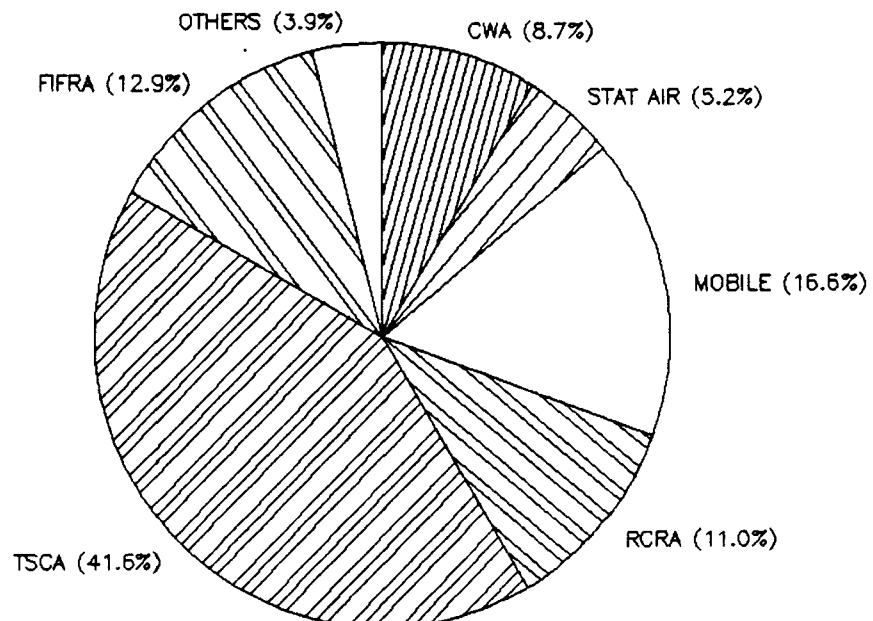


Table 1

Total Amount of Civil Judicial and Administrative Penalties
in FY 1988

	<u>Total dollars (percent)</u>	<u>No. All Cases* (percent)</u>
Clean Water Act	\$ 12,427,658 (34%)	127 (8%)
Judicial	11,885,858	87
Administrative	541,800	40
Safe Drinking Water Act	472,630 (1%)	101 (7%)
Judicial	49,740	6
Administrative	422,890	95
Wetlands Protection	147,000 (<1%)	10 (1%)
Judicial	25,000	5
Administrative	122,000	5
Stationary Source Air	9,062,497 (25%)	78 (5%)
Judicial	8,914,384	74
Administrative	148,113	4
Mobile Source Air	2,657,293 (7%)	238 (15%)
Judicial	10,000	1
Administrative	2,647,293	237
RCRA	6,236,892 (17%)	177 (11%)
Judicial	3,776,239	22
Administrative	2,460,653	155
TSCA - Administrative	5,126,057 (14%)	604 (39%)
FIFRA - Administrative	317,494 (1%)	215 (14%)
CERCLA - Judicial	315,000 (1%)	1 (<1%)
TOTAL	\$ 36,762,521 (100%)	1,551 (100%)

*"Number of all cases" here includes all cases with or without penalties. Percentages shown here will differ from analyses presented elsewhere in this report, based on only those cases with cash penalties.

Table 2

Total Amount of Criminal Fines and Incarceration
in FY 1988

Number of defendants convicted	50
Total fines assessed	
Before suspension	\$ 8,645,050
Ordered (after suspension)	1,450,050
Total months incarceration	
Sentenced (before suspension)	369 (30 years)
Ordered (after suspension, before parole)	95 (8 years)

Median and Average Penalties

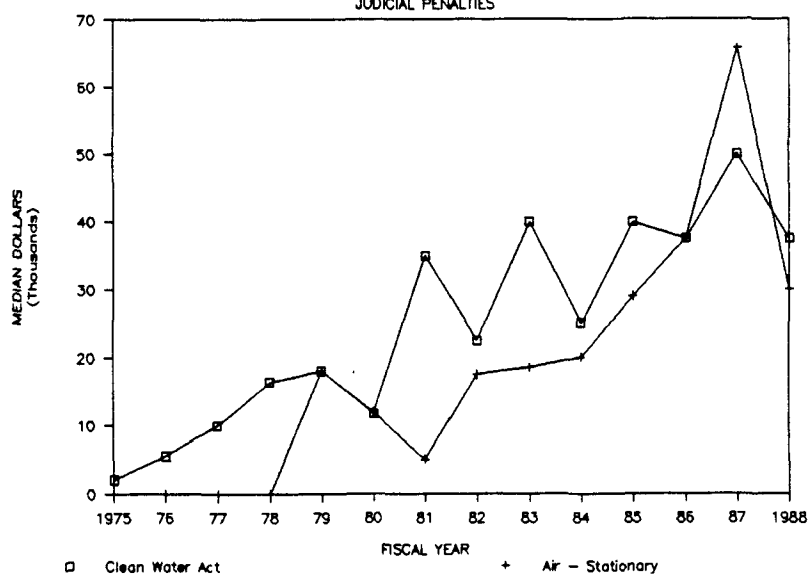
This section of the report attempts to look beyond the aggregate figures to see what the typical penalties were for each program. Average and median penalty figures represent different aspects of the program.

The average penalty is the total dollars divided by the number of penalty cases in a given program. While an average is useful in seeing overall program accomplishments, it may give a misleading picture if the penalties within that program went to extremes. One high-penalty case and a large number of low-penalty cases could produce a mid-level average, even though no cases had a mid-level penalty.

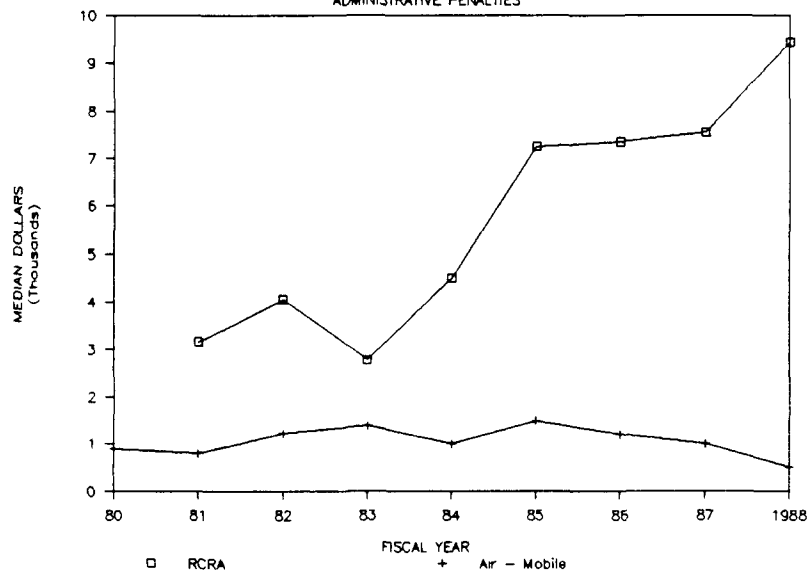
The median is useful to gain a different perspective on a program without the heavy influence of a few extremely large or small penalties. The median penalty represents the middle number in the series of all penalties for a given program arranged in order of size. That is, there were as many penalties below the median as above it.

Medians - Figure 4 shows trends in medians over several years for the largest EPA penalty programs during that period. Programs with fewer than four years of penalty history are not shown. In the Mobile Source Air and TSCA programs, the data reflect several different penalty authorities, including some that lead to higher-dollar penalties. However, most of the cases in both these programs are in lower-dollar categories, which results in low median penalties.

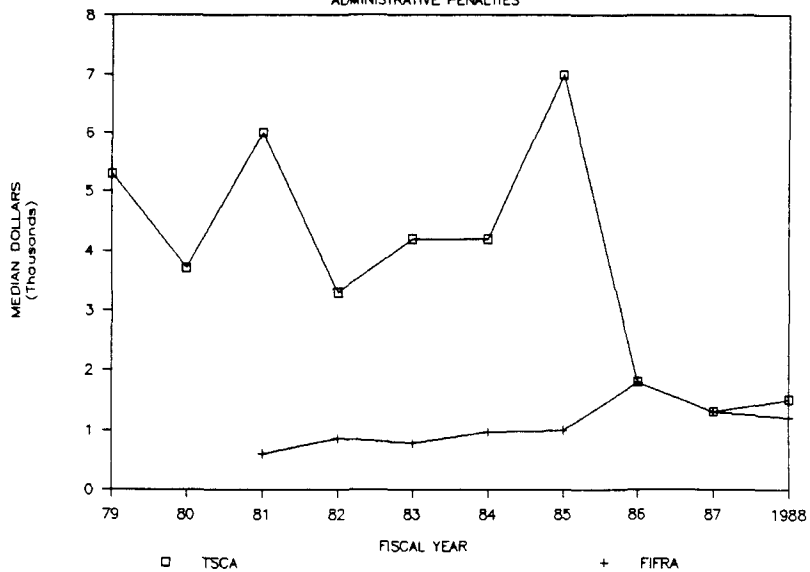
Figure 4
PROGRAM MEDIANS BY FISCAL YEAR
JUDICIAL PENALTIES



PROGRAM MEDIANS BY FISCAL YEAR
ADMINISTRATIVE PENALTIES



PROGRAM MEDIANS BY FISCAL YEAR
ADMINISTRATIVE PENALTIES



Medians increased in four programs in FY 1988 over the previous year's levels. RCRA and SDWA showed notable increases in their judicial cases; RCRA continued the rising trend in its administrative cases; Stationary Source Air reached a new high in its administrative cases; and TSCA made a modest increase over FY 1987.

Medians decreased in four programs. In Mobile Source Air administrative cases the decrease appears to be part of a continuing trend related to a change in program emphasis. In the other three -- CWA judicial, Stationary Source judicial, and FIFRA -- the decreases appear to be within the range of expected annual fluctuation.

Change in medians has not been analyzed for a few categories of cases. There were too few SDWA administrative cases and Mobile Source Air judicial cases in one or both years to make these categories suitable for analysis of change in medians. FY 1988 was the first year of concluded administrative penalty cases in the CWA and Wetlands programs. Wetlands judicial cases are presented separately for the first time this year.

- o Clean Water Act: The median judicial penalty dropped from its FY 87 level of \$50,000 to \$37,500 in FY 88. This returns the figure to the same range between \$35,000 and \$40,000 where it has been in three of the last five years. In this first year of CWA administrative penalties, the median was \$8,500.
- o Safe Drinking Water Act: The median judicial penalty rose from \$3,000 in FY 87 to \$4,900 in FY 88, attaining its highest level yet. The median administrative penalty (all but one being Underground Injection Control cases) declined from \$7,500 to \$2,750, but no conclusions are warranted because in the previous year (FY 87) there were only three cases.
- o Wetlands Protection: This program concluded its first administrative cases in FY 88, establishing a median penalty of \$19,000. The median judicial penalty was \$6,250. (This is the first year Wetlands data have been presented separately in this report. Wetlands judicial penalties were presented as part of Clean Water Act data in previous reports.)
- o Stationary Source Air: The median judicial penalty declined from its record high of \$65,750 in FY 87 to \$30,000 in FY 88, returning to the rough range occupied in FY 85 and 86. The median administrative penalty reached a record high of \$39,397 based on four cases in FY 88, rising from \$8,500 in combined years FY 86-87 based on 11 cases.
- o Mobile Source Air: The median administrative penalty decreased from \$1,000 in FY 87 to \$500 in FY 88, reflecting a changed program emphasis and the use of field citations instead of

formal administrative cases in the fuel-switching enforcement effort. (Analysis of change in median judicial penalties is not productive, because there was only one case in FY 88 and two in FY 87.)

- o RCRA: The median judicial penalty rose from \$40,000 in FY 87 to a new high of \$96,479 in this third year of RCRA judicial cases. The median administrative penalty continued its rising trend for the fifth straight year, increasing from \$7,550 in FY 87 to a record high of \$9,440 in FY 88.
- o TSCA: The median penalty rose from \$1,300 in FY 87 to \$1,500 in FY 88, still below the \$1,800 level of FY 86. Prior to FY 86, medians were not calculated on a TSCA program-wide basis.
- o FIFRA: The median penalty decreased from \$1,547 in FY 87 to \$1,200 in FY 88, the second year of decrease from the program's record high of \$1,852 in FY 86.

Averages - Average penalties increased in six programs in FY 1988 and declined in one. However, it should be noted that averages may be influenced by a few large cases. A year with one or two extremely large cases may have a much higher average penalty than a year without any, even though the latter may have had larger penalties in most enforcement cases.

Averages rose to record highs in CWA judicial cases, SDWA judicial and administrative cases, RCRA judicial cases, and TSCA cases. Also showing higher averages this year were Stationary Source Air judicial and administrative cases, RCRA administrative cases, and FIFRA cases.

Only Mobile Source Air administrative cases had a lower average penalty. Judicial cases in the Mobile Source Air program were not analyzed with respect to change in average penalties, since there was only one case in FY 1988 and two in FY 1987. The three categories included this year for the first time were also not analyzed, since there were no previous year's data for comparison: CWA administrative cases and Wetlands judicial and administrative cases.

- o Clean Water Act: The average judicial penalty rose to a record high of \$139,834. In this first year of concluded administrative cases, the average penalty was \$13,545.
- o Safe Drinking Water Act: The average judicial penalty rose to a new high of \$8,290, and the average administrative penalty (reflecting almost entirely UIC cases) rose to \$10,572.

- o Wetlands Protection: The average judicial penalty was \$6,250. In this first year of concluded administrative cases, the average penalty was \$24,400.
- o Stationary Source Air: The average judicial penalty rose from \$102,634 in FY 87 to \$125,555 in FY 88, partly reflecting three cases with penalties over \$1 million each. The average administrative penalty rose to \$37,028 (reflecting four cases) from its FY 86-87 level of \$13,526.
- o Mobile Source Air: The average administrative penalty declined from \$13,128 in FY 87 to \$11,217 in FY 88. (Analysis of the average judicial penalty is not productive, because there was only one case in FY 88 and two in FY 87.)
- o RCRA: The average judicial penalty rose to a new high of \$209,791 in the third year of concluded RCRA judicial cases. The average administrative penalty rose from \$13,635 in FY 87 to \$17,576 in FY 88. This would be a record high if the single penalty of \$2,103,000 were excluded from the FY 86 data.
- o TSCA: The average penalty rose to a new three-year high of \$8,615. (Averages were not calculated on a TSCA program-wide basis before FY 86.)
- o FIFRA: The average penalty rose from \$1,547 in FY 87 to \$1,716 in FY 88.

Percentage of Cases Concluded with a Penalty

A high percentage of cases were concluded with a penalty in all programs except one. Excluding this one program from the calculation, 95 percent of all FY 1988 cases were concluded with a penalty, the same percentage as in FY 1986-1987.

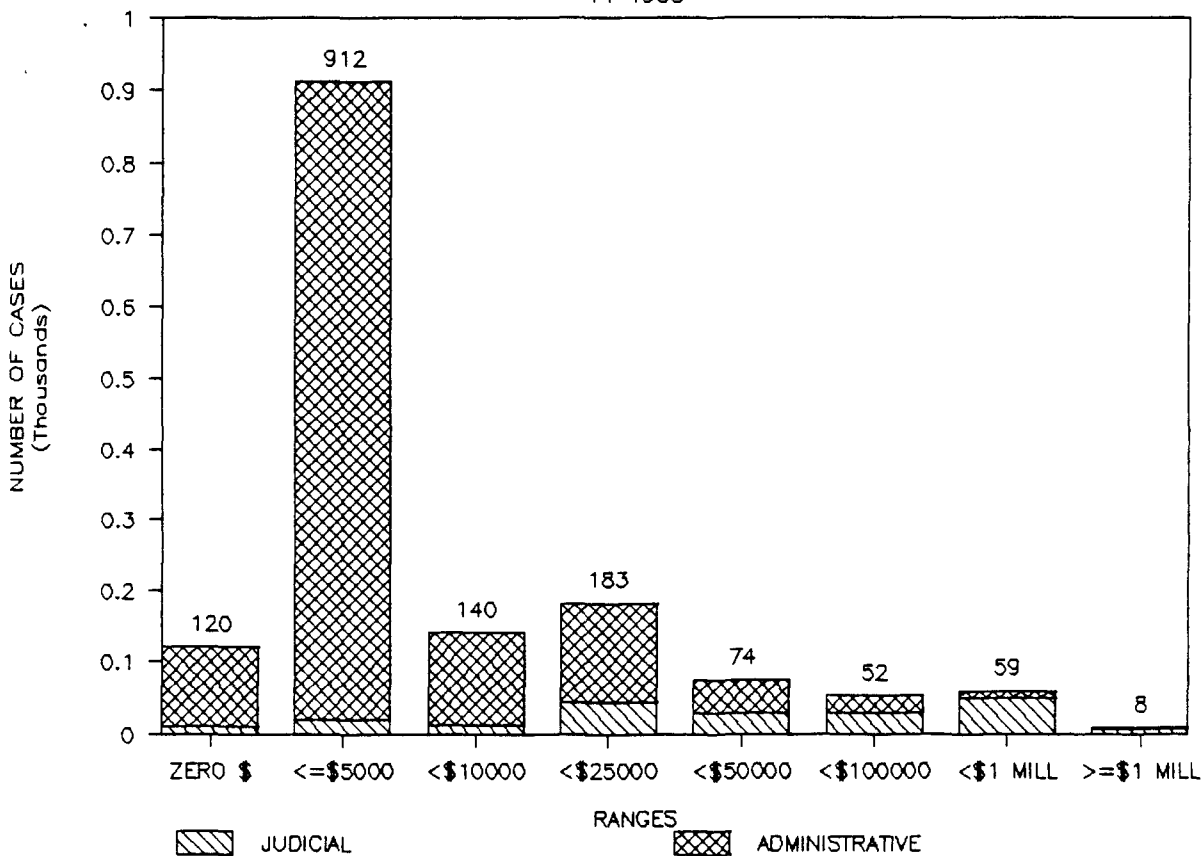
The atypical program was the Underground Injection Control program (authorized by the Safe Drinking Water Act), which obtained penalties in 42 percent of its cases. The UIC program was in its second full year of administrative penalty cases. The low percentage figure is in part a result of the structure of the SDWA, which does not separate EPA's authority for non-penalty UIC administrative orders from the authority for penalty orders, as was done in the Clean Water Act, the Public Water System provisions of SDWA, and the Clean Air Act. In this report, every UIC administrative order is counted as a potential penalty case, while in other programs the only orders counted are the ones issued under the statute's penalty provisions. The agencywide figure including the UIC cases is 92 percent.

The percentage of cases with a penalty ranged from 42 percent in SDWA administrative cases (all but one were UIC cases) to 100 percent in CWA administrative, SDWA judicial, Wetlands administrative, Stationary Source Air administrative, and Mobile Source Air judicial and administrative cases.

Range of Penalty Amounts

The distribution of penalties in most programs maintained position approximately in the profile established in FY 1986 and 1987. This represents a consolidation of the gains achieved over the FY 1984 levels, which had shown a distribution much more heavily weighted toward the low end of the dollar scale. Figure 5 shows the penalty distribution of all FY 1988 cases.

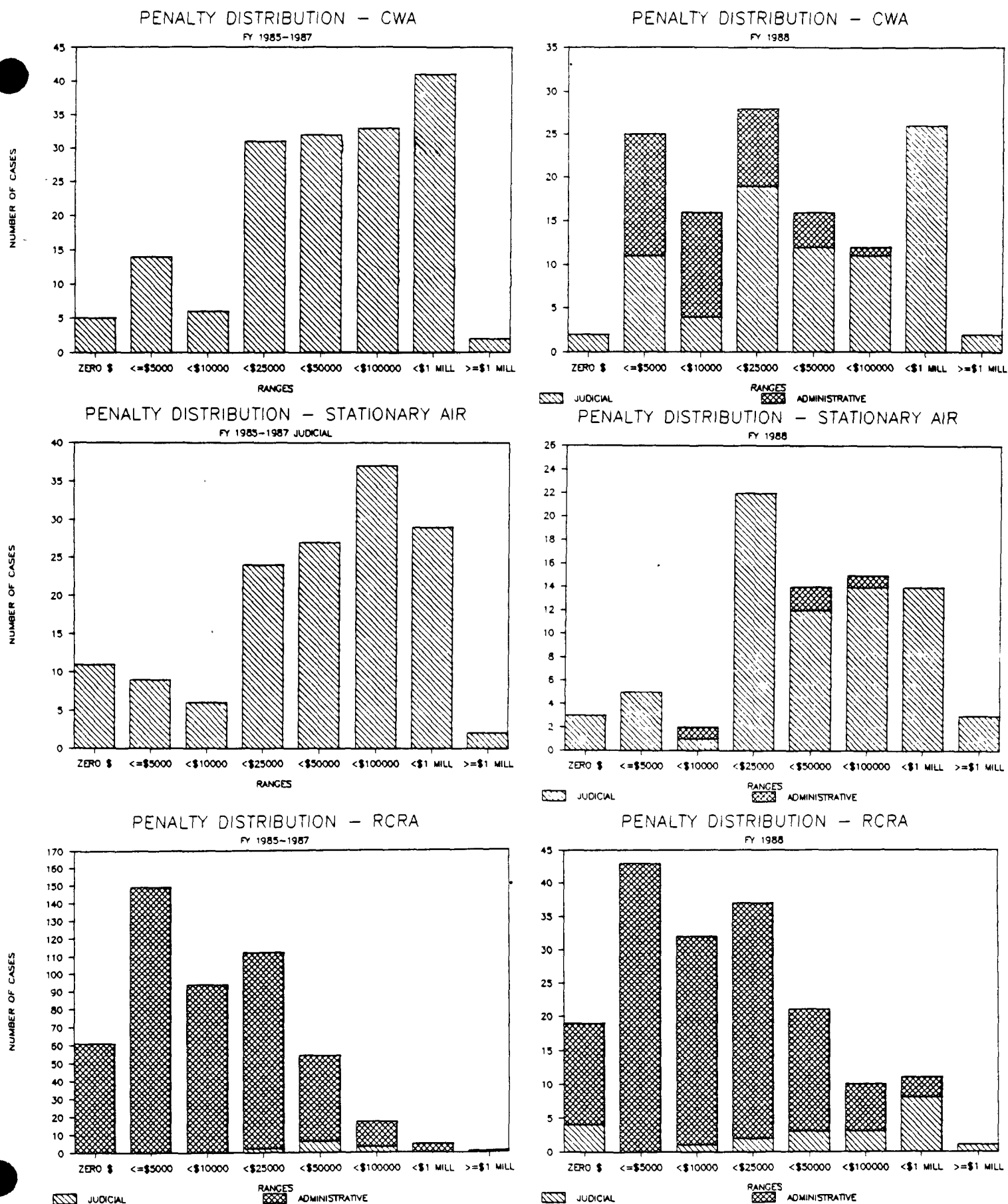
Figure 5
PENALTY DISTRIBUTION - ALL PROGRAMS
FY 1988



There have been changes in the penalty distributions of some programs. In FY 1988 the CWA penalty distribution shows growth both in the lower ranges and in the highest range. There was some growth in CWA judicial penalties in the categories under \$10,000, and CWA administrative penalties contribute to the growth in the same categories. The program also increased its number of judicial penalties over \$1 million. Stationary Source Air judicial penalties showed a decrease in cases over \$25,000, evidently as a result of the program's increasing concentration on asbestos cases, which command lower penalties, but this program too increased its number of penalties over \$1 million from FY 1987 to 1988. RCRA penalties show the effect of growing judicial penalties in the higher categories. Distribution graphs for three programs appear in Figure 6, comparing FY 1988 to the combined data for the three years FY 1985-1987.

The overall distribution (shown in Figure 5) is dominated by the large number of cases brought by the TSCA, FIFRA and Mobile Source Air programs, in which the penalties are generally lower than in other programs.

Figure 6



NOTE: Please note different scales.

Highest Penalties

Three programs established new records for highest individual administrative or judicial penalties -- that is, the highest penalty assessed in a single case. These records were in Safe Drinking Water Act (Underground Injection Control) administrative cases (\$125,000), Stationary Source Air administrative cases (\$61,500), and RCRA judicial cases (\$1.1 million). The highest penalties in each program are shown in Table 3.

Table 3

Highest Penalty in FY 1988 by Program

	<u>Judicial</u>	<u>Administrative</u>
Clean Water Act	\$ 2,000,000	\$ 60,000
Safe Drinking Water Act (UIC)	25,000	125,000
Wetlands Protection	6,250	60,000
Stationary Source Air	1,750,000	61,500
Mobile Source Air	10,000	1,175,000
RCRA	1,100,000	150,000
TSCA	---	1,281,950
FIFRA	---	27,720
CERCLA	315,000	---

Types of Cases

Roughly \$25 million, or 68 percent, of all EPA Federal penalty dollars in FY 1988 came from judicial cases. The remaining 32 percent were from administrative cases.

In number of cases, the administrative outweighed the judicial. Some 87 percent of all penalty cases were administrative enforcement actions, compared to 13 percent that were judicial actions.

In general, the penalty is likely to be higher in a judicial case than in an administrative case, but the ranges overlap. For instance, two of EPA's top ten penalties in FY 1988 were assessed in administrative cases brought by the TSCA and Mobile Source programs. Both were over \$1 million.

New and Increased Penalty Authorities

Two programs obtained their first administrative penalties in FY 1988, using their new authority under the Water Quality Act of 1987: Clean Water Act and Wetlands. The CWA and Wetlands programs also had increased judicial penalty authority under the Water Quality Act of 1987, which raised the maximum judicial penalty from \$10,000 per day of violation to \$25,000 per day.

2. Program Summary

Highlights

Penalties play quite different roles in the different EPA programs. This results from differences in the penalty authorities the United States Congress has granted EPA, different lengths of time the programs have been operating, different types of violations to which the penalties apply, and different types of pollution sources. All of these influence the use and levels of penalties. The following observations are not evaluations of the programs' use of penalties, but rather an attempt to illuminate differences among the environmental media.

Although each program is different, the programs can be seen as falling in four groups on the basis of the size of typical penalties and the number of cases concluded with a penalty in FY 1988:

Group One: High Judicial Penalties - Three programs are represented in this group. The Clean Water Act and Stationary Source Air programs had large typical judicial penalties (medians for FY 88 were \$37,500 and \$30,000, respectively) and low volume of cases (85 and 71, respectively). This year the RCRA program joined this group for the first time, with a median judicial penalty of \$96,479 and 18 cases.

Group Two: Low Judicial Penalties - Three programs had relatively low judicial penalties and few cases: SDWA (median \$4,900 with 6 cases, in both UIC and Public Water Systems programs), Wetlands (median \$6,250 with 4 cases), and Mobile Source Air (one judicial case with a penalty of \$10,000).

Group Three: High Administrative Penalties, Low Volume - Five programs had relatively high median administrative penalties and low numbers of administrative cases in FY 88. These programs include Stationary Source Air (median \$39,397 with 4 cases) and RCRA (median \$9,440 with 140 cases). In addition, three programs with relatively new administrative penalty authority joined this group: Clean Water Act (median \$8,500 with 40 cases) and Wetlands (median \$19,000 with 5 cases), both of which had their first administrative penalties in FY 88, and SDWA (median \$2,750 with 40 cases), which was in its second full year of administrative penalties.

Group Four: Low Administrative Penalties, High Volume - Mobile Source Air, TSCA and FIFRA had relatively low administrative penalties and large numbers of cases. Median administrative penalties for these programs were \$500, \$1,500 and \$1,200, respectively; case numbers were 236, 595 and 185, respectively. Some very high administrative penalties were also obtained by Mobile Source Air and TSCA, placing them as the third and fourth highest programs in the ranking of highest individual penalties. Mobile Source and TSCA cases reflect several different penalty authorities, including some that lead to higher-dollar penalties. Mobile Source Air's top penalty was \$1,175,000 against a refiner under the lead phasedown program, while TSCA's was \$1,281,950 in a Premanufacture Notification case. However, the majority of cases in both programs are in lower-dollar categories, and these dominate the penalty data and result in low average and median penalties.

Criminal Enforcement

The Criminal Enforcement program operates on a cross-media basis, serving all the major programs that have been authorized by Congress to use criminal sanctions against violators. Most criminal cases include charges under more than one environmental law, but for statistical purposes each case is listed under one predominant statute. On this basis, the programs with the largest numbers of defendants convicted in FY 1988 were RCRA (25) and Clean Water Act (12), followed by FIFRA (4), Clean Air Act (3), TSCA and CERCLA (one each). (The foregoing numbers are sums of entities and individuals convicted.)

Relative Contributions

Two penalty programs that dominated the penalty dollars in past years did so again in FY 1988. Clean Water Act and Stationary Source Air penalties made up more than half the FY 1988 penalty dollars (34 percent from CWA and 25 percent from Stationary Source Air). These were followed by RCRA (17 percent), TSCA (14 percent) and Mobile Source Air (7 percent). (See Figure 2.)

The majority of cases with penalties in FY 1988 were concluded by four programs that made heavy use of administrative cases. TSCA alone had 42 percent of the cases, followed by Mobile Source Air (17 percent), FIFRA (13 percent) and RCRA (11 percent). The programs that made heavy use of judicial cases were led in case numbers by Clean Water Act with 9 percent of the total, and Stationary Source Air with 5 percent. (See Figure 3.)

Major Changes in FY 1988

The most striking change in FY 1988 compared to the past two fiscal years is the growth in total penalty dollars. The EPA total of \$36.8 million is \$12.4 million, or 51 percent, over the FY 1987 figure. (It is also 78 percent over the FY 1986 figure.) Moreover, the phenomenon was achieved with only a 4-percent increase in the number of cases with penalties. Where did this dollar increase come from?

Examination of the data reveals three major factors that have played a part. First, substantial penalty totals were obtained by three relatively new enforcement initiatives. Second, four well established programs showed major increases. Third, there was a significant shift in EPA's overall caseload, resulting in a larger percentage of the cases being in programs that obtain traditionally high dollars per case. We will examine these three factors separately.

New Initiatives: Relatively new enforcement initiatives made a large impact in FY 1988 in three programs. RCRA judicial cases, in their third year of penalties, went from \$277,034 in FY 1987 to \$3.8 million in FY 1988, reflecting loss of interim status cases. Clean Water Act administrative cases, based on new penalty authority, achieved more than \$500,000 in their first year. Safe Drinking Water Act administrative cases went from \$19,550 to over \$400,000 in their second full year, largely in the UIC program. RCRA judicial cases and SDWA administrative cases showed increases in number of cases and average and median penalties in FY 1988. In these RCRA and SDWA efforts, the increases in total dollars came both from the growing number of cases and from growing dollars per case.

Established Programs: The second element in the \$12.4-million increase is the higher total dollars obtained by four well established programs. These gains were led by the Clean Water Act program, which obtained more than \$5 million more in its judicial cases than in FY 1987. Stationary Source Air judicial cases had an increase of over \$3 million over FY 1987, RCRA administrative cases increased by almost \$593,000 and the TSCA program gained over \$400,000.

What led to these increases in dollars? In CWA and Stationary Source Air judicial cases, the increases were accompanied by

growth in the programs' number of cases and their average penalties but a decline in median penalties. Examination of program data shows that CWA's lower median reflects more growth in the number of moderate-dollar cases than in other dollar ranges. However, the program also had four cases of \$1 million or more (compared to one in FY 1987), creating a large boost in dollars from a few cases. In Stationary Source Air the lower median reflects a shift to lower-dollar asbestos cases, but the program also had three penalties over \$1 million each (compared to none in FY 1987). The predominant factors driving the increases in CWA and Stationary Source Air, therefore, were both the increased volume of cases and the growth in dollars per case.

In RCRA administrative cases, the growth came in dollars per case. There was no significant growth in number of cases, but more of the cases brought penalties between \$25,000 and \$150,000, which is reflected in higher average and median figures. In TSCA, there was a minor decline in cases and increases in average and median penalties, indicating that growth in dollars per case was the predominant influence.

Caseload Shift: The third element of the increase in dollars from FY 1987 to 1988 was a shift in EPA's caseload among the major programs. There was a notable decline in one program, coupled with increases in others. (Here we compare FY 1988 data with combined FY 1986-87 data.) There was a decline of 12 percent in the Mobile Source Air program's share of the total count of cases with penalties, as a result of changing program priorities upon completion of a successful enforcement initiative. Mobile Source Air is a program with low median and average penalties, but a large number of cases. Compensating gains in caseload share occurred in the Clean Water Act (4 percent), TSCA (4 percent), Safe Drinking Water Act (2 percent) and Stationary Source Air (1 percent) programs. Both CWA and Stationary Source Air are programs with typically high dollars per case.

3. Regional Summary

Regional penalty practices generally differ according to a number of variables which are inherent in the regional organization of any Federal agency. One example is the differing relative importance of the agency's programs. For instance, a Region in which water pollution is the number one problem will have a large Clean Water Act program, and the Region's penalty data will reflect the penalties characteristic of that program. Another Region where hazardous wastes are the largest problem may have relatively little CWA action and instead may have a dominant RCRA program, and its penalties will reflect that difference.

Despite these variables, some overall patterns can be observed among the Regions. Regional analyses for individual programs can be found in the program-specific reports which appear as appendices to this report. These analyses are summarized below.

Some differences among the Regions' penalty practices are to be expected because of varying circumstances, such as different types of sources, differences in the extent of delegation to the States, or the impact of a few large cases (especially where the Region had few cases overall), and perhaps because of some underlying differences in Regional philosophy on how best to create deterrence. Moreover, because of the unknown quality and completeness of the penalty data, comparisons among Regions may have limited reliability. Nevertheless, some real differences may emerge from looking at the overall pattern among Regions and exploring the observed differences further through consultation with the Regions.

Figure 7 shows the percentage of the national total in dollars and numbers of cases with penalties attributed to each Region. (The graph excludes data for the Mobile Source Air program, which is not regionalized.)

- o Regions I, II, and III in particular displayed large penalty totals compared to their proportion of cases. (This can be seen in Figure 7 by comparing the heights of the two bars for a given Region.)
- o Regions II, V and VI were the highest in total penalty dollars and numbers of cases. These same Regions also exhibited the top dollars or cases in two or more programs.
- o In penalty dollars (the bar on the left in Figure 7), Regions II, III, V and VI imposed a significant proportion (more than 10 percent) of the total for FY 1988. Region II had the largest total with nearly \$6.7 million in penalties or 20 percent of the national total for the year.
- o In numbers of cases with penalties (the bar on the right in Figure 7), the Regions with more than 10 percent were Regions II, V, VI, VII and VIII. Region V stands out with 228 cases, or 19 percent of the national total.
- o Regions I and II showed notable increases in their share of the national penalty dollars compared to FY 87.

Penalties in a given program are often concentrated in a few Regions, as is shown in Figure 8. This is influenced by the very significant program differences among the Regions. The program-specific analyses discussed in the appendices are essential to the reader who wishes to gain an understanding of the differences among Regions.

Figure 7
REGIONAL DISTRIBUTION ALL PROGRAMS
FY 1988

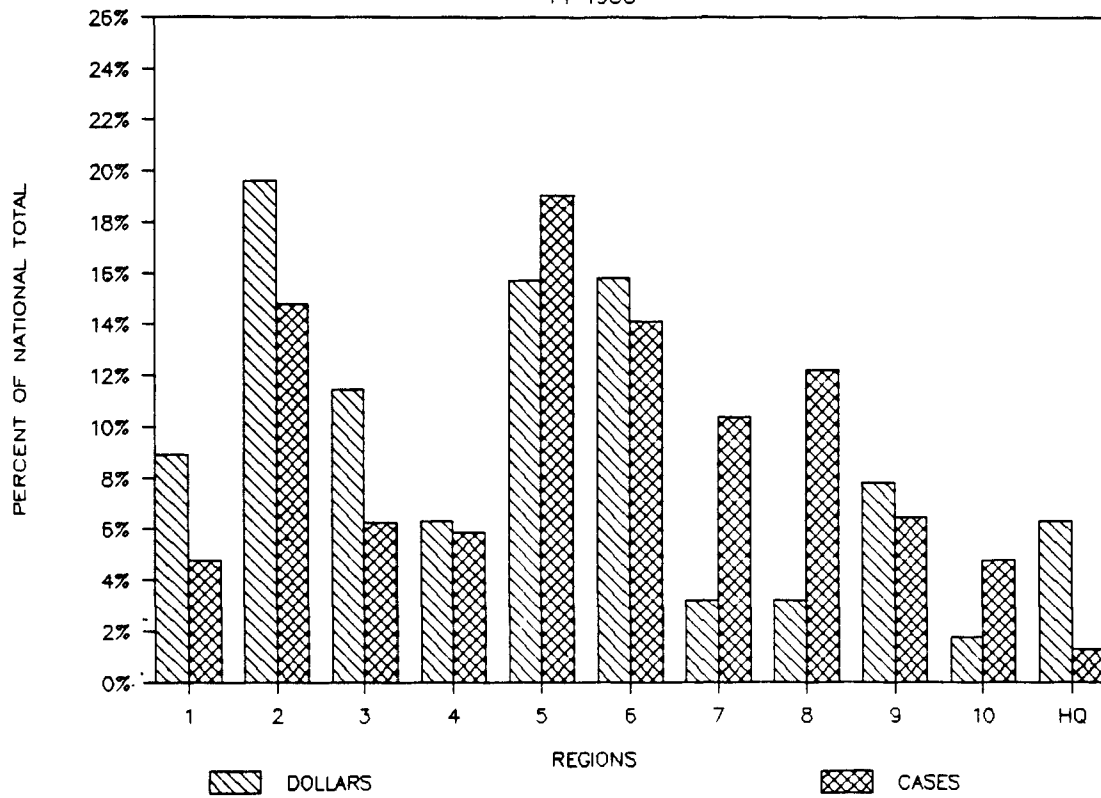
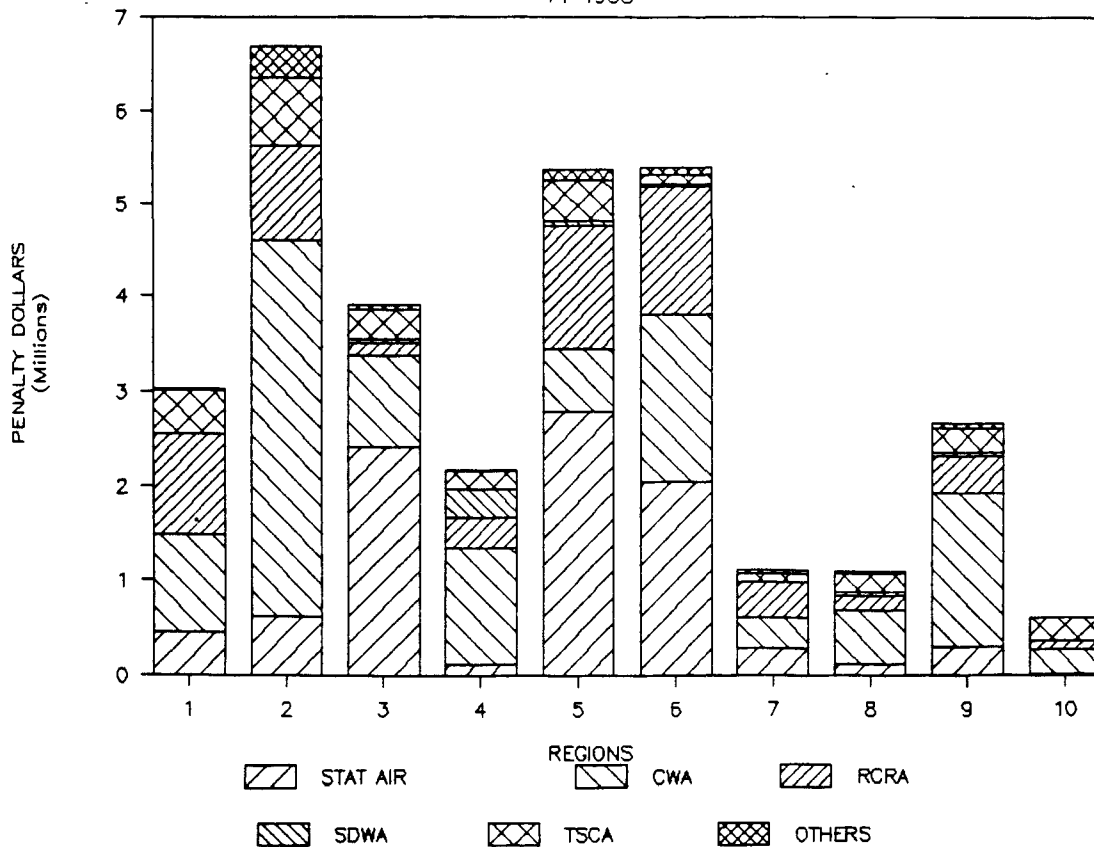


Figure 8
REGIONAL PENALTIES BY PROGRAM
FY 1988

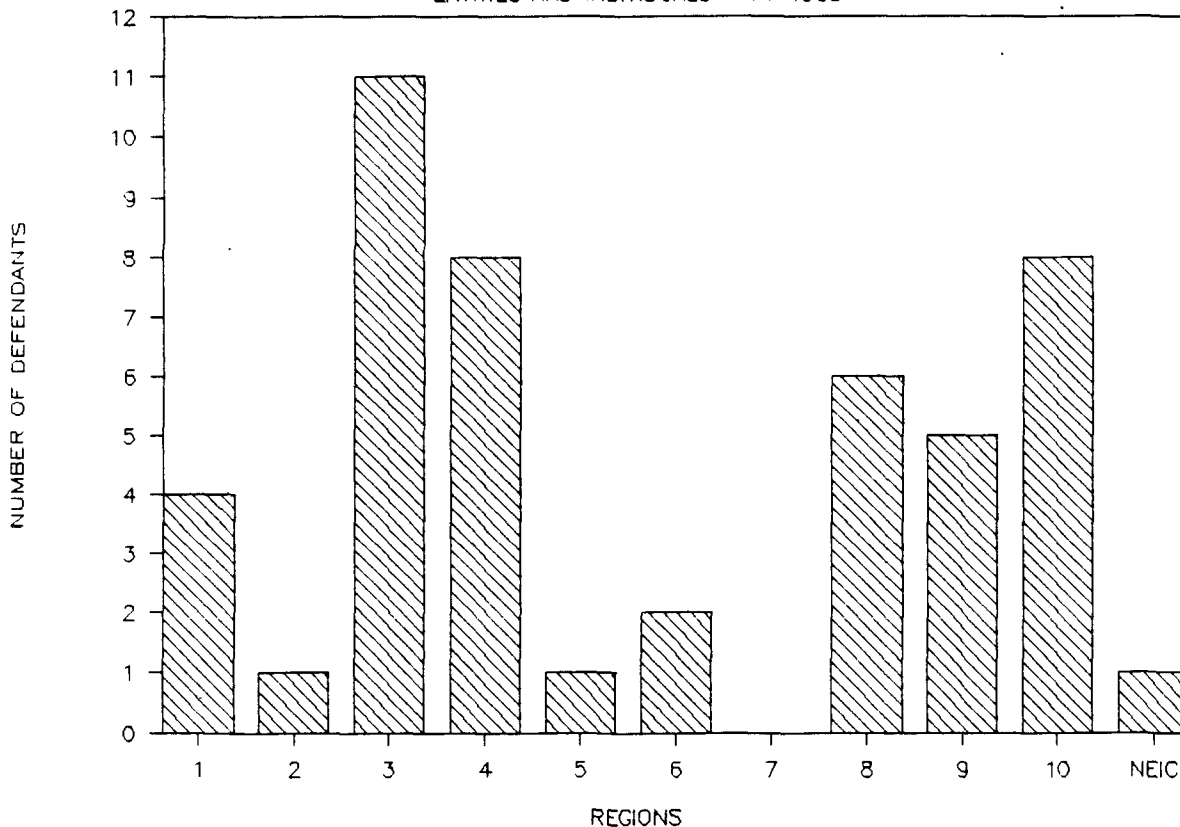


The following program-specific sections summarize the accomplishments of the EPA Regions in each of the penalty programs. Where medians are discussed here, the reference is to the median penalty, not including zero-penalty cases. Where there are significant differences in the percentage use of penalties among Regions, this will be addressed.

Criminal Enforcement

In the criminal enforcement program, nine Regions had one or more defendants convicted during FY 1988. Regions III, IV, VIII and X led the numbers (11, 8, 6 and 8 defendants, respectively). See Figure 9 for the regional distribution of defendants convicted.

Figure 9
DEFENDANTS CONVICTED, BY REGION
ENTITIES AND INDIVIDUALS - FY 1988



Clean Water Act

This was a year of growth in penalties and number of cases, and Regions II and III showed the largest relative growth in penalty dollars in FY 1988, compared to FY 1986-87. The largest relative growth in number of cases was in Region VI, in part a result of that Region's strong start in using administrative cases, a new enforcement tool authorized by Congress in the Water Quality Act of 1987.

Judicial: In FY 1988 the largest relative changes among the Regions were increases in Region II in both dollars and cases. Region IV also showed a notable increase in its share of cases. Regions III, VII, VIII and X achieved increases in median penalties.

A large proportion of the judicial penalty dollars in FY 1988 came in Regions II, IV, VI and IX (34%, 10%, 13% and 14%, respectively). The largest number of cases were concluded by Regions II, IV, V, VI and X (25%, 18%, 12%, 19% and 11%, respectively). Regions II and IX exhibited high total dollars in relation to their number of cases.

In FY 1988 the highest judicial medians were in Regions III and VIII (\$481,334 and \$285,000, respectively), followed by Regions VII, I and IX (\$150,000, \$75,000 and \$75,000, respectively). The Regions with individual penalties over \$1 million were Regions II and IX. See Figures 10 and 11 for the regional distribution of CWA judicial penalties (dollars and cases) and median penalties for FY 1988.

Administrative: FY 1988 was the first year in which CWA administrative penalty cases were concluded under the new authority granted by Congress in the Water Quality Act of 1987. Most of the penalty dollars came in Regions I, VI and X (30%, 39% and 11%, respectively), and most of the cases were in the same Regions (15%, 53% and 13%, respectively). Region I exhibited high total dollars in relation to its number of cases.

The highest median administrative penalties were in Regions I, V and VII (\$18,750, \$20,900 and \$25,000, respectively), followed by Regions VI and IX (\$8,000 and \$10,000, respectively). The Regions with individual penalties over \$40,000 were Regions I, VI and X. See Figures 12 and 13 for the regional distribution of CWA administrative penalties (dollars and cases) and median penalties for FY 1988.

Figure 10
REGIONAL DISTRIBUTION CWA PENALTIES
FY 1988 JUDICIAL PENALTIES

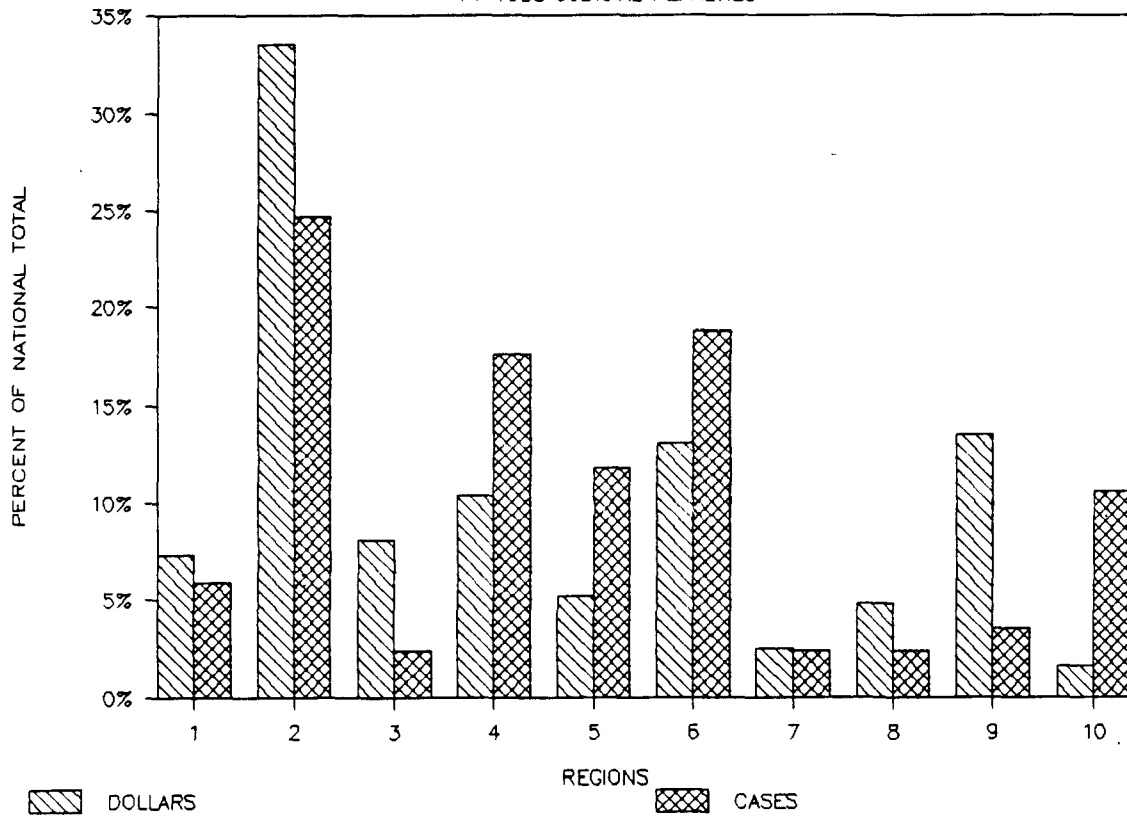


Figure 11
REGIONAL MEDIANS — CLEAN WATER ACT
FY 1988 JUDICIAL CASES

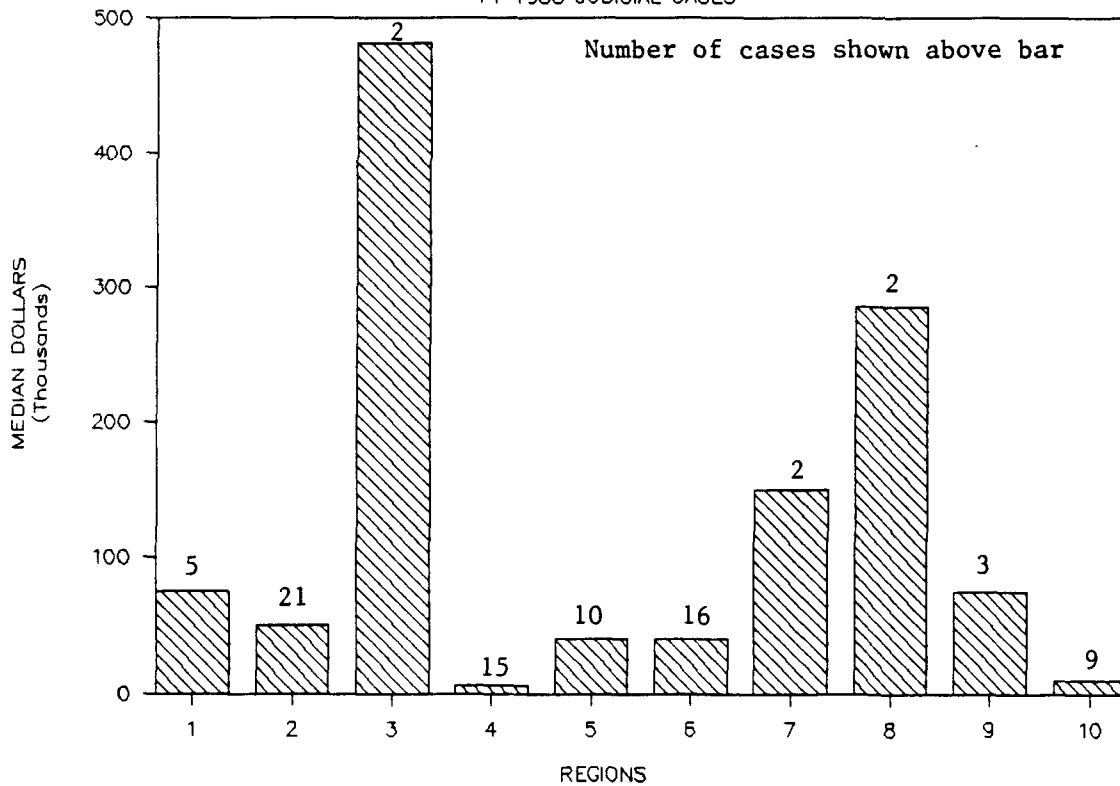


Figure 12

REGIONAL DISTRIBUTION CWA PENALTIES

FY 1988 ADMINISTRATIVE CASES

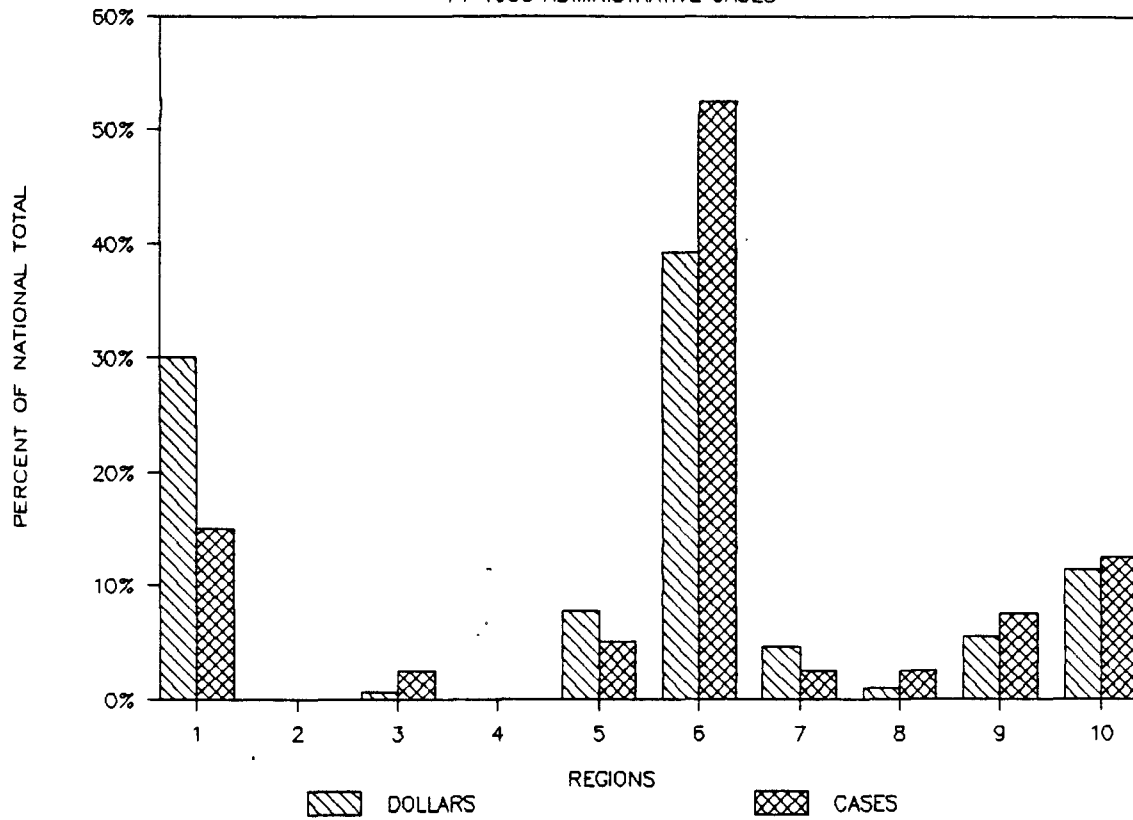
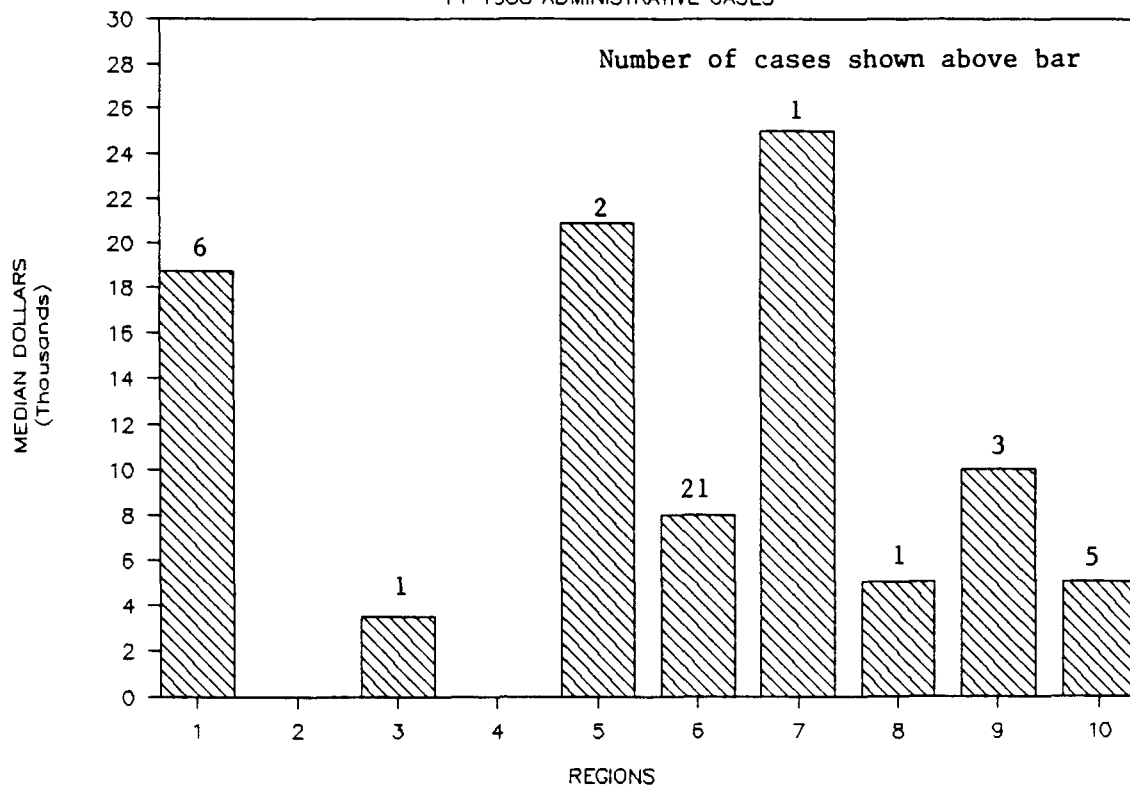


Figure 13

REGIONAL MEDIANS — CLEAN WATER ACT

FY 1988 ADMINISTRATIVE CASES



Safe Drinking Water Act

In the Safe Drinking Water Act program, the Underground Injection Control program showed major growth in its administrative cases in FY 1988, both in penalty dollars and number of cases. The Public Water System program maintained its presence in the judicial cases. Region IV had the highest SDWA penalty dollars overall. Regions IV, V and VIII had both administrative and judicial cases, and Regions III, VI and IX were also active in administrative cases.

Judicial: There is limited value in discussing regional patterns for SDWA judicial penalties because there have been few cases: six in FY 1988, six in FY 1987, and two in FY 1986. The FY 88 cases reflect both UIC and PWS programs. Regions with cases concluded during these three years were Regions III, IV, V, VI, VIII and X. Those with cases in more than one year were Regions V and VIII. Region IV obtained the highest individual penalty to date, a \$25,000 penalty in FY 1988.

Administrative: FY 1988 was the second full year of operations for SDWA administrative penalties, and all but one case were in the UIC program. A large proportion of the penalty dollars were in Region IV (65%). The largest numbers of cases were in Regions IV, V and VI (each with 25%), followed by Regions III and VIII (13% and 10%, respectively). The highest medians were in Regions III, IV and IX (\$10,000, \$10,000 and \$37,500, respectively). Regions with individual penalties over \$30,000 were Region IV, which obtained the statutory maximum of \$125,000, and Region IX (\$37,500). Region IV exhibited high total dollars in relation to its number of cases.

There were notable differences among Regions in their use of UIC administrative penalties. Regions VIII and IX obtained penalties in 100% of their cases, and Region V attained the 77% level. The other Regions with FY 1988 cases obtained penalties in less than half of the cases. The low figures are attributed to two factors: (1) the UIC program focuses on small operators with little or no ability to pay penalties, and (2) many of the UIC orders are directed at types of violations for which the UIC Compliance Strategy does not require assessment of penalties (examples include violations such as failure to submit an annual report or failure to submit a plugging and abandonment plan). See Figures 14 and 15 for the regional distribution of SDWA administrative penalties (dollars and cases) and regional medians for FY 1988.

Figure 14

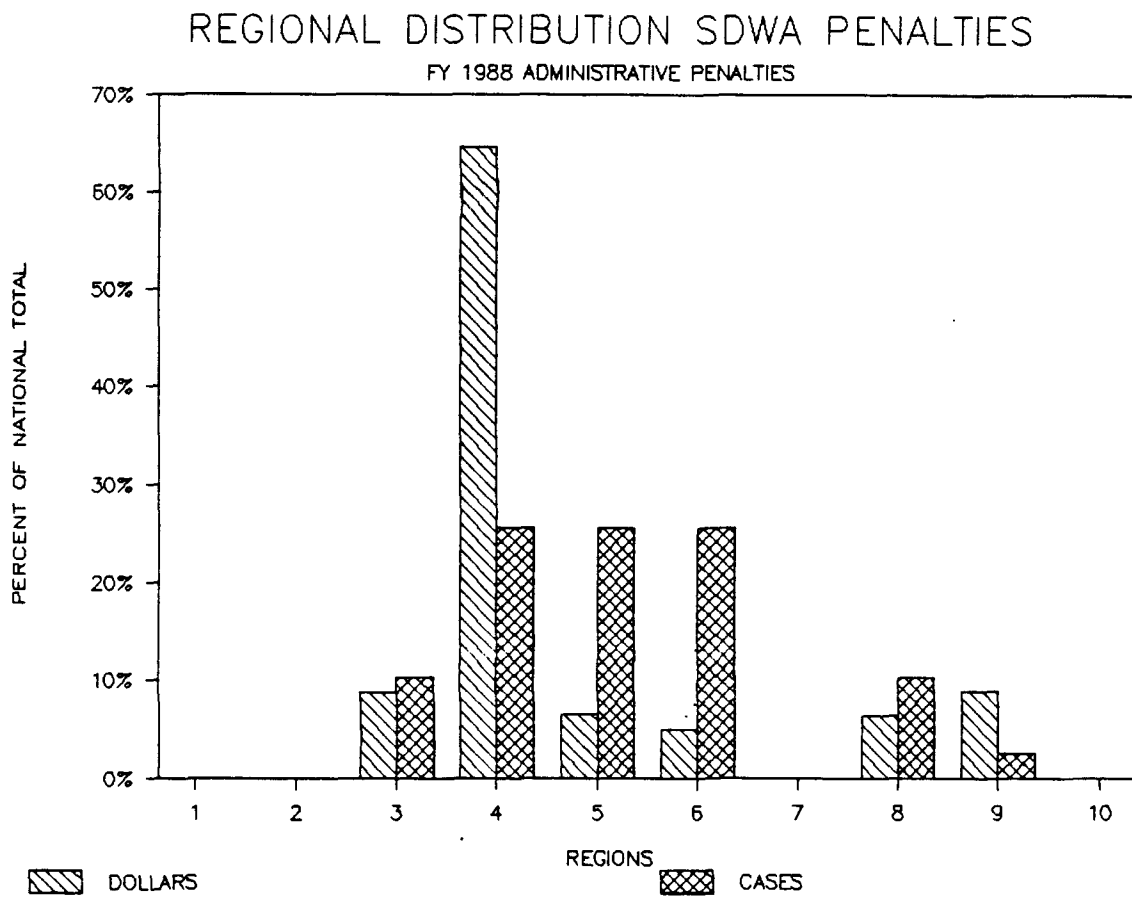
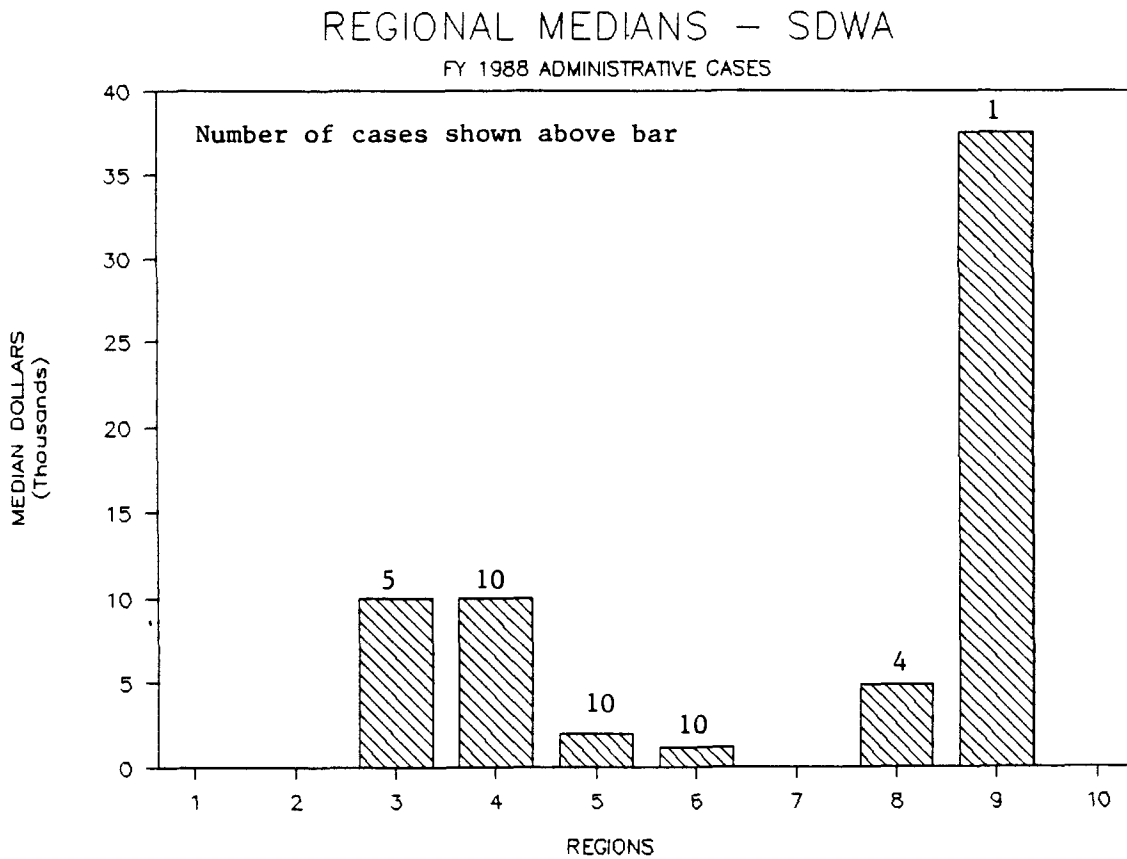


Figure 15



Wetlands Protection

A total of ten judicial and administrative cases were concluded by the Wetlands Protection program in FY 1988. Region III had four judicial cases, with total penalties of \$25,000, and Region IV had one judicial case without penalty but with restoration of the site. FY 1988 was the first year of administrative penalties for the Wetlands program. Three administrative cases were concluded by Region V (total \$94,000) and two by Region VI (total \$28,000). The highest individual administrative penalties were \$60,000 in Region V and \$24,000 in Region VI.

Stationary Source Air

The Stationary Source Air program showed major growth in judicial cases in FY 1988, both in penalty dollars and number of cases. Administrative cases remained at a low level.

Judicial: In FY 1988 Region V made a notable increase in its share of judicial penalty dollars in the Stationary Source Air program. Regions II, III and IX made notable increases in median penalties.

The highest total judicial penalty dollars were in Regions III, V and VI (23%, 32% and 24%, respectively). The largest number of cases were concluded in Regions II, V, VI and VII (15%, 29%, 10% and 15%, respectively). Regions III and VI showed high total dollars in relation to number of cases.

The highest judicial medians in FY 1988 were in Regions III, IX, VI, and IV (\$105,250, \$68,421, \$65,000 and \$52,500, respectively), followed by Regions II, I, VIII and V (\$42,000, \$31,590, \$30,000 and \$27,500, respectively). The regions with individual penalties over \$1 million were Regions III, V and VI. See Figures 16 and 17 for the regional distribution of Stationary Source Air judicial penalties (dollars and cases) and median penalties for FY 1988.

Administrative: There is limited value in discussing regional patterns for Stationary Air administrative cases, because there were only four cases in FY 1988, and two cases in FY 1986-87 combined. In FY 1988, Regions II and V each concluded two cases. Region V obtained the higher total dollars and had the higher median (\$50,273). The highest penalty was \$61,500 in Region V.

Mobile Source Air

The Mobile Source Air program is operated by EPA Headquarters, without regional delegation.

Figure 16
REGIONAL DISTRIBUTION OF PENALTIES

FY 1988 - STATIONARY SOURCE JUDICIAL

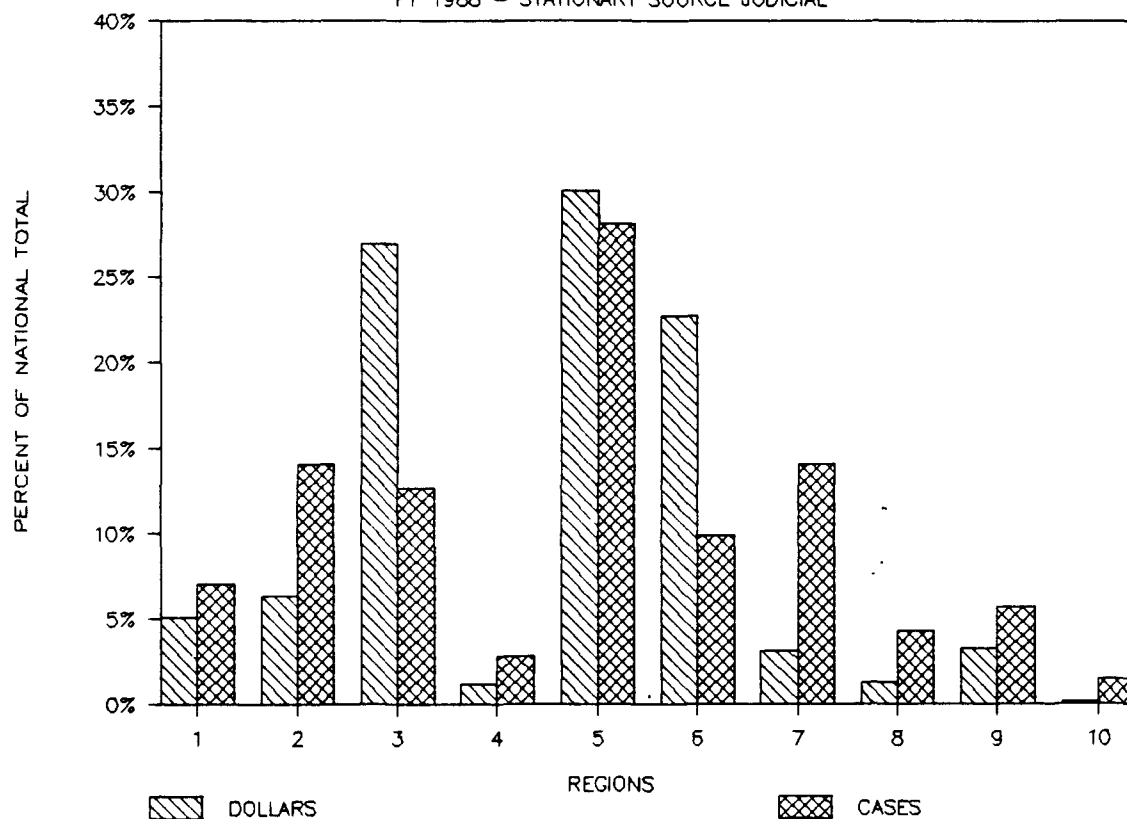
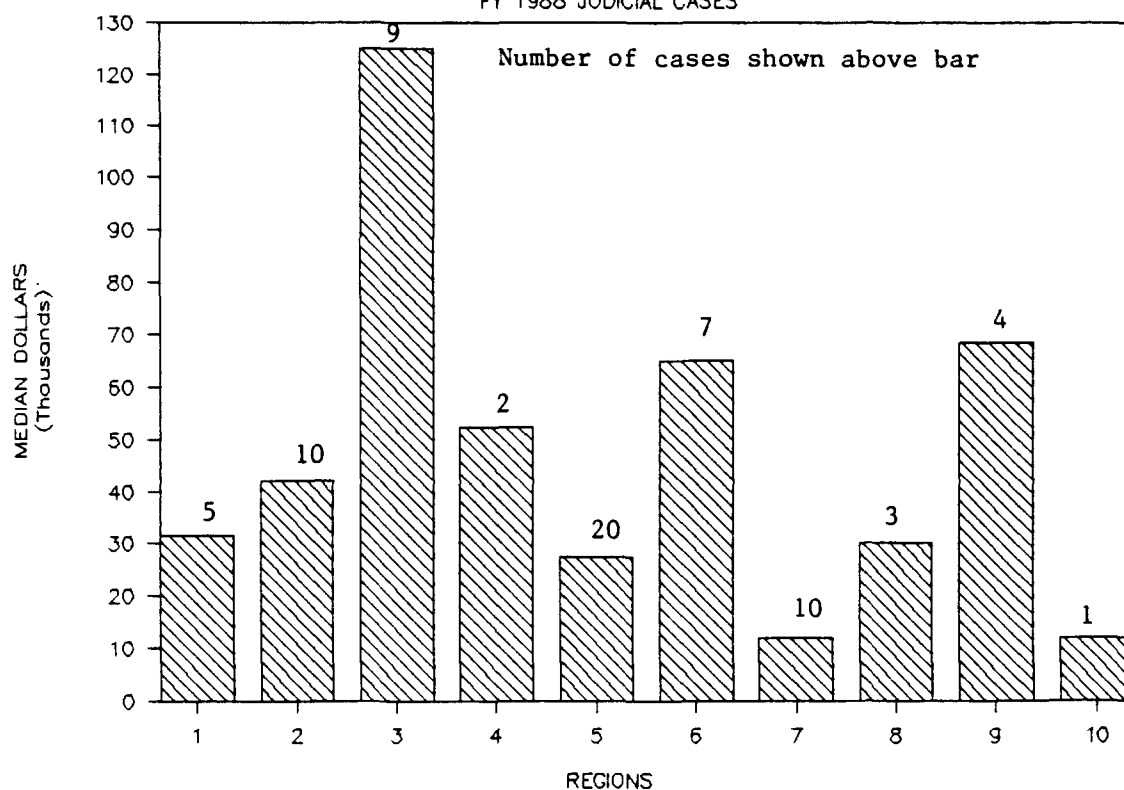


Figure 17
REGIONAL MEDIANS - STATIONARY SOURCE

FY 1988 JUDICIAL CASES



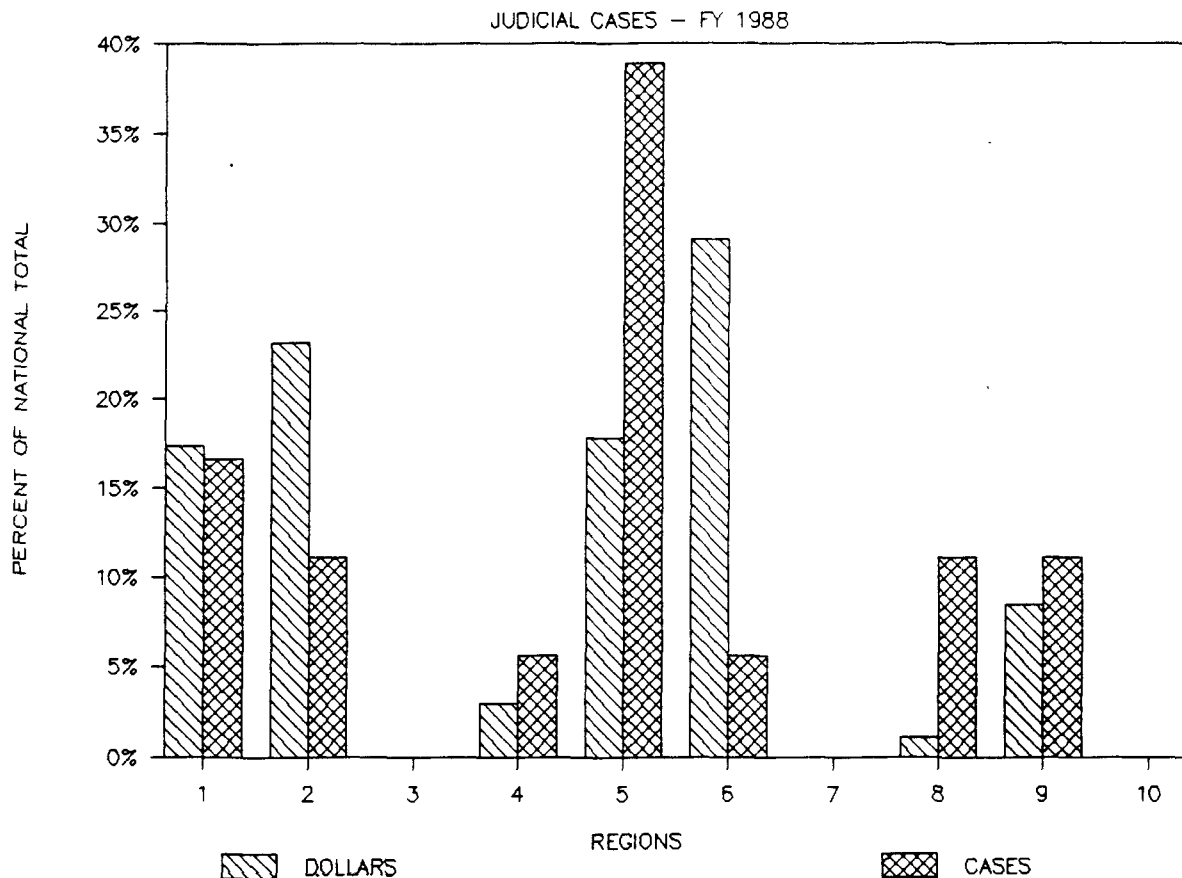
RCRA

The RCRA program showed a major increase in its judicial cases in FY 1988, both in penalty dollars and number of cases, while RCRA administrative cases showed a notable increase above their FY 1987 dollar level. Overall Region VI had the highest penalty dollars, and Region V had the highest number of cases. Regions that showed the greatest growth in their share of dollars compared to FY 1986-87 were Regions VI, I and II.

Judicial: In FY 1988, RCRA judicial cases showed a large increase in dollars and number of cases. A large proportion of the penalty dollars were in Regions I, II, V and VI (17%, 23%, 18% and 29%, respectively). The 18 cases with penalties were in seven Regions, with the largest numbers in Regions I and III (17% and 39%, respectively). The highest medians were in Regions V, II and I (\$1.1 million, \$437,500 and \$230,000, respectively), followed by Regions IX and IV (\$160,000 and \$110,000, respectively). Regions with individual penalties over \$500,000 were Regions II and V. See Figure 18 for the regional distribution of RCRA judicial penalties (dollars and cases) for FY 1988.

Figure 18

REGIONAL DISTRIBUTION RCRA PENALTIES



Administrative: Region I showed a notable increase in its share of RCRA administrative penalty dollars compared to FY 1986-87. Regions III, IV and VIII achieved notable increases in median penalties over FY 1986-87.

The largest shares of administrative penalty dollars came in Regions I, V, VI and VII (16%, 26%, 12% and 15%, respectively). The largest number of penalty cases were in Regions II, V, VI and VII (14%, 29%, 11% and 11%, respectively). Region I exhibited high total dollars in relation to number of cases.

In FY 1988 the highest median administrative penalty was in Region I (\$20,992), followed by Regions III, IX, V and IV (\$14,750, \$13,000, \$12,500 and \$11,000, respectively). The Regions with individual penalties over \$100,000 were Regions IV, VI and VII. See Figures 19 and 20 for the regional distribution of RCRA administrative penalties (dollars and cases) and median penalties for FY 1988.

TSCA

The greatest relative changes in the TSCA program in FY 1988 were an increase in penalty dollars by Headquarters and an increase in cases in Region VIII. Increases in median penalties were achieved by Regions I, II, III, IV, V, IX and Headquarters.

The largest shares of penalty dollars came from Headquarters and Regions I, II and V (41%, 9%, 14% and 9%, respectively). The largest numbers of cases were in Regions II, V, VI and VIII (18%, 20%, 9% and 19%, respectively).

The highest median penalties were at Headquarters and in Regions I and III (\$67,025, \$9,000 and \$5,600, respectively), followed by Regions IX, II and IV (\$4,250, \$3,225 and \$2,948, respectively). The two highest individual penalties were obtained by Headquarters (\$1,281,590 and \$500,000). See Figures 21 and 22 for the regional distribution of TSCA administrative penalties (dollars and cases) and median penalties for FY 1988.

Figure 19
REGIONAL DISTRIBUTION RCRA PENALTIES
FY 1988 ADMINISTRATIVE

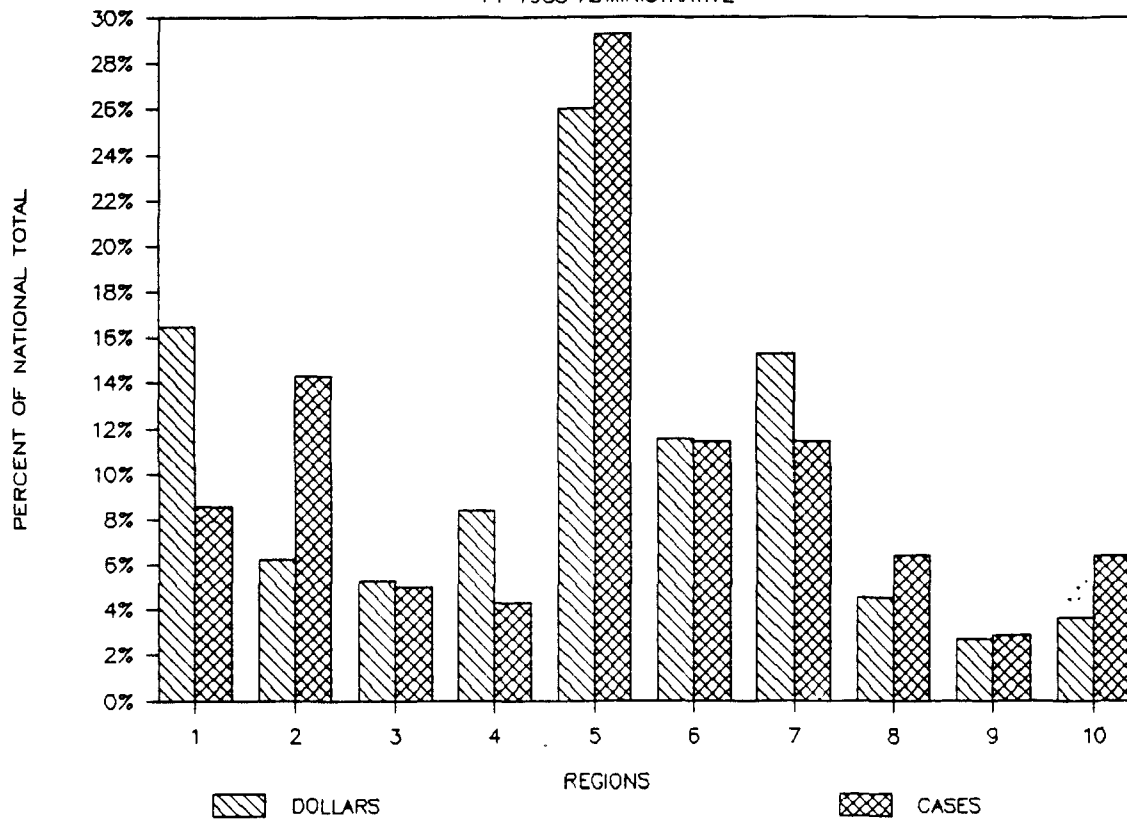


Figure 20
REGIONAL MEDIANS – RCRA
FY 1988 ADMINISTRATIVE CASES

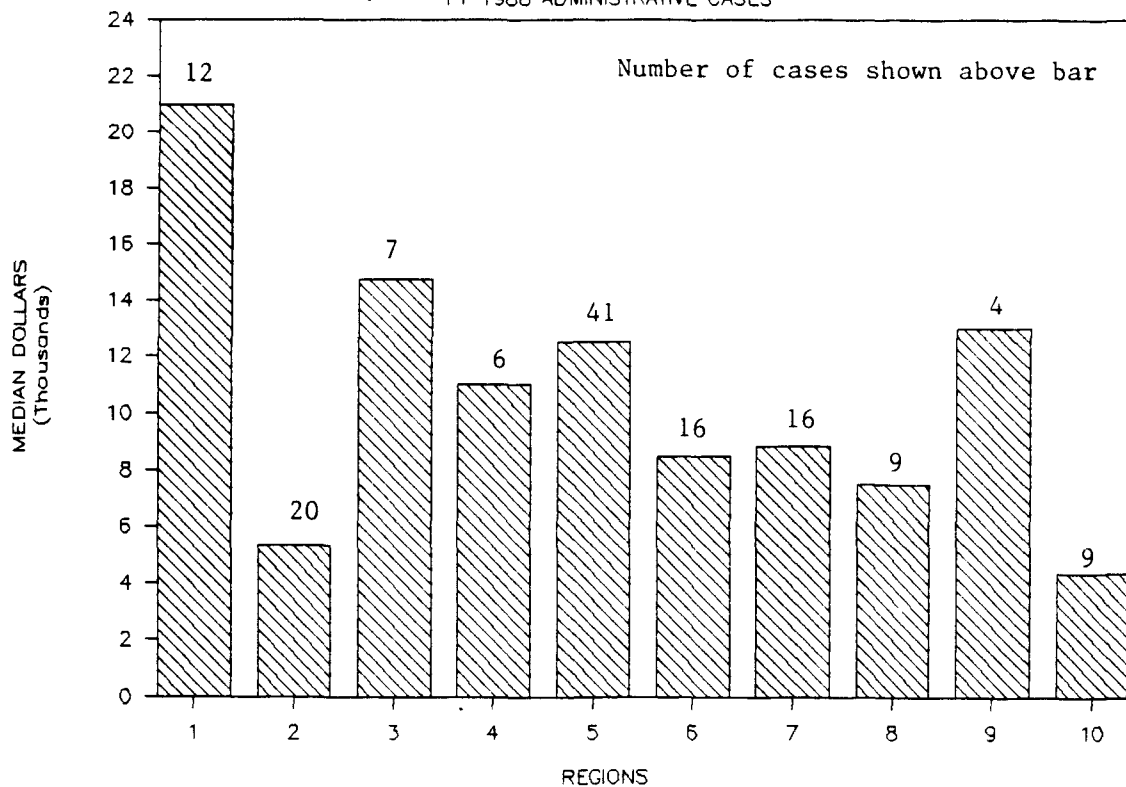


Figure 21
REGIONAL DISTRIBUTION TSCA PENALTIES
FY 1988

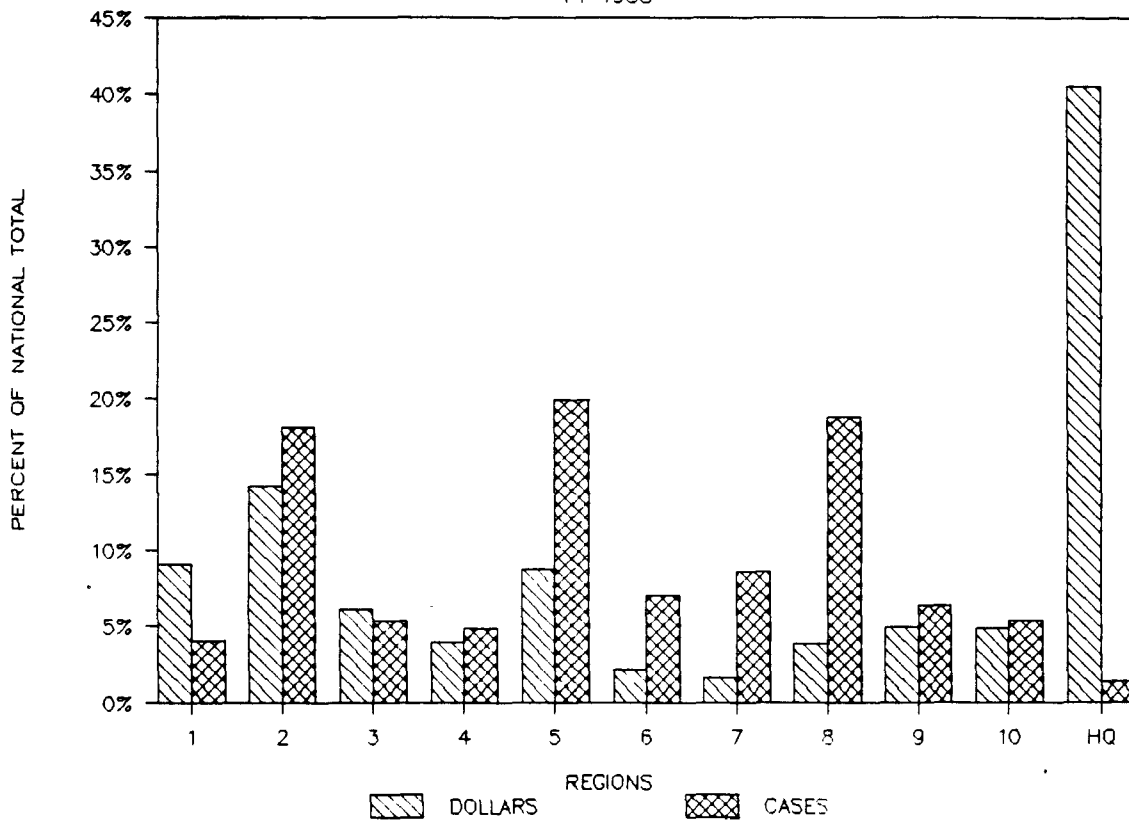
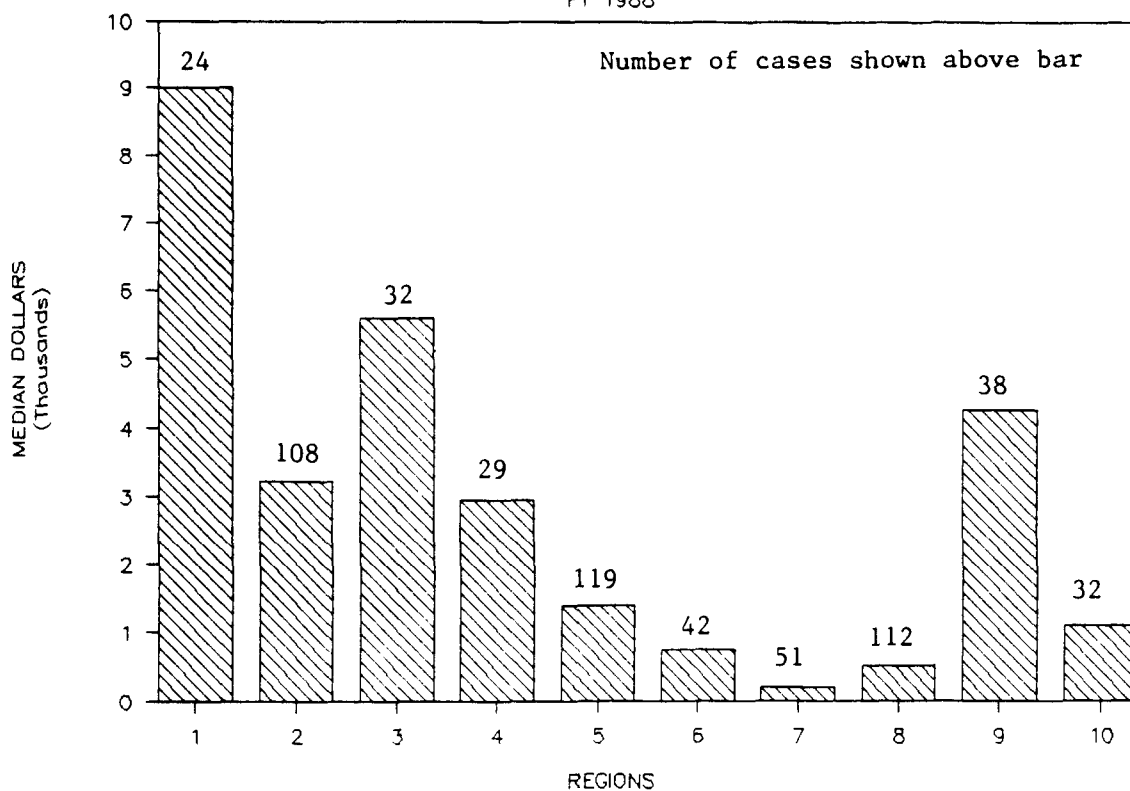


Figure 22
REGIONAL MEDIANS — TSCA PENALTIES
FY 1988



FIFRA

In FY 1988 the largest changes in contributions to total penalty dollars were relative increases by Region VI and Headquarters and relative decreases by Regions VIII and X. Increases in median penalties were achieved by Regions I, II, V, IX, X and Headquarters.

A large proportion of the penalty dollars came from Headquarters and Regions III, VI, VII and IX (21%, 10%, 15%, 12% and 16%, respectively). The largest numbers of cases were in Regions VI, VII and IX (29%, 24% and 12%, respectively).

The highest medians were in Region I and Headquarters (\$9,800 and \$8,150, respectively), followed by Regions X, IX, III and II (\$3,000, \$1,960, \$1,870 and \$1,600). The two highest individual penalties were obtained by Headquarters (\$27,720 and \$12,600). See Figures 23 and 24 for the regional distribution of FIFRA penalties (dollars and cases) and median penalties for FY 1988.

Figure 23
REGIONAL DISTRIBUTION FIFRA PENALTIES

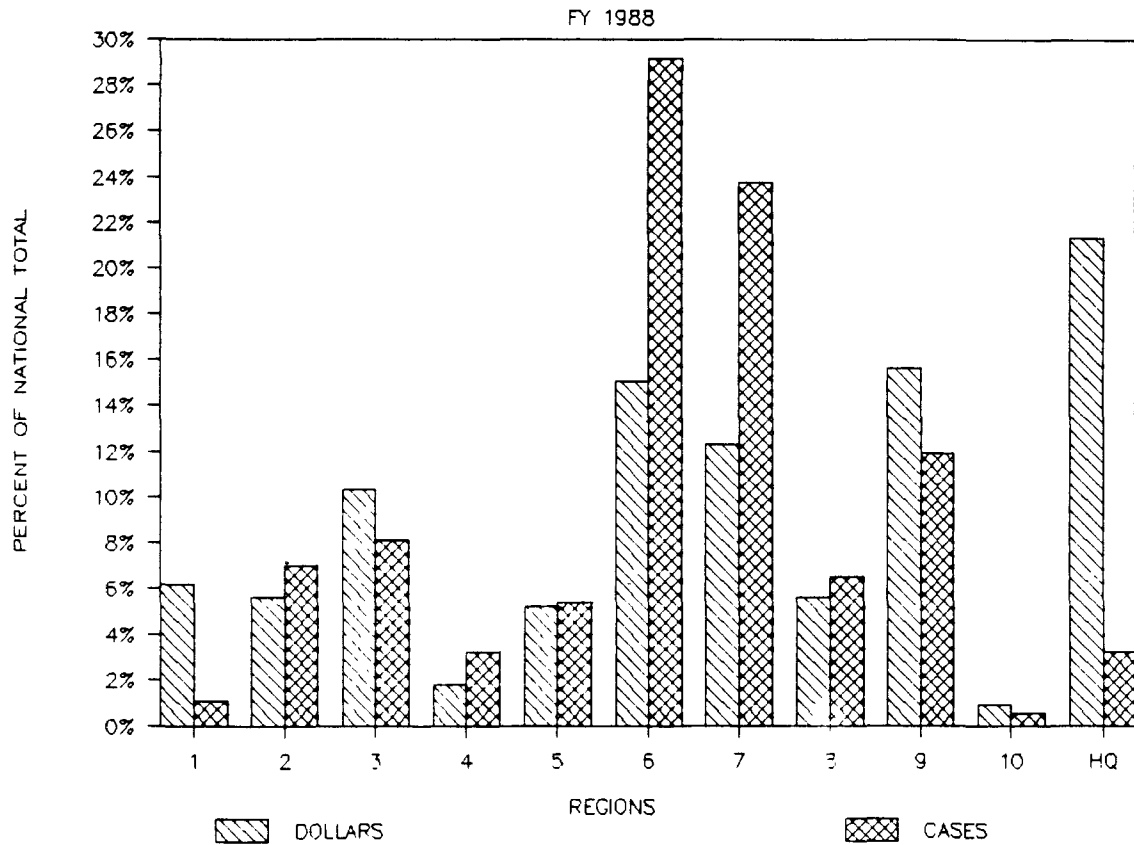
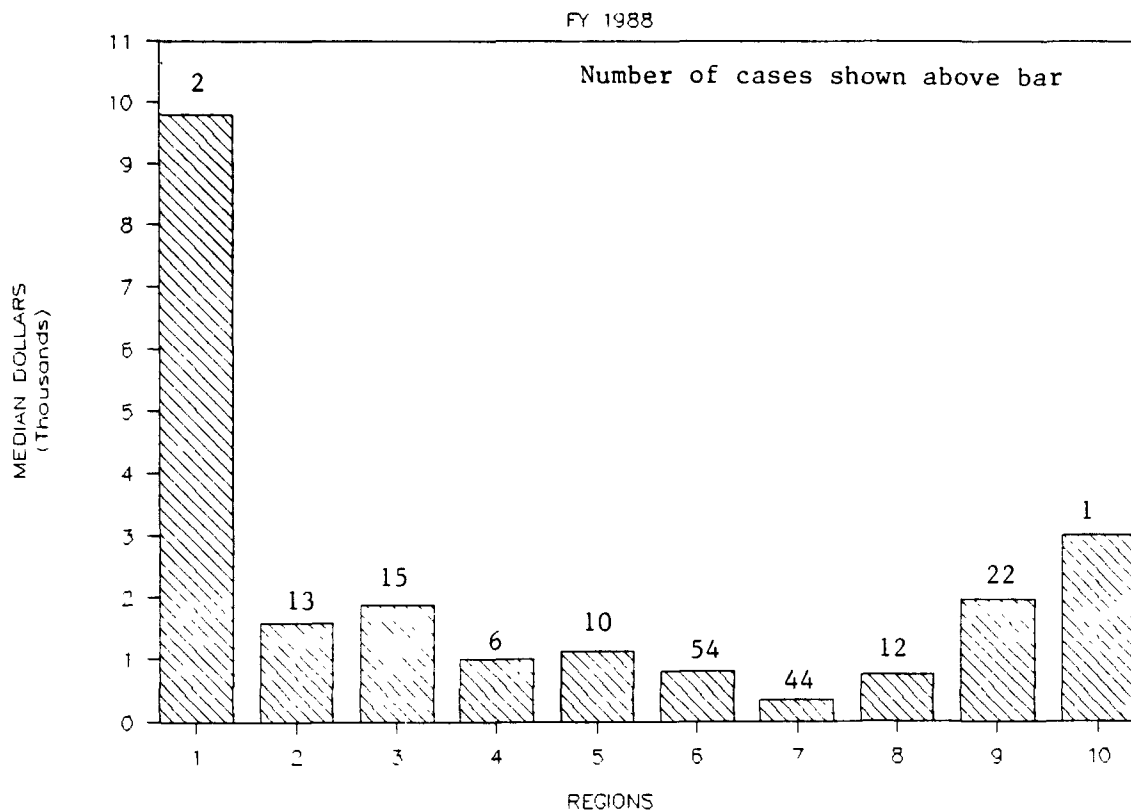


Figure 24
REGIONAL MEDIANS — FIFRA PENALTIES



APPENDICES

TO

OVERVIEW OF EPA FEDERAL PENALTY PRACTICES

FY 1988

- A. Criminal Enforcement
- B. Clean Water Act
- C. Safe Drinking Water Act
- D. Wetlands Protection
- E. Stationary Source Air
- F. Mobile Source Air
- G. RCRA
- H. FIFRA and TSCA



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

February 24, 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: 1988 Penalties Study

FROM: Paul R. Thomson, Jr. *Paul*
Deputy Assistant Administrator-Criminal Enforcement

TO: Gerald A. Bryan, Director
Office of Compliance Analysis and Program Operations

Criminal Enforcement Program: Use and Levels of Penalties

Most EPA statutes from their inception provided criminal sanctions (often initially at the misdemeanor level) for violations of environmental laws committed with the requisite criminal intent (usually defined as "knowing" violations). In recent years, EPA and DOJ have successfully persuaded Congress to augment criminal penalties in new and reauthorized legislation. Typically, violations of environmental laws are felonies punishable by a maximum fine of up to \$50,000 per day of violation or by a term of imprisonment of up to five years per day of violation or by both. To determine maximum penalties in particular cases, reference must be made to the applicable statute, and to the fine enhancement provisions in the Criminal Code, 18 U.S.C. §§ 3623 and 3671.

Additional criminal penalties are provided in the general criminal laws (found in Title 18 of the U.S. Code) applicable to such federal offenses as mail and wire fraud, false statements, and conspiracy, which are often charged by prosecutors in conjunction with charges based on violations of EPA statutes.

In addition to (a) monetary penalties (fines), in criminal enforcement penalties are also measured by (b) time of incarceration ("jail time") and by (c) compliance-related relief. Indeed, because of the enormous deterrent effect of imprisonment, jail time is the most onerous and probably the best measure of the effectiveness of criminal penalties. Compliance-related relief includes such things as monetary restitution or actual performance of corrective action, attendance at or giving of training programs, community service, guaranteeing environmental

compliance during a term of probation and other punishment tailor-made to suit the crime. Compliance-related relief is usually imposed by a creative judge as a condition of probation or of suspension of all or a portion of a sentence. In contrast to jail time, which is completely unavailable in civil enforcement, compliance-related relief may be obtained in both civil and criminal cases.

Finally, it is noteworthy that a criminal conviction often carries additional, collateral consequences which can be very considerable, including (a) personal stigmatization and the loss of fundamental civil rights of felons who are individuals, (b) the automatic "listing," or disqualification from government contracts, grants and loans, of business facilities convicted under the Clean Water Act or Clean Air Act, and (c) the creation of a transcript or record which may assist third-party civil plaintiffs or government agencies in subsequent suits against a convicted defendant. These additional consequences deserve mention to fully understand the totality of the punitive and deterrent impact of criminal enforcement, but they will not be discussed further herein.

Background on the History, Nature, and Current Status of the Criminal Enforcement Program

Because the use of criminal enforcement and its penalties is relatively new, unique, and perhaps unfamiliar to many people involved in environmental protection, some additional background may be useful. Before FY 1983, the federal government brought only a few, isolated criminal cases, and there was no systematic federal program for investigating and prosecuting environmental crimes. In October 1982, EPA hired its first criminal investigators, and small units of attorneys were organized at DOJ and EPA to work exclusively in criminal enforcement. EPA's special agents (all experienced criminal investigators and fully authorized federal law enforcement officers) now are located physically in all ten EPA Regions; organizationally they comprise the Office of Criminal Investigations, a unit headquartered in the National Enforcement Investigations Center (NEIC), itself located in Denver, Colorado and a part of OECM. In 1988, the work of EPA's 45 special agents was complemented by about 26 man years provided by the FBI, and supported by a substantial commitment of technical (field and laboratory) support provided primarily by NEIC and to some extent by the EPA Regions. Prosecutorial support is provided by all Offices of the United States Attorneys and the Environmental Crimes Section of the Department of Justice, with assistance from EPA's Office of Criminal Enforcement Counsel and Offices of Regional Counsel.

Criminal Penalty Policy

While EPA has no criminal penalty policy, for the first time on the federal level the federal government now has a criminal penalty policy, one which explicitly covers offenses involving the environment. On November 1, 1987, the Guidelines of the United States Sentencing Commission became effective (pursuant to 18 U.S.C. § 3551). These were developed at the request of Congress to reduce the disparities among criminal sentences ordered, and between sentences ordered and sentences actually served.

The application of the Guidelines resulted in numerous appeals questioning their constitutionality. On January 18, the United States Supreme Court voted to uphold the Sentencing Reform Act of 1984, the enabling legislation for the Guidelines. Therefore, in essence, the Guidelines will operate as the Agency's criminal penalty policy. Part Q of these Guidelines, which covers "offenses involving the environment," makes it more likely that convicted environmental offenders will receive sentences with at least minimal terms of imprisonment. Fines are more likely to be imposed, and may be calculated in terms of (a) twice the estimated pecuniary loss caused by the offense, or (b) three times the estimated pecuniary gain wrongfully obtained by an environmental criminal, in addition to (c) set statutory amounts. Since criminal cases are often multi-media (or typically involve multiple charges under a number of EPA statutes), defendants' exposure to available maximum penalties can be very large indeed.

The period of imprisonment and amount of fine are contingent on the "specific offense characteristics" applicable to the violation. For example, the Guidelines require a greater penalty for a violation involving hazardous or toxic substances or pesticides as opposed to conventional environmental pollutants. In addition, a greater penalty is required if the environmental offense resulted in an ongoing, continuous or repetitive discharge rather than a one-time discharge. Other such aggravating (and mitigating) factors are contained in the Guidelines.

We have no experience yet with the application of these Guidelines, but within a year or two we expect to report positive results.

Possible Influences on the Use and Levels of Criminal Penalties

In addition to the factors described above which influence criminal penalties, there are a number of institutional factors that affect the use and levels of criminal penalties in environmental cases. These include the following:

- o The criminal enforcement program is a small one. It operates as a supplement to the administrative and civil judicial enforcement vehicles which are EPA's principal enforcement tools.
- o The extent to which particular Regions and media programs actively participate in criminal enforcement still varies.
- o Even in those cases selected with the participation of regional or media program officials, because investigations are centrally managed by NEIC's Special Agents, within EPA it is OECM which is ultimately responsible for case selection and investigation.
- o The bottom-line outcomes (sentencings) from federal criminal prosecutions are determined almost entirely by DOJ and the U.S. District Courts.
- o EPA does not delegate criminal enforcement authority to States, which are free to run their own, concurrent criminal enforcement programs, as EPA encourages them to do. Among the States, there is a wide range from fully developed programs to no criminal enforcement.

Use of Penalties

When EPA criminal charges are filed, there is a greater than 90% likelihood that at least one defendant will be convicted, (whether by a plea or guilty verdict after a trial), and almost all EPA criminal cases resulting in a conviction have concluded with a criminal penalty of some type.

The historical statistics are as follows:

(Pre-1982 data is omitted.)	1982	1983	1984	1985	1986	1987	1988
Investigations (referrals) to DOJ (does not include investigations jointly with FBI and/or other agencies)	20	26	31	40	41	41	60
Investigations (referrals) to DOJ resulting in filing of charges	7	13	16	40	25	42	41
Number of defendants charged (individuals and corporations)	14	34	36	40	98	66	98
Successful cases prosecuted (resulting in a finding of guilty)	7	12	14	15	26	27	24

Number of defendants convicted	11	28	26	40	66	58	50
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Number of special agents	0	23	26	34	34	40	46
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Beginning in early 1987, we began keeping more detailed data with which to produce additional statistics of interest, including the following totals:

	<u>1987</u>	<u>1988</u>
Referrals of investigations		
o resulting in a conviction	27	24
o in which all charges were dismissed or all defendants acquitted	2	2
Defendants sentenced (see two attached charts)		
o entities	16	16
o individuals	<u>48</u>	<u>31</u>
Total	64	47
Total amount of fines assessed (before suspension)	\$3,622,876	\$8,645,050
Total months		
o sentenced (before suspension)	1,015.25 (84 yrs.)	369 (30 yrs.)
o of incarceration ordered (after suspension, before parole)	302.5 (25 yrs.)	95 (8 yrs.)

Judicial Penalty Profile

Accurate data on criminal penalties is not available before the year 1987. Beginning in 1987, when EPA adopted new success measures under the Strategic Planning and Management System (SPMS), accurate data has become available. We are now tracking, by Region and by major statute (or media program), both fines and jail time. There has been a wide variety in the nature and size of criminal penalties actually imposed.

While a monetary fine is the typical penalty which is almost always imposed on a convicted defendant, dollar amounts have varied widely. Unfortunately, jail time has only been imposed in about one-sixth of all cases resulting in the conviction of an individual, and in most of these cases all or a portion of the time has been suspended. For every three or four months of imprisonment to which a defendant is sentenced (before suspension), typically only about one month of incarceration has been ordered (after suspension), and less than this has been served as time is reduced for good behavior in prison. Nevertheless, the threat of incarceration is present in every criminal case where an individual is charged. In the future, as

expect to see more severity, uniformity, and predictability in sentencing.

To date, the government has not made a concerted effort to seek compliance-related relief, and it is ordered in only about 10% of all cases sentenced. Compliance-related relief cannot be easily quantified and is not tracked statistically.

Highest Penalties

Of the few EPA cases brought before 1983, many were substantial cases for serious violations. Indeed, the largest criminal fine ever obtained by EPA was in the criminal case of U.S. v. Allied Chemical Corp., et al., arising out the actions of Life Science Products Company. The companies pled guilty to 940 counts in violation of the CWA for unlawful discharges of the kepone which to this day still contaminates the James River below the city of Hopewell, Virginia. In 1976, Allied Chemical was fined \$13,240,00 and Life Science Products was fined \$3,835,000. After the fine was levied, in response to a motion for reduction of sentence the judge ordered Allied to contribute \$8 million to endow an environmental research foundation in Virginia, so that Allied Chemical actually paid a criminal fine of \$5,240,000.

In the cases tried since EPA first had criminal investigators in 1982, some substantial penalties have been imposed. Some highlights are the following:

<u>Year/ Region</u>	<u>Summary Case Description</u>	<u>Penalty Imposed/ Paid/Time Served</u>
1988		
I	Vice-president of real estate development firm (CWA)	6 months (suspended) \$10,000 in fines
IV	Owner/president of chemical brokerage (RCRA)	5 years (4 years suspended)
VII	Manufacturing of epoxies and grouting compounds (RCRA, CWA)	\$7,630,000 (\$440,000 to be paid in fines; \$950,000 trust fund to compensate injured workers; \$1,980,000 for site clean up; balance suspended)
X	President and treasurer of pesticide manufacturer (FIFRA)	1 year (10 months suspended), \$70,000 in fines

1987

- | | | |
|-----|---|--|
| V | Vice-president of a company operating injection wells (SDWA) | 9 months imprisonment (none suspended) |
| VII | Principal of a distributor of grain products contaminated with a pesticide (a joint investigation, with conviction under CWA, FDCA, and Title 18) | 3 years imprisonment (none suspended) |
| VII | Two companies owning and cleaning river barges (CWA) | \$375,000 total fines (none suspended) |

1986

- | | | |
|----|---|---|
| I | An industrial discharger POTW (CWA) | \$1,025,000 (\$225,000 to a suspended upon construction of wastewater treatment works) |
| I | President of shipyard and his company (CWA, CAA, CERCLA, TSCA) | \$335,000 total fines (\$200,000 and his company (CWA, CAA, suspended upon its payment as restitution to response fund) president required to certify company's compliance for term of five years probation |
| II | Two brothers and their companies exporting hazardous waste (an FBI-lead investigation, with convictions under Title 18) | 13 years imprisonment for each individual (none suspended); fines totalling \$550,000, and \$66,000 restitution |
| IV | An ocean resort, its vice-president and director of utilities (CWA) | \$600,000 fine for corporation (none of suspended, the individual received smaller fines and terms of probation) |
| IV | President of a waste treatment company (RCRA) | 3 years (none suspended) |

- | | | |
|---|---|---|
| X | Food-manufacturing national company and its plant manager (CWA) | \$450,000 fine upon company (\$150,000 suspended upon its payment to fisheries improvement fund), company required to stay in compliance at all plants nationwide for term of three years probation, 1-year and 1-day sentence upon plant manager |
|---|---|---|

1985

- | | | |
|----|--|---|
| IX | Principal operations officer of an imported auto emissions testing facility (Title 18) | 5 years (4 1/2 years suspended) |
| X | Wood-preserving company (RCRA, CWA) | \$1,000,000 (\$850,000 suspended upon its payment into restoration fund for the site) |

Typical Penalties

Given the newness, small size of the program, and other limitations of the available data on criminal penalties, one must be very careful when attempting to draw any conclusions in any one year regarding typical penalties, *i.e.*, the average amount of the typical penalty. Because deterrence is mainly a function of (a) the likelihood of detection, (b) the certainty, and (c) the severity of punishment, as important as average size may be (1) the number of criminal penalties, (2) the fact that a criminal penalty is likely in any case where criminal charges are filed, and (3) the very criminal (*i.e.*, severe) nature and like collateral effects of the "typical" criminal penalty.

During any one year in any given Region or program, the nature and amounts of criminal penalties obtained can vary enormously, so that averages are easily skewed. Consequently, it does not make sense to calculate averages and otherwise analyze data on criminal penalties to the extent that this study analyzes data on civil penalties, and we have not done so.

Effect of Policies and Initiatives

For those few perpetrators who are determined to break the law, a mere fine against the corporation is accepted as "business as usual." Corporations cannot be jailed and cannot be deterred by the possibility of imprisonment, the most onerous of criminal sanctions. Thus it is EPA policy to criminally charge culpable corporate officers, employees, and other individuals whenever possible, in addition to their corporate employers.

In the typical EPA criminal case, one corporation and two or three individual persons are defendants, and individual defendants are more likely to be corporate presidents or other responsible officials than low-level employees such as truck drivers or laborers. The policy of charging individual persons exposes them all to the possibility of jail time. Although only about one person in six is actually sentenced to serve jail time, they all run an enormous risk which we believe maximizes the effectiveness of criminal penalties.

Comparisons of Regional, and of National Media Program, Use and Levels of Criminal Enforcement Penalties

EPA regional media programs cannot be held directly accountable for the level (number and typical amount) of penalties achieved in criminal cases in their areas. This is so for the institutional reasons, discussed above, and because of the small size of the criminal enforcement program. It is to be expected that in any one year a number of regional media programs will not have a criminal case. However, for each Region as a whole, over time the level of criminal penalties achieved will be at least a very rough measure of whether the Region has successfully applied the criminal enforcement tool.

For each national media enforcement program as a whole, over time the level (number and typical amount) of criminal penalties achieved will be an even rougher measure of whether the national program has successfully applied the criminal enforcement tool in its regulatory area. This is true again for the institutional reasons discussed above, and also because of the small size of the criminal enforcement program. In addition, most criminal cases are inherently cross-media, and the available media-by-media data is inevitably somewhat misleading. This is so because most criminal cases include charges placed under several statutes, yet for statistical purposes each case is listed only under its predominant statute. (Thus, for example, a case may be sentenced primarily under RCRA; additional sentences in the same case under CERCLA and other general criminal laws are not reported separately in the SPMS statistical data.) Furthermore, where a defendant is convicted of multiple statutory violations,

unless the sentencing judge is unusually precise it is usually impossible to apportion the totality of the sentence to the individual violations and thus among the particular statutes involved. Despite these "real-world" obstacles to statistical truth, however, OECM is now collecting the underlying data for each and every statutory charge placed against any defendant, and in the future greater media-by-media program specificity should be possible.

Given the foregoing, and because there is as yet no direct measure of regional or program involvement in criminal enforcement, it is to be reiterated that one must be very careful when attempting to draw any conclusions in any one year regarding the use and levels of criminal penalties by a Region as a whole or by a national media program. Yet perhaps from the available data we may begin to make some initial observations, and even postulate some tentative conclusions, as to the relative and absolute use of criminal enforcement in particular areas.

It must be true that the number of defendants sentenced in a given area is at least to some varying extent a reflection of the involvement of each Region and national media program in the small, new criminal enforcement effort. Certainly those Regions and programs which increase their support for and participation in criminal enforcement (and pursue more complex cases involving greater environmental threat or harm) may expect that, over time, the number and the average amount of criminal penalties in their areas will increase proportionately. And while increased environmental compliance through deterrence and increased respect for the integrity of EPA programs cannot be measured, these will be the ripening fruits of criminal enforcement.

Regional Interviews and Case File Review of Implementation of Policy

The Office of Criminal Enforcement Counsel monitors and encourages Regional and media program participation in criminal enforcement. Beginning in Fiscal Year 1988 OCEC initiated a process of periodic review of Regional participation in the criminal enforcement program, which consists of meetings at selected Regional offices with management personnel from all media programs, the Regional and Deputy Regional Administrators, Regional Counsel's Office, the Office of Criminal Investigations, and with representatives from the Department of Justice. While specific case files and penalties achieved do not figure in the agenda for these meetings, targeting in specific media for criminal enforcement action and the achievement of deterrence through a given statute's range in criminal penalties are considered.

Attachment

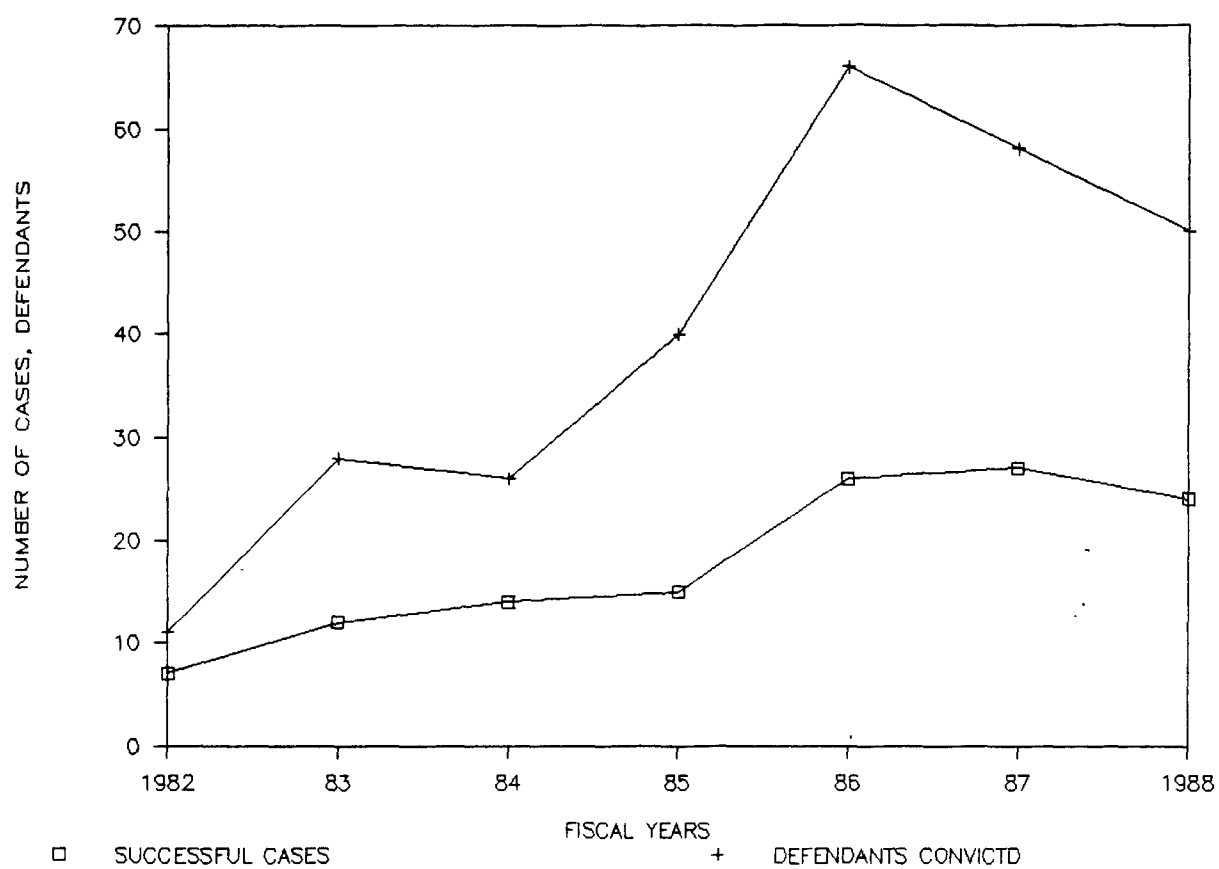
NUMBER OF DEFENDANTS CONVICTED IN FY - 1988 - INDIVIDUALS

REGION	RCRA	CLEAN AIR	CLEAN WATER	FIFRA	TSCA	CERCLA	OTHER	TOTAL
REGION I			1				1	2
REGION II	1							1
REGION III	4		1					5
REGION IV	6							6
REGION V					1			1
REGION VI	2							2
REGION VII								
REGION VIII	4							4
REGION IX	1	2	1					4
REGION X			3	2				5
NEIC		1						1
TOTAL	18	3	6	2	1		1	31

NUMBER OF DEFENDANTS CONVICTED IN FY 1988 - CORPORATIONS

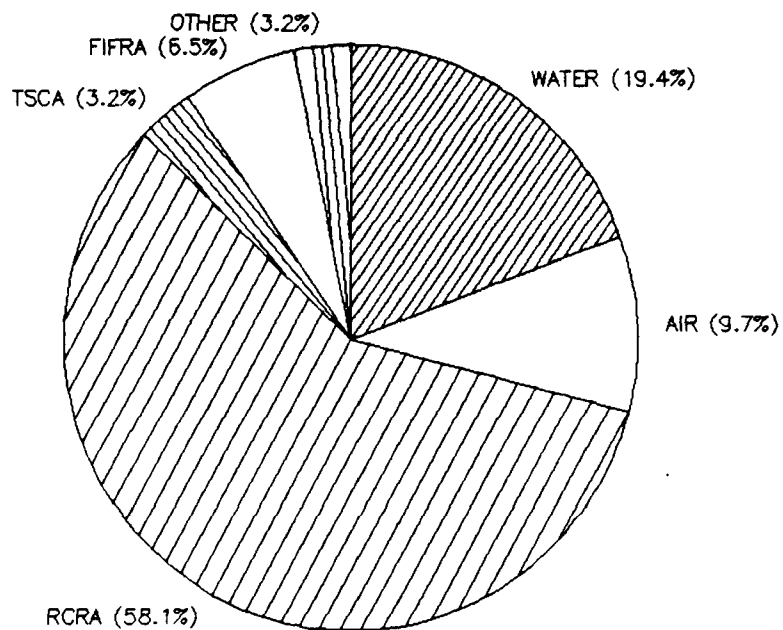
REGION	RCRA	CLEAN AIR	CLEAN WATER	FIFRA	TSCA	CERCLA	OTHER	TOTAL
REGION I			1			1		2
REGION II								
REGION III	4		1	1				6
REGION IV	1		1					2
REGION V								
REGION VI								
REGION VII								
REGION VIII	1		1					2
REGION IX	1							1
REGION X			2	1				3
NEIC								
TOTAL	7		6	2		1		16

CRIMINAL ENFORCEMENT PROGRAM



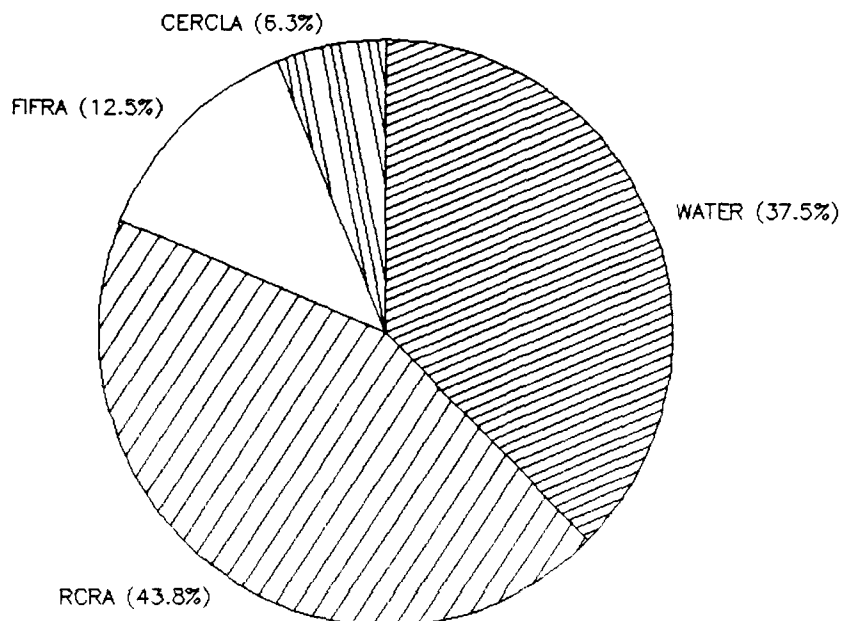
DEFENDANTS CONVICTED, BY PROGRAM

INDIVIDUALS CONVICTED FY 1988



DEFENDANTS CONVICTED, BY PROGRAM

CORPORATIONS CONVICTED FY 1988





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAR 17 1989

MEMORANDUM

SUBJECT: CWA Civil Judicial And Administrative Penalty Practices Report for FY88

FROM: Robert G. Heiss *RGH*
Associate Enforcement Counsel
for Water

James R. Elder *JRE*, Director
Office of Water Enforcement
and Permits

TO: Gerald A. Bryan, Director
Office of Compliance Analysis
and Program Operations

Attached is the Clean Water Act Civil Judicial and Administrative Penalty Practices Report covering cases concluded in FY88. Pursuant to your request, it has been revised from the submission earlier this year to reflect the face amount of judicial penalties without reduction to present value for those penalties to be paid over extended periods. If you have any questions regarding this report please contact Kathy Summerlee or David Drelich of the Office of Enforcement and Compliance Monitoring at 382-2879 or 382-2949, respectively, or Carol Hudson Jones of the Office of Water Enforcement and Permits at 475-8487.

We look forward to receiving the final agency-wide report when it is completed.

Attachment

cc: Cheryl Wasserman
J. William Jordan
Kathy Summerlee
Tonia D. Bandrowicz
David Drelich
Carol Hudson Jones
Ken Keith

CWA CIVIL JUDICIAL AND ADMINISTRATIVE
PENALTY PRACTICES REPORT FOR FY88

1. Use and Levels of Penalties

This report summarizes the use and levels of civil judicial and administrative penalties in FY88 in cases concluded under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") program. Separate reports have been prepared summarizing FY88 penalties for Clean Water Act criminal actions and Section 404 (wetlands) civil judicial actions.¹

Section 309(d) provides that any person who violates certain enumerated sections of the Clean Water Act, any NPDES or Section 404 permit condition or limitation implementing any one of those enumerated sections, any requirement in a pretreatment program, or any EPA-issued administrative order, shall be subject to a penalty of \$25,000 per day for each such violation. Prior to enactment of the Water Quality Act ("WQA") in February, 1987, such violations were subject to a penalty of \$10,000 per day per violation.

Section 309(d), as amended by the WQA of 1987, also lists criteria which the court must consider in determining the amount of the civil penalty. Specifically, the court must consider "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require."

The authority to seek administrative NPDES penalties is found in Section 309(g) of the Act. Prior to enactment of the WQA in 1987, the agency did not have authority to seek administrative penalties. The WQA authorizes EPA to institute Class I or Class II administrative penalty actions. In Class I actions, EPA may seek penalties of up to \$25,000, at a rate not to exceed \$10,000 per violation. In Class II actions, the maximum is \$125,000, also assessed at a rate not to exceed \$10,000 per day. Class II penalty proceedings must conform to the Administrative Procedures Act. EPA issued guidance on

¹ There were no judicial cases concluded under Section 311 of the Clean Water Act in FY88. The amount of administrative penalties obtained under Section 311 in FY88 was negligible and therefore was not added to the administrative penalty data base.

administrative penalty orders in August, 1987 and Regional Offices began imposing penalties shortly thereafter. Although several administrative cases were commenced in FY87, no cases were concluded until FY88.

For purposes of settlement, penalties are calculated according to EPA's February, 1986 Clean Water Act penalty policy. An addendum to the policy for the calculation of administrative penalties was issued in August, 1987. Essentially, the policy requires the recoupment of economic benefit and a gravity component. Adjustments are authorized for ability to pay and litigation considerations. The economic benefit is typically calculated using EPA's BEN computer software program.

2. Statutory Changes to Penalty Authorities

There have been no changes to the penalty authorities under the Clean Water Act since the WQA of 1987.

3. Possible Influences on Use and Level of Penalties

There are several factors which may have affected the amount of penalties the United States has received in settling or litigating Clean Water Act cases in FY88:

- a. The increase in the civil penalty liability from \$10,000 to \$25,000 provided by the WQA of 1987;
- b. Addition of administrative penalty authority in the WQA of 1987;
- c. The Clean Water Act settlement penalty policy which, absent ability to pay or litigation considerations, requires recoupment of economic benefit and a gravity component;
- d. Use of the BEN computer model to calculate economic benefit; and
- e. The agency's emphasis on enforcement of the National Municipal Policy and the pretreatment regulations.

4. Use of Penalties

Ninety-Eight percent of the judicial cases concluded in FY88 were settled with a penalty. See Table 1. This continues the post-1985 trend noted in last year's report of concluding virtually all Clean Water Act civil judicial cases with a penalty. See Figure 1 (Use of Penalties in CWA Judicial Cases FY75-88).

All administrative penalty actions in FY88 were concluded with a penalty. See Table 4.

5. Judicial Penalty Profile

The penalties which establish the data base for the judicial penalty profile include only upfront, cash penalties² payable to the United States.

Only entered consent decrees or judicial decisions are counted as concluded cases in the data base. Multiple complaints consolidated in one consent decree or decision are counted as one concluded case.

a. Number of Cases

The total number of judicial cases concluded in FY88 (including those concluded without a penalty) was 87, the highest annual total ever. See Table 1. This was an increase from the figures reported for FY87 and FY86 (i.e., 66 and 56 cases, respectively). See Figure 1.

Figure 1 shows that the number of cases brought each year has steadily increased in recent years from the low point which occurred in the early eighties (FY82-84) to the higher numbers seen in the late seventies.

b. Total Penalties

Total penalties for all concluded judicial cases in FY88 was \$11,885,858. See Table 1. This amount is nearly double the FY87 figure of \$6,872,940 and by far the highest amount ever collected in one year for the period FY75 through FY88. See Figure 2 (Clean Water Act Penalties By Year - Judicial Cases).

c. Typical Penalties

The median penalty for all concluded judicial cases in FY88 (including those concluded without a penalty) was \$37,500. See Table 1. This is a decrease from the FY87 median of \$41,000 and is consistent with the FY86 median. See Figure 3 (Median Penalties - Clean Water Act - All Concluded Judicial Cases).

A review of Figures 4 (Distribution CWA Judicial Penalties FY88) and 5 and 6 (Distribution CWA Judicial Penalties FY87 and FY86, respectively) indicates that this change in the median is not due to a decrease in the number of cases in the higher penalty ranges (i.e., \$10,000 to \$999,999 range) but to a disproportionate increase in the number of cases in the lower penalty ranges (i.e., 0 to \$9,999 range).

² Although this report concerns cash penalties, we note that the Court required the defendant in the Boston Harbor case to undertake and complete a \$2,000,000 environmental project as well as pay a civil penalty.

A comparison of Figure 7 (Distribution CWA Judicial Penalties - Average Yearly FY75 - 85)³ with Figure 4 indicates that there has been a shift in recent years toward cases with higher penalties.

d. Highest Penalties

The highest penalty in FY88 was concluded by Region 2 against the Puerto Rico Aqueduct Sewer Authority for \$2,000,000. The next highest penalty was concluded by Region 9 against Chevron for \$1,500,000. There was also a large case concluded by Region 3 for \$840,000 against Atlas Powder. See Table 3.

e. Comparison of Regional Uses and Levels of Judicial Penalties

Four Regions concluded cases with penalties of over 1 million dollars in FY88. Region 2 obtained the largest amount of penalties, \$3,987,451. Regions 9, 6, and 4 obtained penalties of \$1,606,000, 1,556,500 and \$1,230,050, respectively. See Table 3.

In terms of the number of cases concluded, Region 2 also concluded the most cases (21) followed by Regions 6 and 4 (16 and 15, respectively). See Table 3.

Figure 8 (Regional Distribution CWA Penalties FY88 - Judicial Penalties) shows the percentage of total Clean Water Act penalties concluded by each Region and the percentage of the total number of cases concluded by each Region.

6. Administrative Penalty Profile

The penalties which constitute the data base for the administrative penalty profile reflect upfront, cash penalties which are to be paid to the United States generally within 30 to 60 days. In a few instances payment terms extended beyond 60 days without interest payment. Since discounting these few extended payments to present value would not change the data significantly, they have not been discounted.

a. Total Penalties and Number and Type of Cases

In FY88 the total penalties for all concluded administrative penalty orders was \$541,800. See Table 4. The total number of administrative penalty orders was 40. Of these, 32 were Class I penalty orders and 8 were Class II penalty orders. The penalty

³ A breakdown of the penalty ranges for each year from FY75 through FY85 was not available. Therefore the number of cases in each penalty range for the period FY75 through FY88 was divided by the number of years in the period (i.e., 10) to produce a yearly average which could be compared with the yearly data for FY88.

orders were issued for a variety of violations: effluent violations (18); failure to submit discharge monitoring reports or submission of late reports (9); pretreatment violations (5); failure to start or complete scheduled construction (these are categorized as National Municipal Policy violations) (3); and unpermitted facilities (5).

b. Efficiencies of Use

The administrative penalty orders in FY88 were concluded, on an average, within 136 days of being issued. There was considerable variation in the time taken to conclude an administrative penalty order with 49 days the shortest duration and 251 the longest. All of the penalty orders concluded in FY88 were achieved by consent order; none of the concluded cases were decided as a result of a formal hearing.

c. Typical Penalties

The median penalty for administrative penalty orders concluded in FY88 was \$8,500. See Table 4. The median for Class I actions was \$7,400 and for Class II actions was \$39,500. See Table 4.

The majority of cases concluded in FY88 were in the 0 to \$10,000 range (26 cases). See Table 5 and Figure 9.

d. Penalties Issued to Municipalities

Fifteen of the 40 respondents were municipalities. The median penalty assessed against municipalities (\$8,000) was slightly lower than the median for all administrative penalty orders concluded in FY88 (\$8,500). Major municipalities were assessed a median penalty of \$12,500.

e. Pretreatment Penalties

Five penalties were issued for pretreatment violations, three to industrial users (IUs) and 2 to municipalities for failure to implement all or part of a pretreatment program. The median penalty assessed against IUs was \$45,000; the median penalty assessed against a municipality was \$18,750.

f. Highest Penalties

The largest penalty order concluded in FY88 was issued by Region 1 against Dartmouth Woolen Mills, Inc. for \$60,000. See Table 6. The next highest, also issued by Region 1, was for \$50,000 against an industrial user, Carr Leather Co. Both Regions 6 and 10 issued penalties for \$45,000. The Region 10 penalty for \$45,000 was issued to both the City of Kodiak, Alaska as owner and the Kodiak Fish Reduction Corp. as operator. The highest penalty issued solely to a municipality was for \$25,000 against the City of Mount Pleasant, Texas.

g. Comparison of Regional Use and Levels of Penalties

Region 6 issued over half the administrative penalty orders concluded in FY88. See Figure 10. In Region 6 authority for the NPDES program is vested in EPA in all but one state. Region 1 and 10 had the second and third largest number of final administrative penalty orders (6 and 5, respectively).

Region 6 obtained the highest amount of penalties (\$212,500). Region 1 had the second highest amount of penalties (\$162,500). See Figure 11.

Table 1
Total Civil Judicial CWA Penalties
For All Cases Concluded in FY88

Total Dollars	Number Cases w/ Penalty	Number Cases w/o Penalty	Total Cases	Total w/ Penalty	Average Penalty	Ave. All Concl'd Cases	Median Penalty	Med. All Concl'd Cases	Highest Penalty
11,885,858	85	2	87	98	139,834	136,619	37,500	37,500	2,000,000

B-8

Table 2
Total Civil Judicial CWA Penalties
Distribution of Penalty Sizes FY88

	<=5000	<10,000	<25,000	<50,000	<100,000	<1,000,000	>=1,000,000
0							
2	11	4	19	12	11	26	2

Table 3
Total Judicial CWA Penalties
All Cases Concluded in FY 88

Region	Total Dollars	Number Cases w/ Penalty	Number Cases w/o Penalty	Total Cases	% Total w/ Penalty	Average Penalty	Ave. All Concl'd Cases	Median Penalty	Med. All Concl'd Cases	Highest Penalty
1	870,000	5	0	5	100	174,000	174,000	75,000	75,000	425,000
2	3,987,451	21	0	21	100	189,879	189,879	50,000	50,000	2,000,000
3	962,667	2	1	3	66	481,334	320,889	481,334	122,667	840,000
4	1,230,050	15	0	15	100	82,003	82,003	5,500	5,500	500,000
5	617,350	10	0	10	100	61,700	61,700	40,000	40,000	160,000
6	1,556,500	16	0	16	100	97,281	97,281	40,000	40,000	375,000
7	300,000	2	0	2	100	150,000	150,000	150,000	150,000	150,000
8	570,000	2	0	2	100	285,000	285,000	285,000	285,000	450,000
9	1,606,000	3	0	3	100	535,333	535,333	75,000	75,000	1,500,000
10	186,190	9	1	10	90	20,688	18,619	10,000	10,000	100,000

Table 4
Total Civil Administrative CWA Penalties
For All Cases Concluded in FY88

Total Dollars	Number Cases w/ Penalty	Number Cases w/o Penalty	Total Cases	Total & w/o Penalty	Average Penalty	Ave. All Concl'd Cases	Median Penalty	Med. All Concl'd Cases	Highest Penalty
Class I 262,800	32	0	32	0	8,212	8,212	7,400	7,400	25,000
Class II 279,000	8	0	8	0	34,875	34,875	39,500	39,500	60,000
All 541,800	40	0	40	0	13,545	13,545	8,500	8,500	60,000

Table 5
Total Civil Administrative CWA Penalties
Distribution of Penalty Sizes FY88

	<=5000	<10,000	<25,000	<50,000	<100,000	>=125,000
0						
0	14	12	9	4	1	0

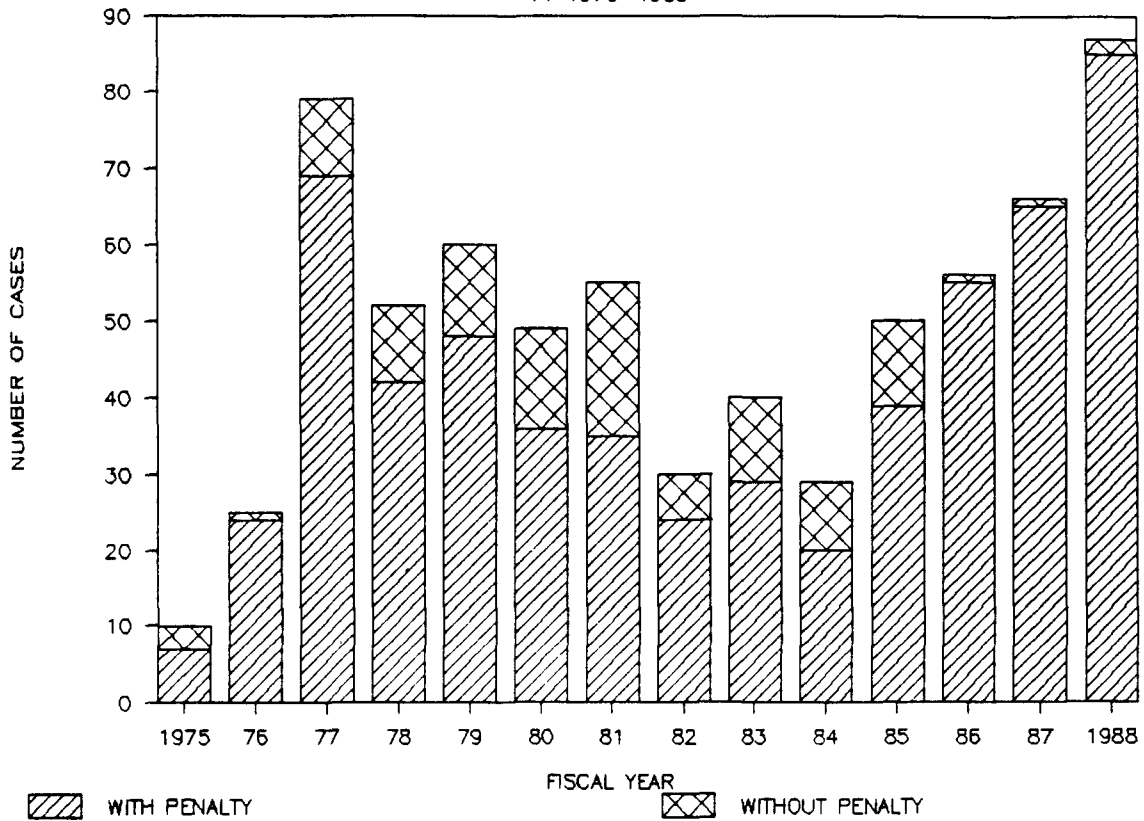
Table 6
Total Administrative CWA Penalties
All Cases Concluded in FY 88

Region	Total Dollars	Number Cases w/ Penalty	Number Cases w/o Penalty	Total Cases	% Total w/o Penalty	Average Penalty	Ave. All Concl'd Cases	Median Penalty	Med. All Concl'd Cases	Highest Penalty
1	162,500	6	0	6	0	27,083	27,083	18,750	18,750	60,000
2	0	0	0	0	--	--	--	--	--	--
3	3,500	1	0	1	0	3,500	3,500	3,500	3,500	3,500
4	0	0	0	0	--	--	--	--	--	--
5	41,800	2	0	2	0	20,900	20,900	20,900	20,900	34,000
6	212,500	21	0	21	0	10,119	10,119	8,000	8,000	45,000
7	25,000	1	0	1	0	25,000	25,000	25,000	25,000	25,000
8	5,000	1	0	1	0	5,000	5,000	5,000	5,000	5,000
9	30,000	3	0	3	0	10,000	10,000	10,000	10,000	15,000
10	61,500	5	0	5	0	12,300	12,300	5,000	5,000	45,000

B-11

FIGURE 1**USE OF PENALTIES IN CWA JUDICIAL CASES**

FY 1975-1988

**FIGURE 2****CLEAN WATER ACT PENALTIES, BY YEAR**

JUDICIAL CASES

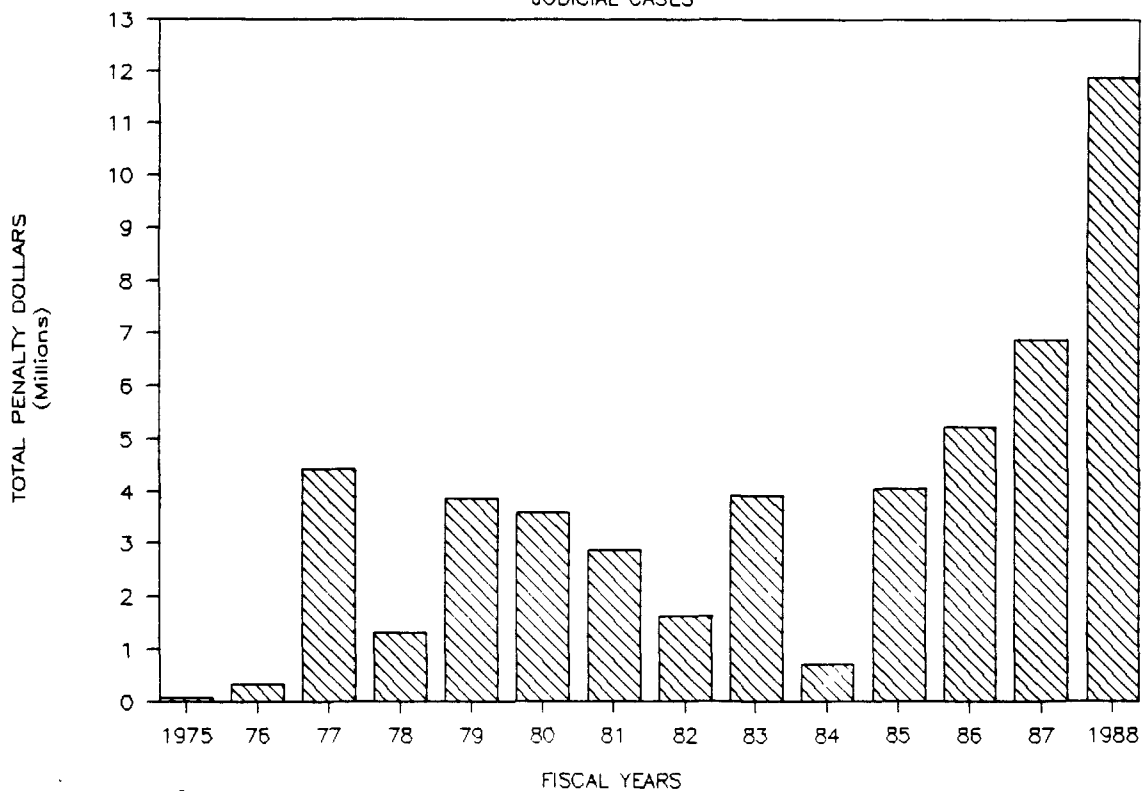
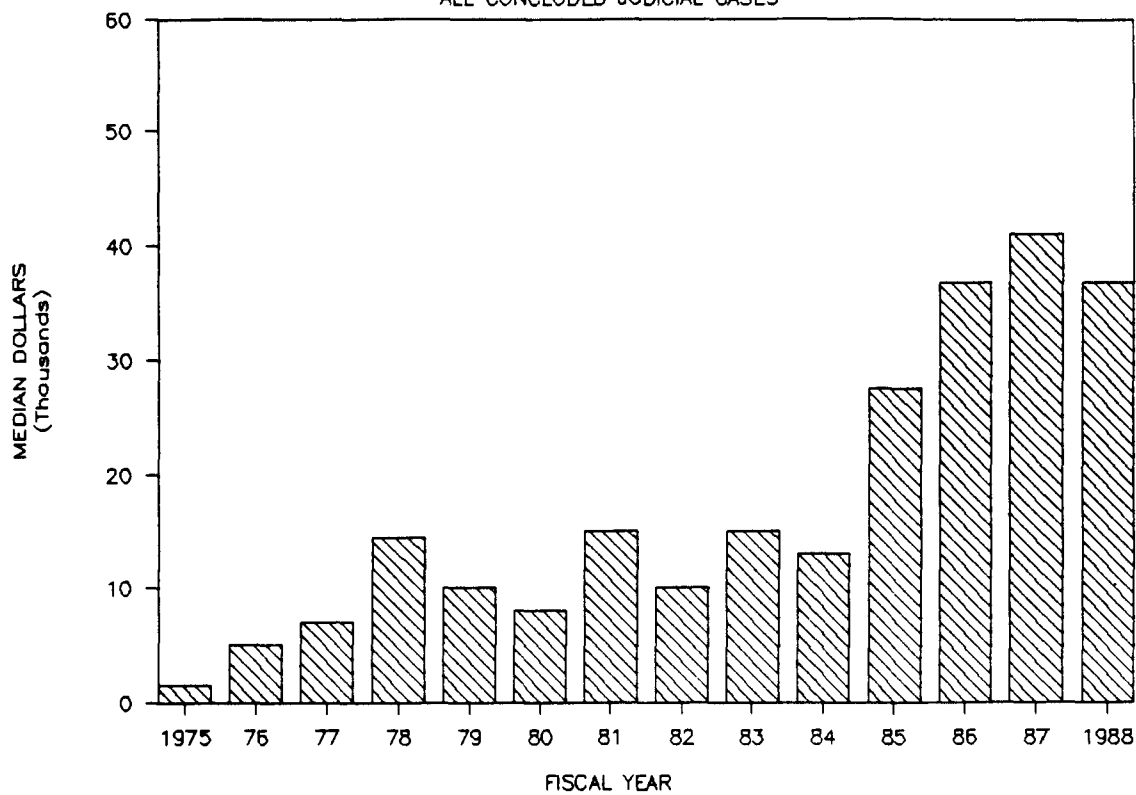


FIGURE 3**MEDIAN PENALTIES — CLEAN WATER ACT**

ALL CONCLUDED JUDICIAL CASES

**FIGURE 4****DISTRIBUTION CWA JUDICIAL PENALTIES**

FY 1988

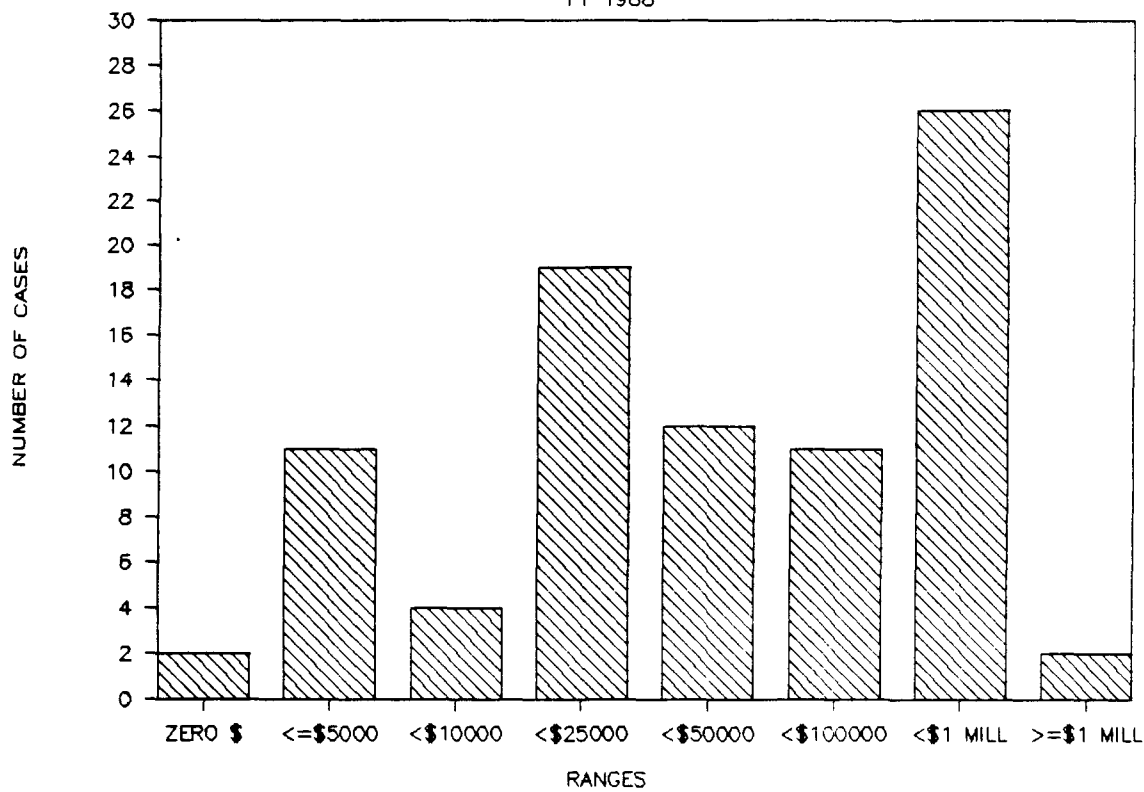
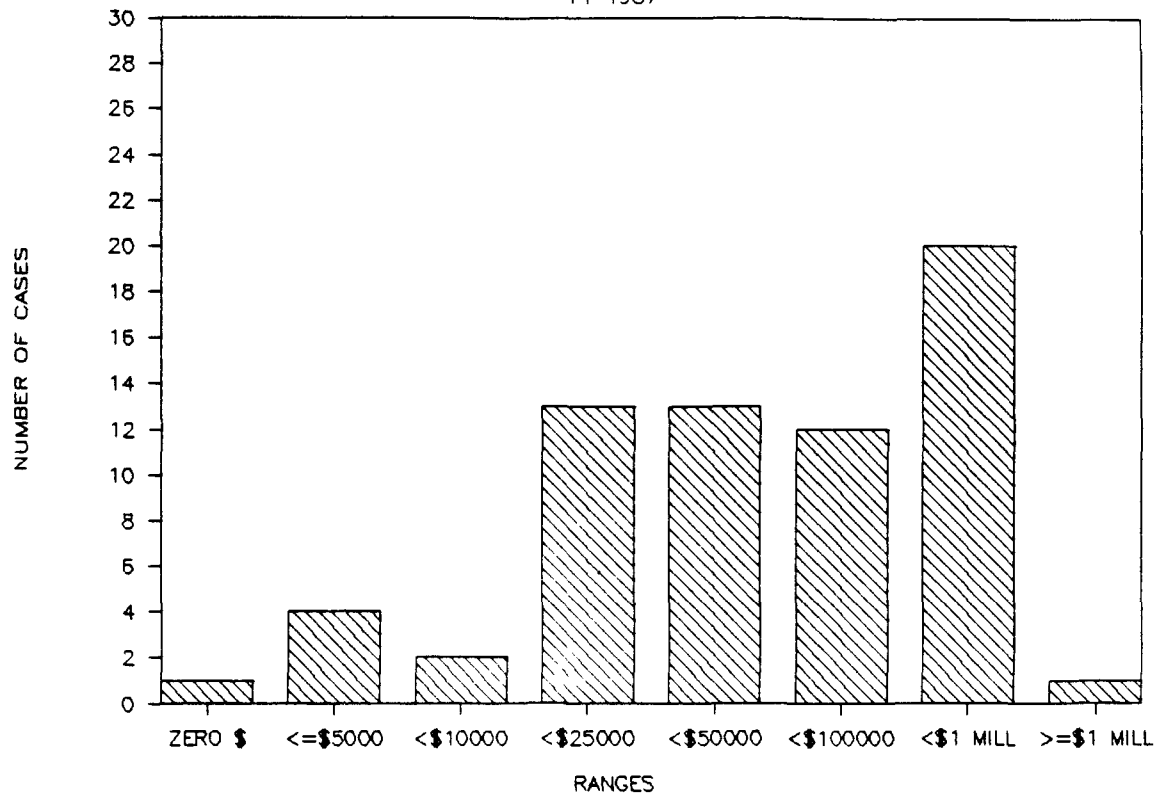


FIGURE 5

DISTRIBUTION CWA JUDICIAL PENALTIES

FY 1987

**FIGURE 6**

DISTRIBUTION CWA JUDICIAL PENALTIES

FY 1986

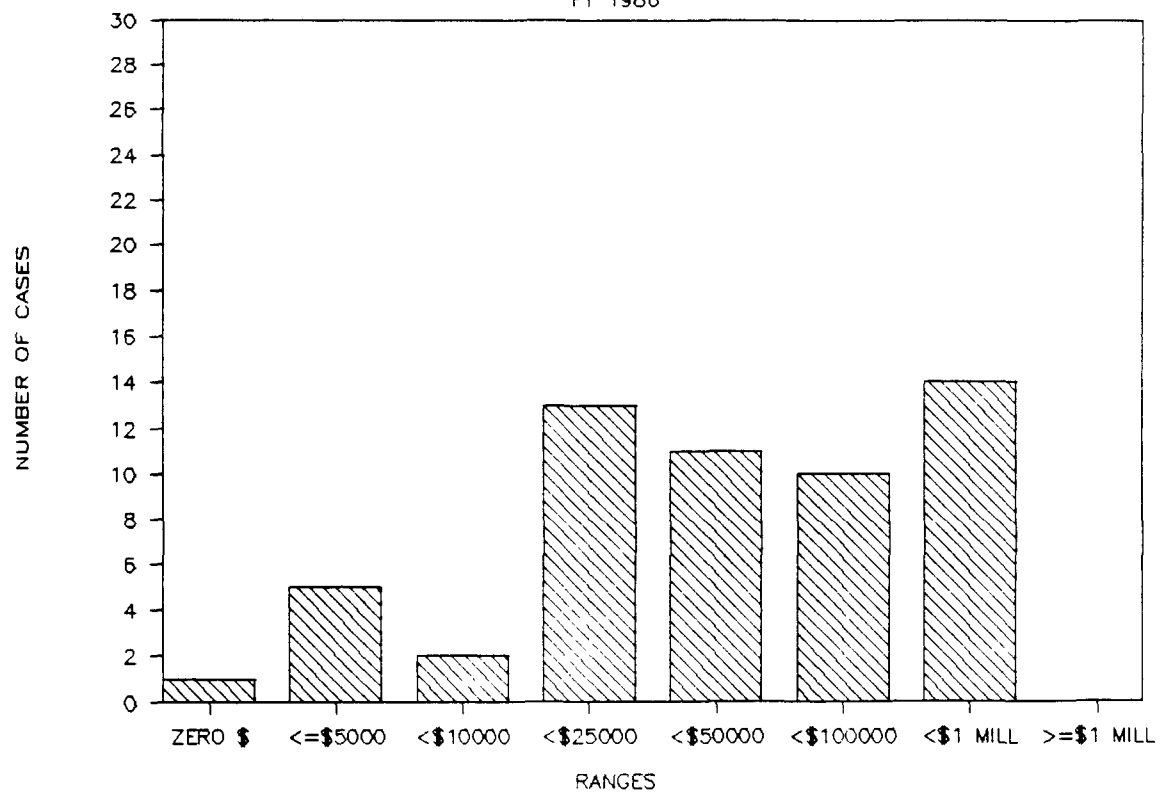
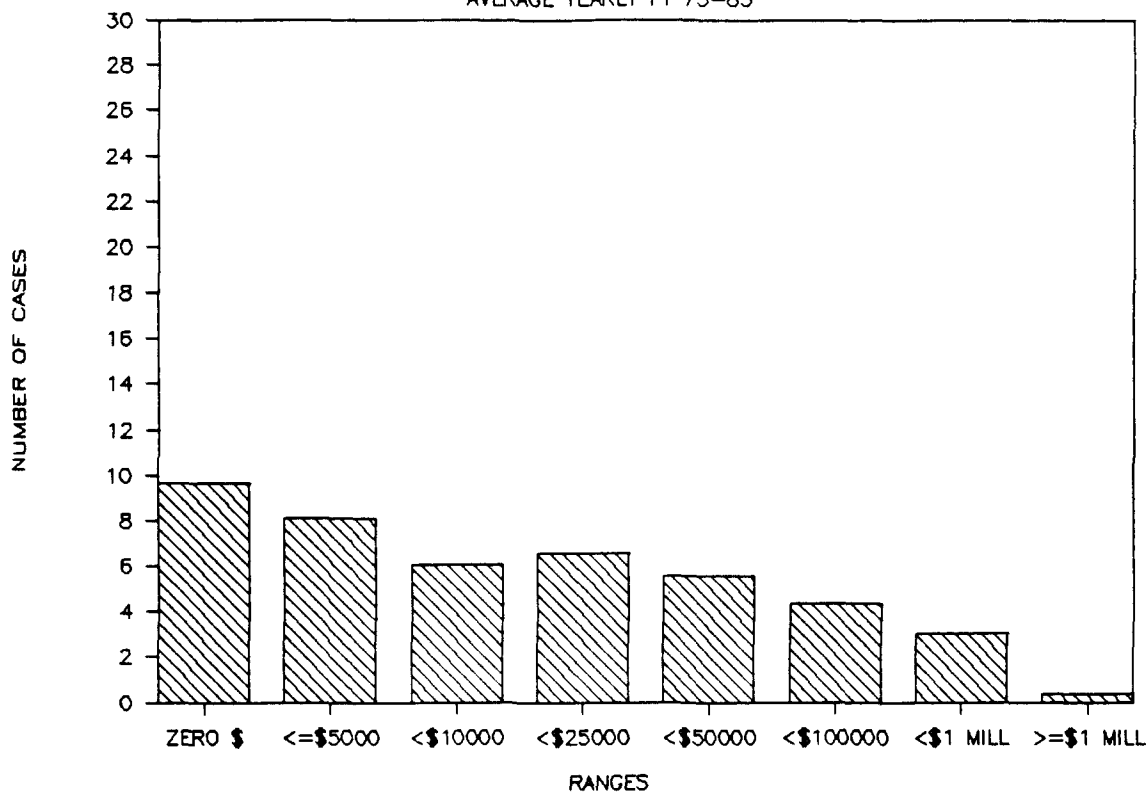


FIGURE 7**DISTRIBUTION CWA JUDICIAL PENALTIES**

AVERAGE YEARLY FY 75-85

**FIGURE 8****REGIONAL DISTRIBUTION CWA PENALTIES**

FY 1988 JUDICIAL PENALTIES

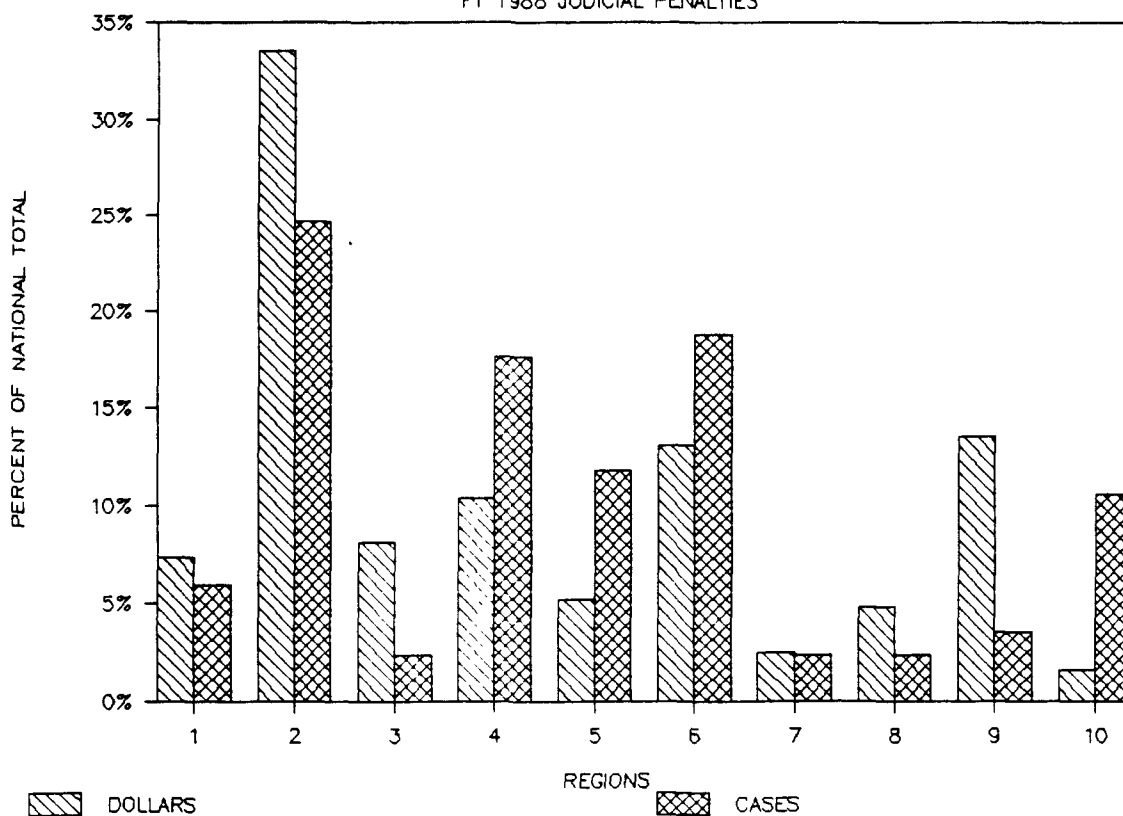


FIGURE 9**DISTRIBUTION OF CWA PENALTIES**

ADMINISTRATIVE CASES - FY 1988

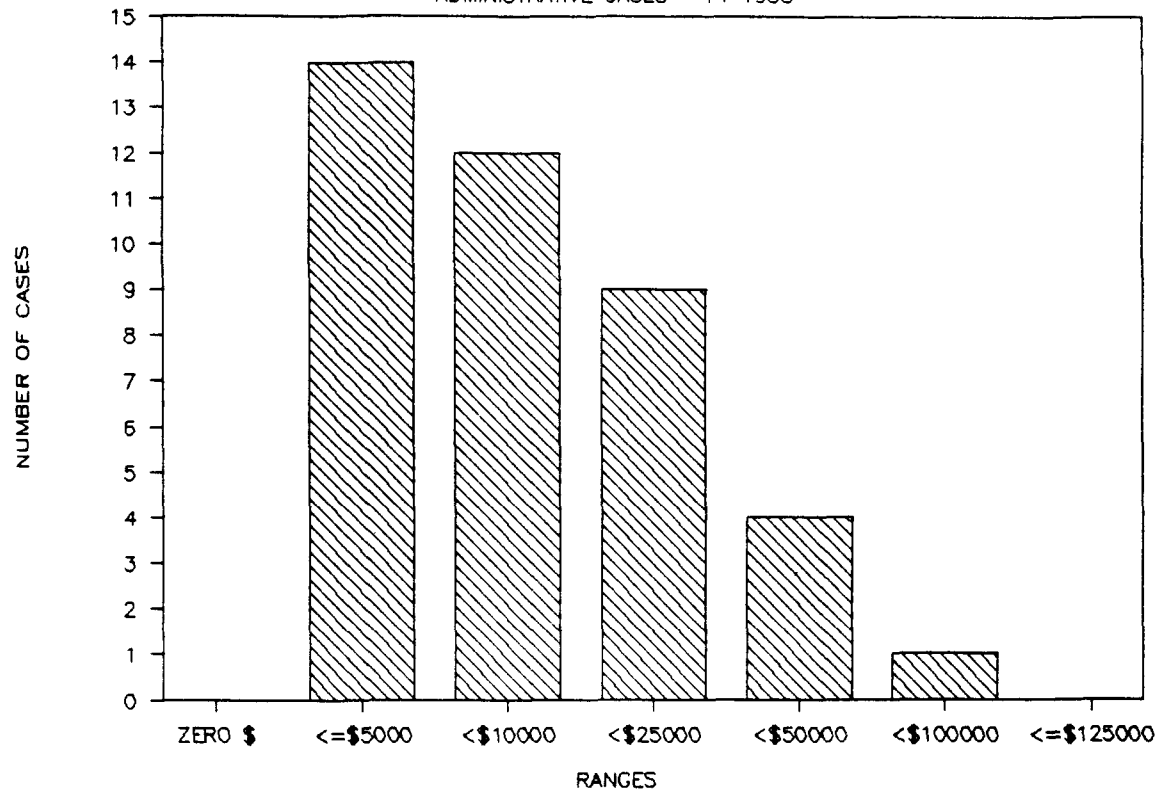
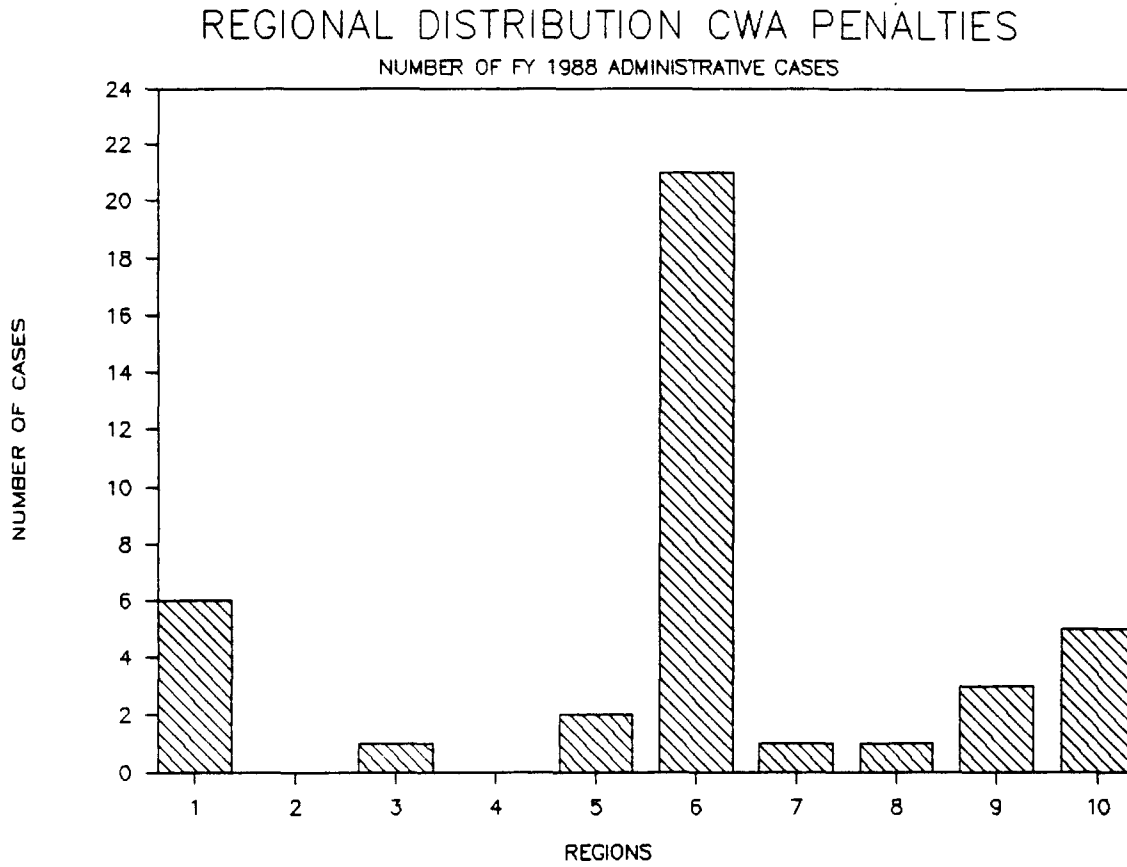
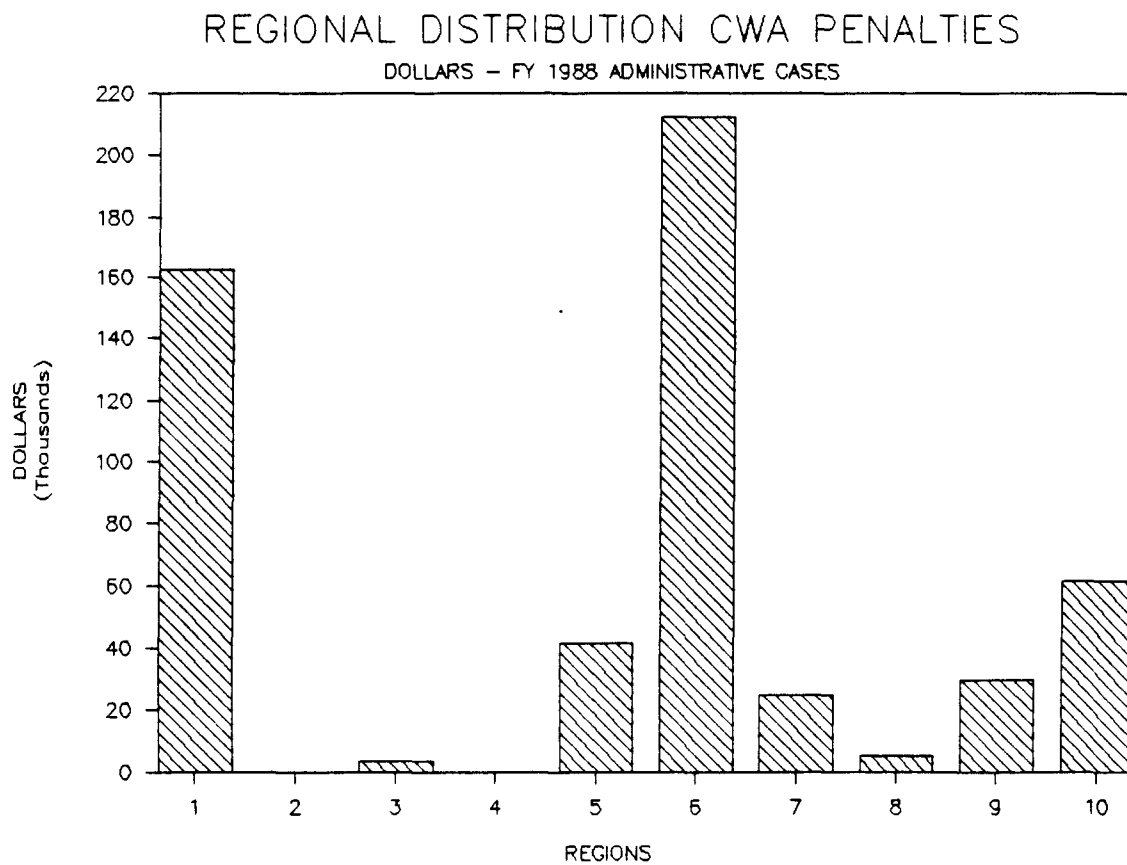


FIGURE 10**FIGURE 11**

B-18

NOTES



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAR 24 1989

MEMORANDUM

SUBJECT: SDWA Civil Penalty Practices Report for FY88

FROM: Robert G. Heiss *RGH*
Associate Enforcement Counsel
for Water

Robert J. Blanco, Director *[Signature]*
State Programs Division

TO: Gerald A. Bryan, Director
Office of Compliance Analysis and
Program Operations

Attached is the Safe Drinking Water Act Civil Penalty Practices Report covering penalties concluded in FY88. Pursuant to your request, it has been revised from the January 27, 1989 submission to reflect the face amount of judicial penalties without reduction to present value for those penalties to be paid over extended periods. If you have any questions regarding this report, please contact Kathy Summerlee or David Drelich of the Office of Enforcement and Compliance Monitoring at 382-2879 or 382-2949, respectively, or Don Olson of Underground Injection Control Branch at 382-5558.

We look forward to receiving the final agency-wide report when it is completed.

Attachment

cc: Cheryl Wasserman
Francoise Brasier
Kathy Summerlee
Tonia D. Bandrowicz
David Drelich
Don Olson

SAFE DRINKING WATER ACT CIVIL PENALTY PRACTICES REPORT FOR FY881. Use and Levels of Penalties

This report summarizes the use and levels of civil judicial and administrative penalties in FY88 in cases concluded under the Safe Drinking Water Act ("SDWA").

The authority to seek penalties for violations of the Public Water Supply ("PWS") and Underground Injection Control ("UIC") programs is found in Section 1414 and 1423 of the SDWA, respectively. When Congress amended the SDWA in June, 1986, it increased civil judicial penalties for PWS and UIC violations from \$5,000 to \$25,000 a day and eliminated the need to show "willfulness" as a precondition to the imposition of penalties in the PWS program.

Congress also established administrative remedies in both the PWS and UIC programs, including the authority to issue administrative compliance orders to violators of SDWA requirements. If any person fails to comply with a PWS administrative compliance order, the Administrator is authorized to seek either judicial penalties of \$25,000 a day or, if the total penalty is \$5,000 or less, administrative penalties.

For violations of UIC administrative compliance orders or the requirements of the SDWA, the Administrator may seek either judicial penalties of \$25,000 a day or administrative penalties of up to a maximum of \$125,000 (assessed at the rate of \$5,000 or \$10,000 per day of violation depending on the type of injection activity at issue). Administrative penalties under both the PWS and UIC programs can only be assessed after providing the respondent with the opportunity for a hearing.

The November 17, 1983 "Safe Drinking Water Act Public Water System Settlements--Interim Guidance," governs PWS judicial penalty settlements. Penalty settlement policy for the UIC judicial program and the SDWA's administrative penalty program is governed by the agency's more general February 16, 1984, "Policy on Civil Penalties."

2. Statutory Changes to Penalty Authorities

There have been no changes to the penalty authorities under the SDWA since the statutory amendments in 1986.

3. Possible Influences on the Use and Levels of Civil Penalties

The penalty guidance documents referred to above, as well as the April 14, 1987 UIC Compliance Strategy Guidance, have had an effect on the use and levels of civil penalties the U.S. has received in settling or litigating SDWA cases in FY88.

The reason that the majority of the concluded cases contain no penalties or penalties of under \$5,000 may be due to the fact that many of the violators are small operators often having ability to pay problems.

4. Use of Penalties

All six of the SDWA judicial cases concluded in FY88 were concluded with a penalty. See Table 1.

Forty-two percent of the administrative cases concluded in FY88 were concluded with penalties (40 out of a total of 95 cases). See Table 3.

5. Judicial Penalty Profile

The penalties which establish the data base for the judicial penalty profile include only upfront, cash penalties, payable to the United States. Only entered consent decrees or judicial decisions are counted as concluded cases in the data base.

The total number of judicial cases concluded in FY88 was 6. See Table 1. This is consistent with FY87 in which the same number of cases were concluded. In FY86, two judicial cases were concluded.

Total judicial penalties for FY88 are \$49,740. See Table 1. This amount is an increase from FY87's total of \$19,140 and FY86's total of \$2,000.

The median judicial penalty for FY88 (\$4,900) was also an increase over last year's figure (\$3,000). See Table 1.

The highest penalty collected in FY88 was \$25,000. See Table 1.

Only Regions 4, 5 and 8 concluded SDWA judicial cases, with Region 5 concluding the most cases (4) and Region 4 collecting the highest penalty (\$25,000). A summary of the SDWA judicial cases by Region follows:

Region 4	Roskee	\$25,000
Region 5	Devon	\$ 5,000
	Tussey	\$ 5,000
	Carlisle	\$ 4,800
	Carefree	\$ 7,500
Region 8	Merritt	\$ 2,440

5. Administrative Penalty Profile

EPA concluded a total of 95 administrative cases in FY88 (including those cases concluded without a penalty). See Table 3. This is an increase over the 18 cases concluded in FY87. In FY88 more cases were concluded with a penalty (42%) than in FY87 (17%).

All but one of the SDWA administrative cases in FY88 were concluded under the UIC program. The only PWS program case that was concluded in FY88 was in Region 3 for \$1,000.

The total administrative penalties obtained in FY88 is \$422,890. See Table 3. This is a dramatic increase over the FY87 administrative total of \$19,550 and considerably more than the FY88 judicial total.

The median penalty for FY88 is \$2,750. See Table 3. The greatest number of cases in FY88 were in the \$5,000 or less penalty range. See Figure 1.

The highest penalty in FY88 is \$125,000 (the statutory maximum) collected by Region 4 against Ashland Oil. See Table 3. In FY87, the highest penalty was only \$10,000.

Regions 3, 4, 5, 6, 8 and 9 concluded SDWA cases in FY88. See Table 3. Regions 3, 4, and 6 all concluded over 20 cases each. Region 4 had the highest number of cases (25) and the most penalties (\$274,000).

Table 1
Total Civil Judicial SDWA Penalties
For All Cases Concluded in FY88

Total Dollars	Number Cases w/ Penalty	Number Cases w/o Penalty	Total Cases	Total % w/o Penalty	Average Penalty	Ave. All Concl'd Cases	Median Penalty	Med. All Concl'd Cases	Highest Penalty
49,740	6	0	6	0	8,290	8,290	4,900	4,900	25,000

Table 2
Total Civil Judicial SDWA Penalties
Distribution of Penalty Sizes FY88

	<=5,000	<10,000	<25,000	<50,000	<100,000	<1,000,000	>=1,000,000
0							
0	4	1	0	1	0	0	0

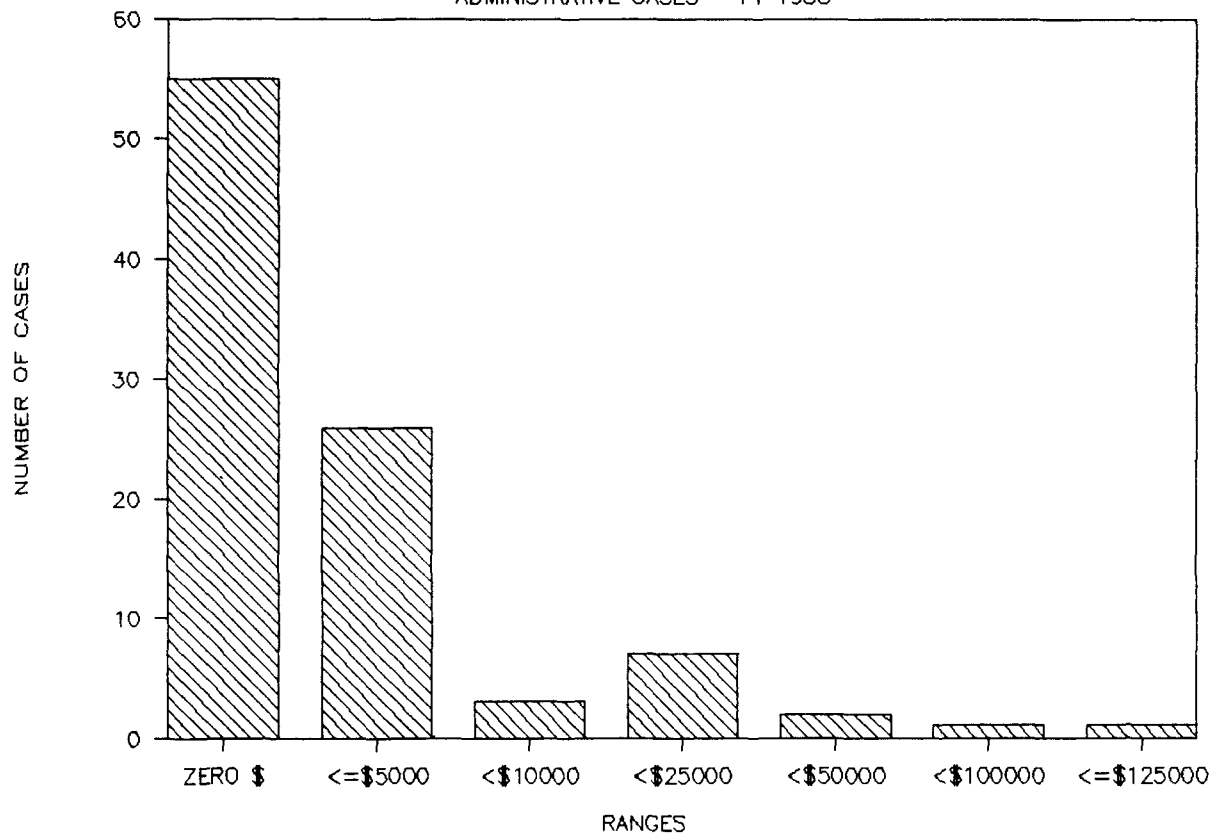
FY88 Federal Penalty Report

Table 3

	Total Dollars	Number of Cases WITH Penalties	Number of Cases WITHOUT Penalties	Total Cases	% Total WITH Penalties	Average Penalty	Average for ALL Cases	Median Penalty	Median for ALL Concluded Cases	Highest Penalty
1	0	0	0	0	0%	0	0	0	0	0
2	0	0	6	6	0%	0	0	0	0	0
3	38,000	5	17	22	23%	7,600	1,727	10,000	0	15,000
4	274,000	10	15	25	40%	27,400	10,960	10,000	0	125,000
5	27,630	10	3	13	77%	2,763	2,125	1,925	1,350	5,380
6	18,660	10	14	24	42%	1,866	778	1,155	0	7,000
7	0	0	0	0	0%	0	0	0	0	0
8	27,100	4	0	4	100%	6,775	6,775	4,850	4,850	15,000
9	37,500	1	0	1	100%	37,500	37,500	37,500	37,500	37,500
10	0	0	0	0	0%	0	0	0	0	0
Total	422,890	40	55	95	42%	10,572	4,451	2,750	0	125,000

DISTRIBUTION OF PENALTIES — SDWA

ADMINISTRATIVE CASES — FY 1988





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

DEC 30 1988

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Submission of CWA Section 404 Civil Penalty Report
for FY 1988

FROM: Suzanne E. Schwartz, Director
Regulatory Activities Division
Office of Wetlands Protection

TO: Gerald A. Bryan, Director
Office of Compliance Analysis and Program Operations
Office of Enforcement and Compliance Monitoring

The Office of Wetlands Protection (OWP) is pleased to submit to your office for review a copy of the Clean Water Act Section 404 Civil Penalty Report covering penalties concluded in FY 1988. Since it was during FY 1988 that EPA first initiated and concluded administrative penalty actions for 404 violations, we suggest including a statement to this effect in the Executive Summary of the Report.

OWP only learned of the requirement to submit this report on December 5. Therefore, per a conversation with George Alderson, we are submitting a first draft of the Clean Water Act Section 404 submission at this time.

Should you have any questions concerning this submission, please contact Joseph DaVia of the Enforcement and Regulatory Policy Staff at 245-3902.

Attachment

cc: John W. Lyon
OECM-Water (LE-134W)

George Alderson
Compliance Policy and Planning Branch (LE-133)

Becky Barclay
Compliance Policy and Planning Branch (LE-133)

CWA SECTION 404 CIVIL PENALTY REPORT FOR FY 1988Program Description

Section 404 of the Clean Water Act establishes a program to regulate the discharge of dredged or fill material into "waters of the United States," which includes most wetlands. EPA and the Army Corps of Engineers jointly implement Section 404, with the Corps responsible for deciding whether to issue or deny permits. EPA, in conjunction with the Corps, develops Guidelines under Section 404(b)(1) which contain the environmental standards that the Corps must apply when evaluating permit applications. Under Section 404(c), EPA has authority to prohibit or restrict discharges if it determines that the discharge would have unacceptable adverse effects on the resource. EPA's other Section 404 responsibilities include determining and defining the geographic scope of Section 404.

Section 404 enforcement differs from other Clean Water Act enforcement programs in several ways. For one, EPA and the Corps share 404 enforcement authority. Section 309 of the Clean Water Act gives EPA the authority to act against persons who discharge without a permit and also to enforce against violations of 404 permit conditions. Section 309 provides EPA with a variety of enforcement mechanisms. Our first line of defense is the administrative compliance order issued pursuant to Section 309(a), which generally requires a violator to stop all illegal discharges and, where appropriate, to remove the fill and/or restore the site. Section 309(g) authorizes EPA to assess administrative civil penalties for, among other things, violations of Section 404. A third enforcement mechanism allows EPA to seek monetary penalties, injunctive relief, and even prison sentences through judicial action pursuant to Sections 309(b) and (c). Under these Sections, EPA may refer cases to the Department of Justice for criminal and/or civil litigation. Since the Corps has a larger field presence and is the federal permitting authority, EPA has focused its resources on identifying and enforcing against unpermitted discharges of dredged or fill material. The Corps has the lead on acting against violations of Corps-issued permits, and has also been responsible for a significant amount of the enforcement efforts against unauthorized discharges. The administrative and judicial 404 enforcement actions discussed below only reflect those initiated solely by EPA or jointly by EPA and the Corps.

Another distinction is the nature of the 404 discharge, which most often converts waters of the U.S., including wetlands, into fastland. Thus, enforcement actions which only require a violator to stop the illegal discharge activity or which impose monetary penalties may not adequately redress the environmental harm caused by such activity. As a result, EPA Section 404

enforcement efforts generally also seek timely removal of the illegal fill and, where necessary, restoration of the site.

Turning to the dischargers, many are not large corporations, as is the case in other Clean Water Act programs. Instead, they are often "mom and pop" businesses, and usually private individual landowners. This becomes particularly significant when considering "ability to pay" in calculating a penalty amount. This is also reflected in the fact that 404 discharges may occur at any time at any place where waters of the U.S. occur. Another difference between Section 404 and other Clean Water Act enforcement programs is that, since only one state (Michigan) has assumed the 404 program, virtually all 404 enforcement remains the responsibility of EPA and the Corps.

Statutory Changes

The Water Quality Act of 1987 (WQA) made several changes to EPA's 404 enforcement authorities. It amended Section 309(d) to increase judicial civil penalties from \$10,000 per day per violation to \$25,000 per day per violation. As amended, Section 309(d) also enumerates the factors the courts must consider in assessing judicial penalties, which are: seriousness of the violation(s), economic benefit resulting from the violation(s), the violator's compliance history and any good-faith efforts to comply, the economic impact of the penalty on the violator, and "such matters as justice may require." The 1987 amendments also amended Section 309(c) to increase maximum allowable penalties and imprisonment for knowing criminal violations of Section 404.

Further, the WQA established a new Section 309(g) which gives the Agency and the Secretary of the Army the authority to assess administrative civil penalties for violations of Section 404. The administrative penalties are divided into two separate classes. Class I penalties are assessed at a rate of up to \$25,000 through non-Administrative Procedures Act (APA) methods. Class II penalties are assessed at a rate of up to the statutory maximum of \$125,000, where the APA procedures are followed. Pursuant to Section 309(g), the Administrator and the Secretary of the Army, when assessing an administrative penalty, "shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation and such other matters as justice may require." FY 1988 marks the first year that EPA has exercised its new authority to assess administrative penalties for Section 404 violations.

Possible Influences on the Use and Levels of Civil Penalties

There are several factors which may have affected the amount

of money EPA has received in settling and litigating Section 404 enforcement cases. In 1987, EPA issued draft guidance on settling CWA administrative penalty actions for Section 404 violations, with final guidance scheduled for completion in FY 1989. This guidance supplements the August 1987 OECM/OW administrative penalty guidance by specifically addressing the unique informational requirements and needs for assessing penalties under Section 404. In particular, given the lack of quantitative standards dealing with 404 discharges, the guidance is more qualitative than quantitative in nature. It discusses the statutory factors to be considered when assessing administrative penalties as they relate to Section 404 violations, and provides recommended settlement ranges based on the environmental significance of the violation and the compliance significance of the violator.

Experience to date has indicated that penalty levels may need to be adjusted for economic benefit and ability to pay considerations. However, determining the economic benefit derived by the violator by discharging without a permit may be difficult. For one thing, economic benefit is not always relevant, e.g., where the fill is removed and the site is restored to its original condition. Even where economic benefit is relevant, it may be quite difficult to calculate. Unlike the CWA Section 402 program, economic benefit in the context of a Section 404 violation will not be based on "costs saved from failure to install and maintain proper pollution control equipment." Since many Section 404 violators are individual land owners or small businesses, in appropriate cases, penalty levels may need to be adjusted for ability to pay considerations.

Penalty levels in EPA Section 404 civil judicial referrals are assessed based on the statutory language found in Section 309(d) of the Clean Water Act, as discussed above. Experience to date indicates that many courts are willing to assess relatively large penalties for violations of Section 404. In addition, given the need in many 404 cases for removal and/or restoration, some courts have tied the level of a monetary penalty to the violator's agreement to complete such removal and/or restoration. This was the case in U.S. v. Cumberland Farms of Connecticut, Inc., 647 F. Supp. 1166 (D. Mass. 1986), aff., 826 F. 2nd 1151 (1st Cir. 1987), where the district court assessed a \$540,000 penalty, \$390,000 of which would be remitted after the defendant restored the wetlands satisfactorily.

Use of Penalties

Only recently, since 1985, has EPA had an active nationwide presence in Section 404 enforcement. Figure 1 graphs EPA's Section 404 enforcement activities since 1986. Since then, the Regions have been referring an increasing number of cases to DOJ. Also, in FY 1988 the Regions began to implement the new

administrative penalty authority, with actions initiated in four Regions. Nevertheless, the number of EPA 404 enforcement actions remains relatively small, especially when compared to other Agency enforcement programs. All the 404 cases concluded in FY 1988 were against persons who discharged without a permit. All five of the administrative penalty cases concluded in FY 1988 assessed monetary penalties.

Judicial Penalty Profile

Five judicial actions were concluded in FY 1988:

Edward Tull [4 separate actions]	Region 3	\$25,000
Joseph Carter	Region 4	\$ 0

The \$25,000 penalty assessed against Edward Tull was part of a settlement agreement which resolved four separate Section 404 enforcement actions against this defendant. In addition, the settlement agreement also directs the defendant to undertake some restoration. In the Joseph Carter case, the judge refused to grant monetary penalties because the defendant died. However, the judge ruled for total restoration of the site, which was completed.

Administrative Penalty Profile

In FY 1988, EPA initiated 18 administrative penalty actions for unauthorized Section 404 discharges. Of these, five actions were finalized during FY 1988. Four cases were settled by consent agreements:

Kirk Corporation	Region 5	\$60,000
Woodland Development Corporation	Region 5	\$15,000
Portrait Homes of Chicago, Inc.	Region 5	\$19,000
George Wilcox, Wilcox Construction Co.	Region 6	\$ 4,000

In the fifth case, the respondent defaulted, resulting in issuance of a unilateral final order assessing a penalty of \$24,000. The respondent subsequently appealed the order to federal district court. Of the 18 administrative penalty actions initiated in FY 1988, the average Class I proposed penalty was \$13,000, and the average Class II proposed penalty was \$102,000.

As described earlier, in most Section 404 enforcement actions, the immediate goal is removal of the illegal fill and,

where necessary, restoration of the site. Thus, the initial Agency response to an unauthorized discharge is frequently a Section 309(a) administrative compliance order (AO). The 404 program issued 93 AO's in FY 1988 (Figure 2). The number of administrative compliance orders has increased rather steadily since EPA began to strengthen its wetlands enforcement program in 1985.

Comparisons of Regional Use and Levels of Penalties

Given the small number of administrative and judicial cases concluded, no detailed regional analyses are possible.

EPA SECTION 404 CWA ENFORCEMENT DATA FY 1986 - 1988

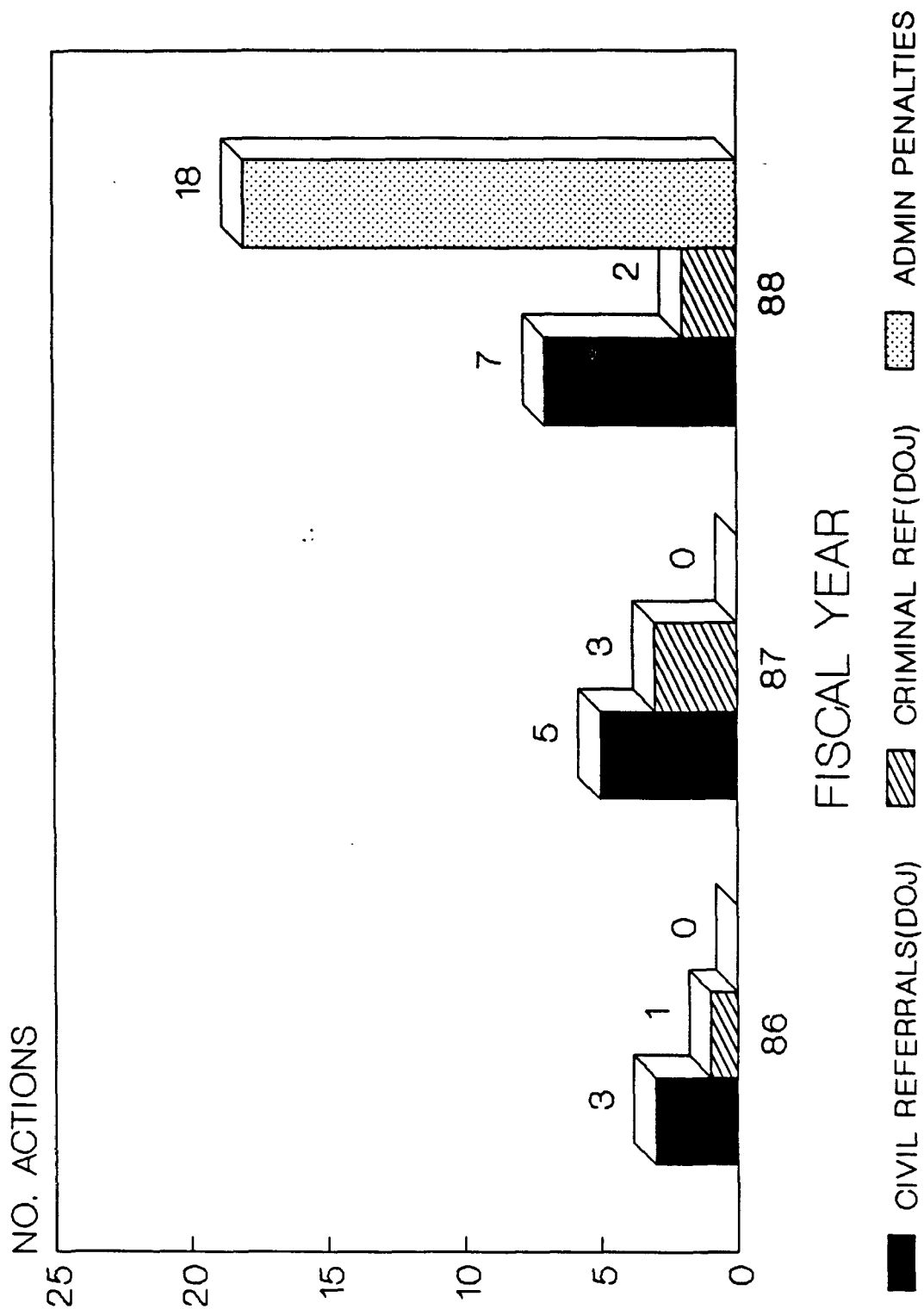


FIGURE 1. EPA Section 404 Enforcement Activities 1986-88

EPA SECTION 404 CWA ENFORCEMENT DATA
SECTION 309(a) ADMINISTRATIVE ORDERS

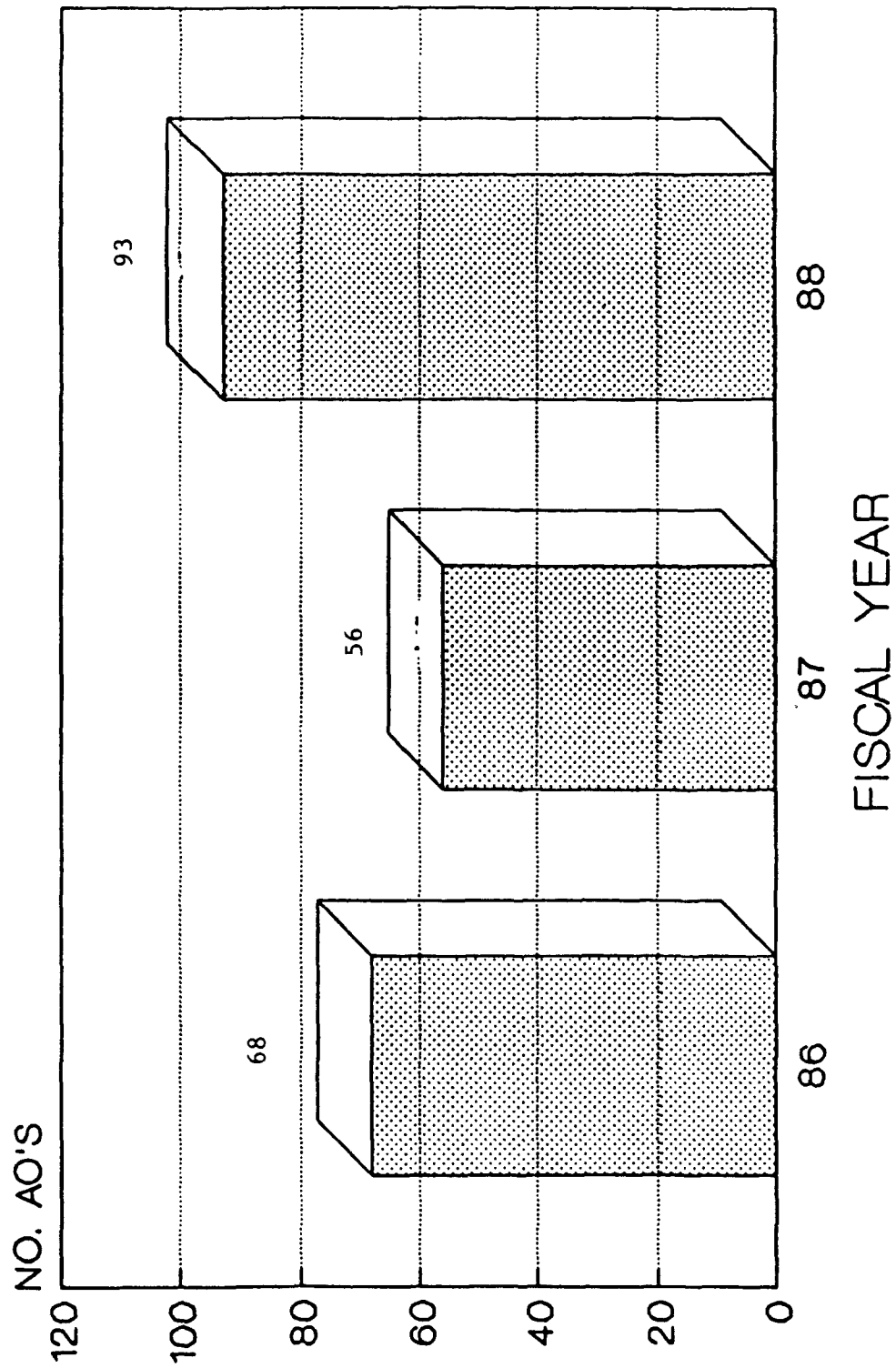


FIGURE 2. Administrative Compliance Orders Issued by EPA From 1986-88



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

APR 14 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Submission of CAA Civil Penalty Practices Report
for FY 88.

FROM: Terrell E. Hunt *TEH*
Associate Enforcement Counsel
Air Enforcement Division

TO: Gerald A. Bryan, Director
Office of Compliance Analysis
and Program Operations

Attached is the CAA Civil Penalty Practices Report covering penalties concluded in FY 88 in accordance with your memorandum of November 4, 1988. As requested, the report data and text follow the format outlined in the memorandum. This report updates the report we submitted on December 13, 1988 to reflect additional data recently submitted by one of the Regions. If there are any questions, please have your staff contact Elise Hoerath of OECM at 382-2842.

Attachment

cc: Gerald Kraus
George Alderson

Stationary Source Program: Use and Levels of Penalties

The 1977 amendments to the Clean Air Act authorized two sources of civil penalty authority: civil judicial under Section 113 and civil administrative under Section 120. The Section 113 judicial penalty authority is limited to \$25,000 per day of violation. In assessing a penalty, a court may consider the size of the business, the seriousness of the violation, and the impact of the penalty on the business. Section 120 is specifically designed to recover the economic benefit of noncompliance which a source may have gained through its failure to comply.

Penalties under Section 113 are now calculated according to the Clean Air Act Stationary Source Civil Penalty Policy, issued September 12, 1984 and revised on March 25, 1987. Before that, the Agency-wide policies of 1978 and 1980 governed air penalties. The current policy covers specific situations such as PSD, asbestos demolition and renovation, and vinyl chloride in appendices to the policy.

Section 120 penalties focus exclusively on the economic benefits of noncompliance and are calculated according to the formula set forth in the Technical Support Document and the Instruction Manual. EPA may settle for an amount less than the penalty calculated under the Technical Support Document in some circumstances in accordance with a guidance issued March 19, 1985 entitled "Permissible Grounds for Settlement of Noncompliance Penalties Under Section 120 of the Clean Air Act."

Use of Penalties

Seventy-four judicial cases were concluded in FY 88. This year, the percentage of cases where a penalty was imposed has remained high. The percentage of cases which were concluded with a penalty has increased from 38% in FY 79, to 80% in FY 85, 96% in FY 86, 95% in FY 87 and 96% in FY 88.

Nearly all judicial cases were settled; only three cases in FY 88 were decided in court.

All administrative cases under §120 concluded in FY 88 were concluded with a penalty.

Judicial Penalty Profile

Highest Penalties

Three cases in FY 88 imposed penalties over one million dollars. These are:

\$1,750,000	Region V
\$1,350,000	Region III
\$1,250,000	Region VI

These three large penalties account for 49% of all cash penalties imposed in the Air program and only 4% of the number of cases concluded in FY 88.

Typical Penalties

This year total judicial stationary source penalties increased significantly, up to \$8,914,384 in FY 88 from \$5,285,700 in FY 86 and \$5,542,250 in FY 87. The total number of cases concluded also increased significantly from 50 in FY 86 and 54 in FY 87 to 74 in FY 88. In addition, the average penalty increased from \$105,714 in FY 86 and \$102,634 in FY 87 to \$125,555 in FY 88. The continuing trends in higher numbers of cases concluding with a penalty and higher average penalties have resulted in overall yearly totals increasing steadily.

However, the median penalties are usually a better indication of a typical penalty than the average. This is because averages can be skewed by a few large penalties, such as the three cases over \$1,000,000 referred to above which accounted for 49% of all FY 88 penalties. The median penalty was down this year from \$37,500 in FY 86 and \$65,750 in FY 87 to \$30,000 in FY 88. The median is down in large part due to the large number of asbestos cases concluded in FY 88. The largest concentration of FY 88 cases was in the \$10,000 to \$24,999 range, 22 out of 74 cases or 30%. Of these cases, 10 cases or 48% were asbestos cases. Many of these cases are against sources of limited ability to pay, a factor considered in the Stationary Source Civil Penalty Policy. The trend though is towards larger penalties in asbestos cases, such as the \$260,000 penalty in the Big Apple Wrecking case from Region I.

The distribution of penalties also reflects the influence of asbestos cases on the median penalty. In FY 86 and 87, 77% of penalties were \$25,000 or greater. In FY 88, only 58% of penalties were \$25,000 or greater. Of the 31 cases, or 42%, that were below \$25,000, one half were asbestos cases.

Administrative Penalty Profile

Section 120 of the Clean Air Act provides for administrative imposition of penalties against sources in violation of the Act. In general, the size of a §120 penalty depends solely on the economic benefit accruing to a source because of noncompliance with applicable law. While recoupment of the economic benefit of noncompliance is the central goal of a §120 action, Regions have also found that the prospect of such a penalty can cause very accelerated steps towards compliance by the violating source.

All four §120 cases concluded in FY 88 were concluded with penalties. For §120 cases concluded through FY 87, only 63% concluded with a penalty. Penalties in §120 cases are typically smaller than §113 penalties. The highest §120 penalty ever is \$61,500, imposed this fiscal year by Region V. The previous high was \$45,528. The median and average penalties both increased this year. The average for FY 88 was \$37,028 compared to \$13,526 for all §120 cases concluded through FY 87 and \$14,206 for cases with notices of noncompliance issued in FY 85-87. The median penalty was up from \$8,500 for all cases concluded through FY 87 and \$12,639 for cases with notices issued in FY 85-87 to \$39,397 in FY 88. These figures indicate a trend towards higher penalties being imposed in §120 cases.

The major cause of the disparity between judicial and administrative penalties in their use and size is probably that the Regions tend to use the §120 remedy in relatively straightforward cases in which the economic benefit of noncompliance is relatively small. This is likely due to the fact that §120 contains no authority to obtain injunctive relief. This is often important in larger, more complicated cases which may involve bigger economic benefits and require a defendant to perform, or refrain from, certain actions. In these cases, a §113 action with its provision for injunctive relief must be pursued.

Comparisons of Regional Use and Levels of Penalties

There may be significant differences in types of violations, violators, and external factors such as trends in court rulings among Regions that would explain apparent differences in the use and levels of civil penalties. The Regions appear to differ substantially with respect to air penalties, but a general pattern is not evident. Regional totals (judicial and administrative penalties) ranged widely however from Region V with \$2,781,375 to Region X with \$12,000.

The three Regions that collected the three penalties over \$1,000,000 had the highest total penalties imposed. They were Region III with a total of \$2,402,500, Region VI with \$2,028,505 and Region V with the highest total of \$2,781,375. Region V also had the highest total number of cases concluded in FY 88 by far with 25, judicial and administrative, followed by Region II with 12 and Region VII with 10. Region V was also the only Region to have a case conclude without any penalty. All three cases from FY 88 that had no penalty were from Region V.

Table 1
Stationary Source Program
Total Civil Judicial Penalties
For FY 88

	No. Cases with Penalty	No. Cases without Penalty	Total Cases	% of Total with Penalty	Average Penalty	Average All Concl. Cases	Median Penalty	Median All Concl. Cases	Highest Penalty
Total	71	3	74	96%	\$125,555	\$120,465	\$30,000	\$29,000	\$1,750,000
8,914,384									

Total Civil Judicial Penalties
by Size of Penalty FY 88

	< \$5,000	< \$10,000	< \$25,000	< \$50,000	< 100,000	< \$1M	> \$1M
Zero \$0							
3	5	1	22	12	14	14	3

Table 2
Stationary Source Air Program
Total Administrative Cases Concluded
in Fiscal Year 1988

<u>Total</u>	<u>No. Cases with Penalty</u>	<u>No. Cases without Penalty</u>	<u>Total Cases</u>	<u>% of Total with Penalty</u>	<u>Average Penalty</u>	<u>Average All Concl. Cases</u>	<u>Median Penalty</u>	<u>Median All Concl. Cases</u>	<u>Highest Penalty</u>
\$148,113	4	0	4	100%	\$37,028	\$37,028	\$39,397	\$39,397	\$61,500

Regional Breakdown

<u>Region</u>	<u>Total</u>	<u>No. Cases with Penalty</u>	<u>No. Cases without Penalty</u>	<u>Total Cases</u>	<u>% of Total with Penalty</u>	<u>Average Penalty</u>	<u>Average All Concl. Cases</u>	<u>Median Penalty</u>	<u>Median All Concl. Cases</u>	<u>Highest Penalty</u>
II	\$47,566	2	0	2	100%	\$23,783	\$23,783	\$23,783	\$23,783	\$39,748
V	\$100,547	2	0	2	100%	\$50,273	\$50,273	\$50,273	\$50,273	\$61,500

No other Regions had any \$120 cases conclude in FY 88.

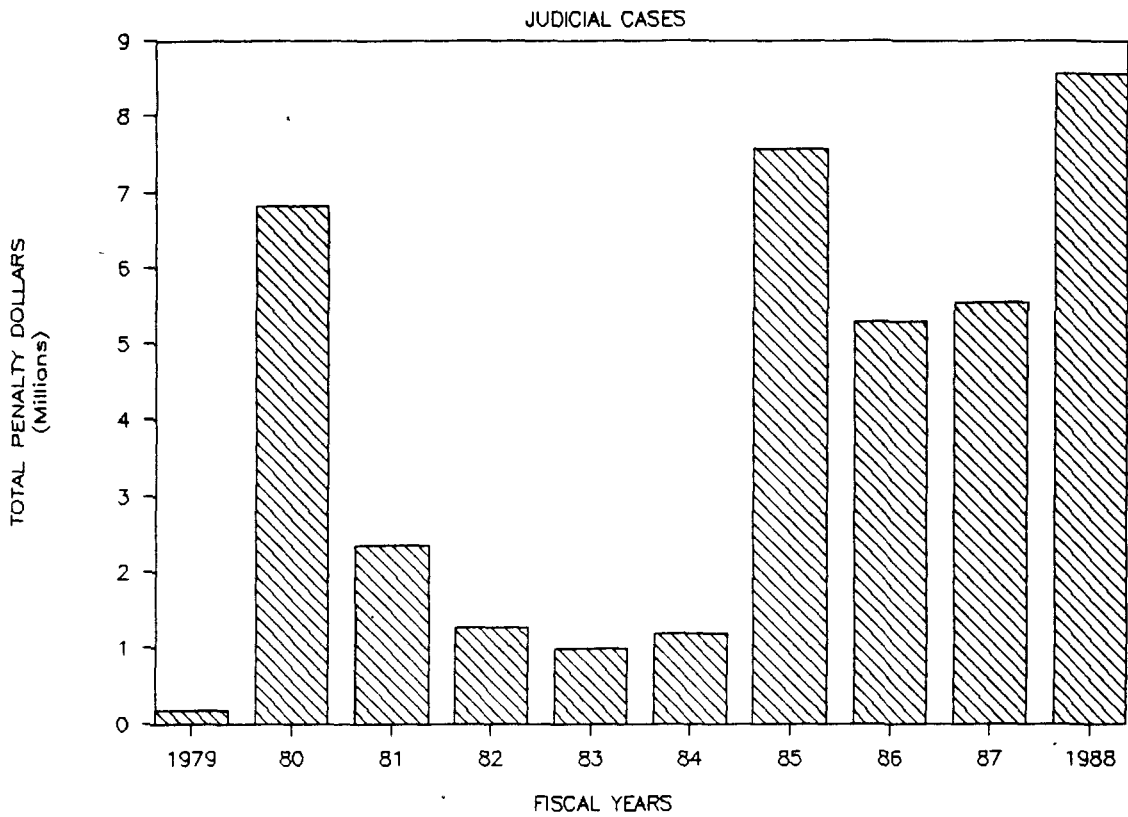
Total Civil Administrative Penalties
by Size of Penalty FY 88

<u>Zero \$0</u>	<u>≤ \$5,000</u>	<u>< \$10,000</u>	<u>< \$25,000</u>	<u>< \$50,000</u>	<u>< 100,000</u>	<u>< \$1M</u>	<u>≥ \$1M</u>
0	0	1	0	2	1	0	0

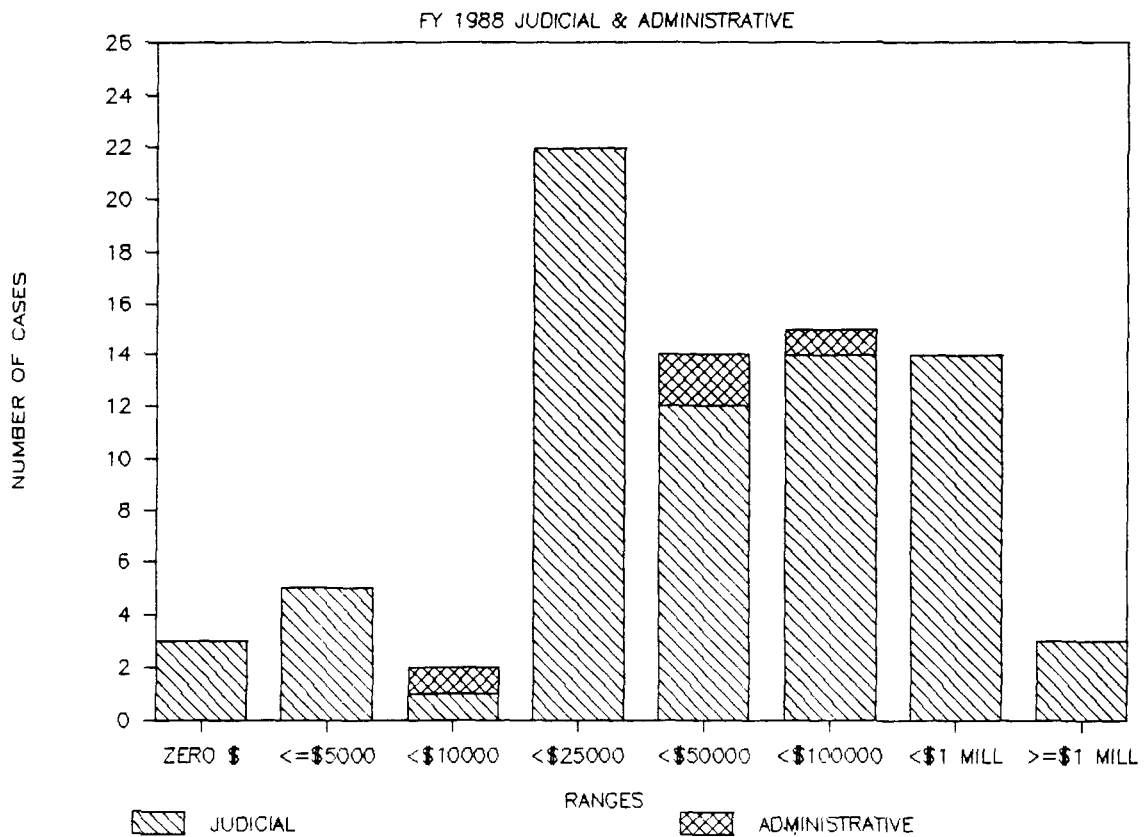
Table 3
Stationary Source Program
Total Civil Judicial Penalties by Region for FY 88

Region	Total	No. Cases with Penalty	No. Cases without Penalty	Total Cases	% of Total with Penalty	Average Penalty	Average All Concl. Cases	Median Penalty	Median All Concl. Cases	Highest Penalty
1	\$ 448,590	5	0	5	100%	\$ 89,718	\$89,718	31,590	31,590	\$ 260,000
2	564,600	10	0	10	100	56,460	56,460	42,000	42,000	149,000
3	2,402,500	9	0	9	100	266,944	266,944	125,000	125,000	1,350,000
4	105,000	2	0	2	100	52,500	52,500	52,500	52,500	95,000
5	2,680,828	20	3	23	87	134,041	116,557	27,500	27,500	1,750,000
6	2,028,505	7	0	7	100	289,786	289,786	65,000	65,000	1,250,000
7	273,519	10	0	10	100	27,352	27,352	12,000	12,000	168,519
8	110,000	3	0	3	100	36,667	36,667	30,000	30,000	65,000
9	288,842	4	0	4	100	72,210	72,210	68,421	68,421	125,000
10	12,000	1	0	1	100	12,000	12,000	12,000	12,000	12,000

STATIONARY SOURCE AIR PENALTIES BY YEAR

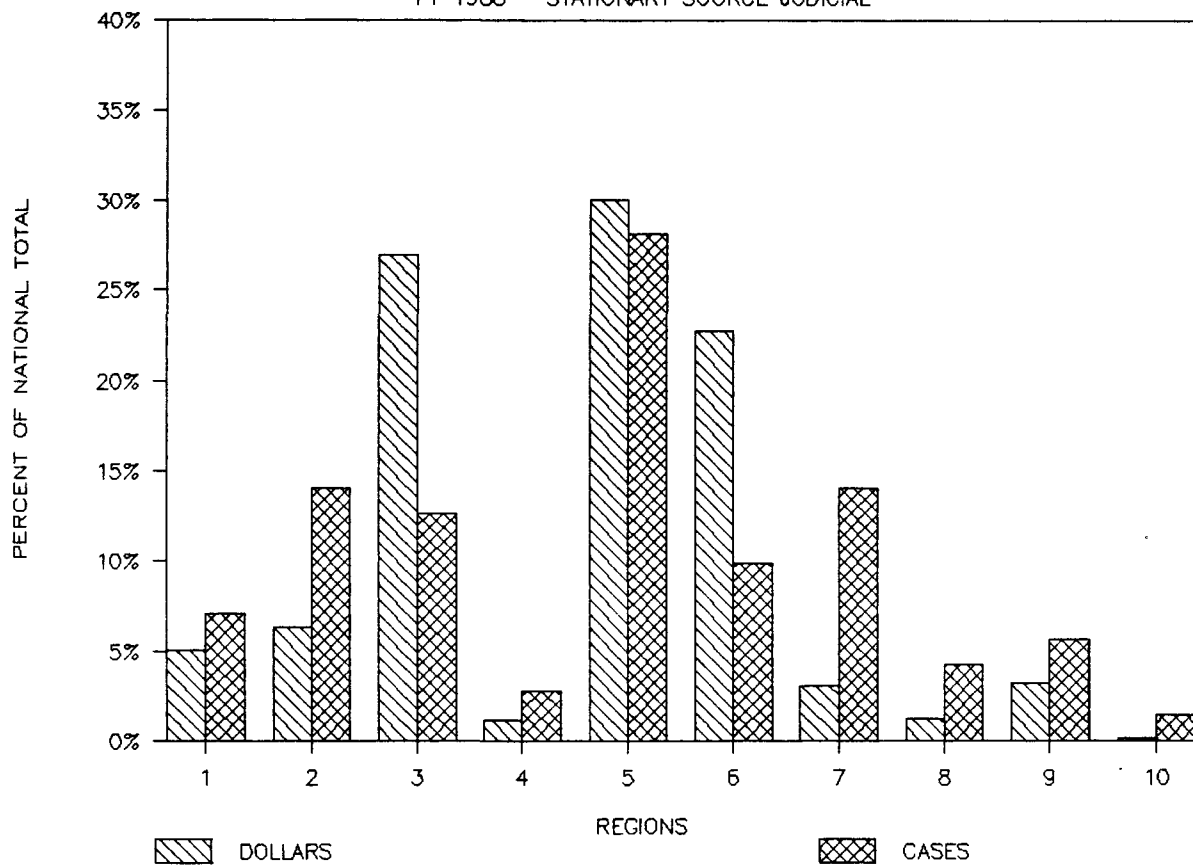


DISTRIBUTION OF PENALTIES - STATIONARY



REGIONAL DISTRIBUTION OF PENALTIES

FY 1988 - STATIONARY SOURCE JUDICIAL



NOTES



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

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Submission of Office of Mobile Sources
1988 Penalty Data

FROM: Richard D. Wilson, Director
Office of Mobile Sources *[Signature]*

TO: Gerald A. Bryan, Director
Office of Compliance Analysis
and Program Operations

Attached is the submission of the Office of Mobile Sources for the 1988 penalty report being compiled by your office.

This year we have incorporated the enforcement activities of the Manufacturers Operations Division with those of the Field Operations and Support Division. The analysis follows the format of previous years.

If you have any questions about this material, please contact Phyllis Anderson of my staff at 382-2664.

Attachment

PENALTY STATISTICS
OFFICE OF MOBILE SOURCES
OFFICE OF AIR AND RADIATION

I. INTRODUCTION

Two divisions within the Office of Mobile Sources conduct enforcement activities related to motor vehicles and fuels. These are the Manufacturers Operations Division (MOD) and the Field Operations and Support Division (FOSD). The enforcement authorities of each of these offices rest with the program offices at headquarters, rather than with the regions.

MOD enforcement centers on the introduction into commerce of vehicles not covered by a certificate of conformity certifying that the vehicle (new or imported) meets applicable emissions requirements. FOSD enforcement ensures that emission control devices originally installed on a vehicle are not tampered with, and also regulates the composition and use of motor vehicle fuels. FOSD's most notable achievement has been the dramatic reduction in the use of lead in gasoline production.

II. STATUTORY CHANGES TO PENALTY AUTHORITIES

There have been no changes to the statutory penalty authority of either office as contained in the Clean Air Act, 42 U.S.C. § 7401 et seq. Fuels violations are subject to a \$10,000 per violation per day statutory authority. The penalty for tampering with emission control devices is \$10,000 for new car dealers or manufacturers, and \$2,500 for fleet operators and vehicle repair facilities.

The penalty provisions applicable to violations related to introduction into commerce of vehicles not covered by a certificate of conformity is \$10,000 per vehicle. Reporting violations are also subject to a \$10,000 penalty.

III. INFLUENCES ON THE USE AND LEVELS OF CIVIL PENALTIES

A. Increased Lead Phasedown Enforcement

In recent years FOSD has concentrated its enforcement resources on audits of gasoline producers to determine compliance with lead phasedown regulations. This has resulted in fewer Notices of Violation (NOVs) with higher proposed penalties. Thirty-four phasedown NOVs were issued in FY 1988, with proposed penalties totalling over \$18.9 million.

Consequently, the number of phasedown settlements has also increased. During FY 1988 there were 18 lead phasedown settlements, a third of which involved penalties greater than \$50,000. The total amount of settlement dollars for phasedown cases was \$1,684,338. The highest penalty was \$1.175 million.

B. New Tampering Initiative and Policy

In FY 1988, FOSD began a new tampering enforcement initiative, carving out an exception to the antitampering policy for the use of aftermarket catalytic converters under controlled circumstances. FOSD's monitoring program found hundreds of violations of the policy. Most commonly, vehicles originally equipped with "three-way" catalysts (capable of reducing emissions of nitrogen oxides in addition to carbon monoxide and hydrocarbons) were being replaced with "two-way" catalysts that have no effect on NOx emissions.

These cases are different from the standard tampering case in which catalysts are permanently removed. Since new catalysts are being installed, albeit less efficient ones, the penalty policy was amended for such cases. Instead of a \$2,500 per violation proposed penalty, a repair shop would be subjected to a \$1,000 proposed penalty. 1/

The number of general tampering cases is also increasing. More efforts were put into tampering enforcement because of the large number of tampering complaints received. This has led in turn to increased state and local inspection activities. In FY 1988, 112 NOVs were issued for tampering, with proposed penalties of \$2.2 million. For the same period, there were 64 cases settled with a total of \$229,125 in penalties.

1/ FOSD is in the process of reviewing its tampering penalty policy to ensure that its proposed penalties are consistent and equitable for the various types of tampering that occur. If any impact to settled penalties results, it will not be seen until FY 1989.

C. Expedited Enforcement Procedures

FOSD has also continued its use of expedited settlements for fuel nozzle violations. (A nozzle violation occurs when a party, generally a retailer, equips a leaded gasoline pump with a smaller nozzle that allows insertion into unleaded vehicles.) In previous years, a single document was sent to the party allowing it to settle the matter by signing the one-page document and returning it to the agency with a \$200 payment.

Beginning in FY 1988, FOSD further amended the procedure to a field citation program. This allows the violator to mail the \$200 payment in accordance with the terms of the citation left at the time of the inspection. In FY 88, there were 89 nozzle settlements concluded through one of these methods.

IV. JUDICIAL PENALTY PROFILE

There were no judicial penalties in the MOD program. For FOSD, there was one judicial penalty awarded for \$10,000 against a gasoline retailer for installing a smaller, "unleaded" sized nozzle on a pump dispensing leaded gasoline.

V. ADMINISTRATIVE PENALTY PROFILE

The attached chart shows the administrative penalty profile for both MOD and FOSD. MOD had 2 cases resolved with a penalty in FY 1988. FOSD resolved 235 cases, all with penalties except for one against a federal facility for which civil penalties are not authorized.

The two MOD settlements totalled \$208,000. One of the cases involved a production misbuild in which the manufacturer also agreed to recall some 100,000 vehicles at an estimated cost of \$5.3 million. The 235 FOSD penalties totalled \$2,493,292. The highest penalty was \$1,175,000 against a refiner under the lead phasedown program. The smallest was \$50 for a nozzle violation after consideration of a financial hardship claim.

FOSD continues to make use of alternate payments to support public information programs. In addition to the penalties referenced above, another \$1,903,927 was expended in such endeavors. This would include having public service announcements related to tampering or fuel-switching (using leaded gas in unleaded vehicles) shown on television, sponsoring mechanic training courses on emission control devices, publication of newspaper ads, and a variety of other projects.

FY 1988 PENALTIES
OFFICE OF MOBILE SOURCES

I. Judicial Penalties

<u>Number of Cases with Penalty</u>	<u>Number of Cases No Penalty</u>	<u>Total Cases</u>	<u>% With Penalty</u>	<u>\$ Average Penalty</u>	<u>\$ Average All Concluded Cases</u>	<u>\$ Median Penalty</u>	<u>\$ Median All Concluded Cases</u>	<u>\$ Total Penalties</u>	<u>\$ Highest Penalty</u>	<u>\$ Lowest Penalty</u>
1	0	1	100	10,000	10,000	10,000	10,000	10,000	10,000	10,000

II. Administrative Penalties

<u>Number of Cases with Penalty</u>	<u>Number of Cases No Penalty</u>	<u>Total Cases</u>	<u>% With Penalty</u>	<u>\$ Average Penalty</u>	<u>\$ Average All Concluded Cases</u>	<u>\$ Median Penalty</u>	<u>\$ Median All Concluded Cases</u>	<u>\$ Total ** Penalties</u>	<u>\$ Highest Penalty</u>	<u>\$ Lowest Penalty</u>
236	1*	237	100	11,217	11,170	500	500	2,647,293	1,175,000	50

- * Single case without a penalty was against a federal facility against whom penalties are not authorized.
 ** Total penalties does not include \$1,903,927 expended in alternative projects, such as publishing ads, sponsoring courses, etc.

F-6

NOTES



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

APR 8 1989

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: RCRA Civil Administrative and Judicial Penalty
Practices Report for FY88

FROM: Bruce M. Diamond, Director 
Office of Waste Programs Enforcement

TO: Gerald A. Bryan, Director
Office of Compliance Analysis and Program Operations

Attached is the RCRA Civil Administrative and Judicial Penalty data and accompanying analyses for cases concluded in FY88. As you requested we have utilized the data and textual reporting formats as per earlier reports.

The Civil Administrative penalty data and associated text are based on signed and dated enforcement actions sent to OWPE (HQ) from our Regional offices. As you may know our Regional enforcement offices are constantly afforded the opportunity to quality assure the completeness of this data by means of cumulative monthly (and end of fiscal year) enforcement reports. I want to acknowledge the efforts and attention that our Regional offices have exercised in ensuring that copies of all issued enforcement actions have been sent to OWPE (HQ) in a timely fashion for use in projects such as this.

Also, in addition to the Administrative penalty information provided by OWPE, you will also find attached data and text on FY88 Civil Judicial penalties; this latter information has been furnished by the Office of Enforcement and Compliance Monitoring and is included verbatim, in its entirety, as part of the accompanying attachment. Any comments on the Overview Report will be sent directly, per request, to George Alderson of your staff by COB, April 3, 1989.

If you have any questions on the administrative penalty data, please feel free to call Bob Small of my staff at (FTS) 475-9375.

Attachments

cc: Glenn Unterberger, (OECM)

I. Use of Administrative Penalties

One hundred fifty five (155) administrative actions are currently recorded as having been concluded under the Federal RCRA program during FY88¹. Of these, 90% (N=140) are recorded as having been concluded with a penalty. This is slightly higher than the 88% seen in the last Federal Penalty Report covering combined fiscal years 1986 and 1987. Both median and average final penalty dollars appear to have increased in FY88 over that of the prior two fiscal years, but there is no outstanding administrative penalty recorded for FY88.

Introduction

A brief statement on the quality control measures employed for this section may be helpful, prior to presenting the analyses derived from the original data.

Each month (and at the end of each fiscal year) all Regions are sent exhaustive, cumulative summary reports (RAATS Reports) that list all administrative enforcement actions received by Headquarters, from the Regions, in signed and dated hardcopy. Regional RCRA enforcement personnel are requested (each month, and at the end of each fiscal year) to ensure that HQ has copies of all administrative actions issued by them. For this section it should be understood that all administrative penalty analyses contained herein are based on (and dependent on) hardcopy input of the signed and dated administrative enforcement actions referenced above.

Furthermore, the specific subject area of this section is that subset of FY88 administrative actions - primarily consent agreements/final orders (CAFO's) - that usually consummate 3008(a) complaints and result in final penalties. Where ALJ decisions have resulted in a decision relative to penalties these also are included in Regional statistics. Civil judicial penalties (i.e., penalties specified in consent decrees, litigated cases) are considered in the following section; which has been provided by the Office of Enforcement and Compliance Monitoring.

¹ The 155 Federal administrative actions reference consent agreement/final orders (CAFO's) issued pursuant to 3008(a) of RCRA or relevant ALJ decisions. A complete listing of these and other types of administrative enforcement actions can be found in the RCRA Administrative Action Tracking System (RAATS) FY88 summary report.

Data & Analyses

The highest RCRA administrative penalty recorded for FY88 was \$150,000 imposed by Region IV; there were however, several other final penalty assessments from other Regions below this amount, but which were themselves, in excess of \$100,000.

There is a current total of \$2,460,653 recorded as having been assessed as final RCRA administrative penalties during FY88; for the prior fiscal year (1987) \$1,868,004 was recorded - an increase of \$592,649. These FY88 total dollars, although greater than that in FY-87, are considerably below the \$4,185,871 recorded for FY-86. In context, however, it should be noted that one (1) case in the FY86 total was itself in excess of \$2,000,000.

The average final administrative penalty recorded for FY88 was \$17,576 (zero, waived, dismissed penalties, etc., excluded) and \$15,875 with such actions averaged into the totals. The final penalty averages (with zero, waived, dismissed penalties, etc., excluded) for FY-86 and FY-87 were \$14,565 and \$13,635 respectively (it should be noted that the FY-86 average of \$14,565 excluded the unusually large penalty - in excess of \$2,000,000 referenced earlier - otherwise that average would be unrealistic (i.e., highly skewed)).

The median penalty for FY88 (zero, waived penalties, etc., excluded) was approximately \$9,440 (table 1); similar medians recorded for FY-86 and FY-87 were approximately \$7,350 and \$7,550 respectively.

Table 2 and figure 1 display the frequency distribution of RCRA FY88 final administrative penalties. This is the same distribution pattern as seen in FY-86 and FY-87 data i.e., the majority of non-zero final administrative penalties are found in those dollar ranges up to \$50,000 after which there is a sharp decline in the number of cases finalized in higher penalty ranges.

Although admittedly speculative in nature it seems not unreasonable to suggest that larger penalties are usually - for various reasons - associated with a judicial rather than administrative process; there are, however, usually far greater numbers of administrative rather than judicial cases.

Comparisons of Regional Use and Levels of Administrative Penalties

Total regional (administrative) penalty dollars for FY88 - and allied statistics - are displayed in Table 3. Region V is recorded as having the highest administrative penalty total; it is followed in decreasing order of total dollars by Region I, VII, VI, and IV; the remaining regional totals are listed in Table 3. Viewed as rounded percents of total FY88 administrative penalty dollars some (figure 3) of the more prominent regional percentages are: V (26%); I (16%); VII (15%); VI (12%); IV (8%). Regions V and I, considered together, accounted for 42% of the total recorded administrative penalty dollars. Region IV, however, had the highest single administrative penalty recorded for FY88 (\$150,000).

In addition to final penalty dollars, the number of final administrative actions associated with these dollars, should also be noted (figure 3). In this context it appears that in some Regions there may be fewer numbers of final actions - but these actions are associated with a larger average final assessment. In other Regions there may be a much greater number of cases handled, but these actions may be settled for somewhat lower penalty amounts. Also, of general interest was the percentage of total administrative cases across all the Regions that involved the imposition of a penalty; approximately 90% of all the final actions examined involved a penalty - although as already noted - the magnitude of regional penalty amounts do vary (greatly) as do the number of case processed.

In an allied area, there was also considerable variation seen in regional median penalties (Table 1; figure 2). Caution is advised, however, when interpreting some of this regional data, especially where the sample size (number of cases) under consideration is small.

TABLE 1

RCRA PROGRAMFY88 RCRA CIVIL ADMINISTRATIVE PENALTIES^{A/}

<u>\$ Total</u>	<u>NO. OF B/ CASES WITH PENALTY</u>	<u>NO. OF C/ CASES NO. PENALTY</u>	<u>TOTAL CASES</u>	<u>% OF CASES WITH PENALTY</u>	<u>AVERAGE D/ PENALTY</u>	<u>AVERAGE E/ ALL CONCL. CASES</u>	<u>MEDIAN F/ PENALTY</u>	<u>MEDIAN: G/ ALL CONCL. CASES</u>	<u>RANGE M/ LOWEST HIGHEST</u>
2,460,653	140	15	155	90%	17,576	15,875	9,440	7,667	1,000 150,000

TABLE 2

Number and Distribution of Civil Administrative Penalties B/

Number of Penalties 50	Number of Penalties < = \$5,000	Number of Penalties < \$10,000	Number of Penalties < \$25,000	Number of Penalties < \$50,000	Number of Penalties < 100,000	Number of Penalties < 1 million	Number of Penalties = 1 million >	Total
15	43	31	35	18	7	3	---	152

TABLE 3

FY88 RCRA CIVIL ADMINISTRATIVE PENALTIES^{A/}FY88 Federal Penalty Report
Data Analyses

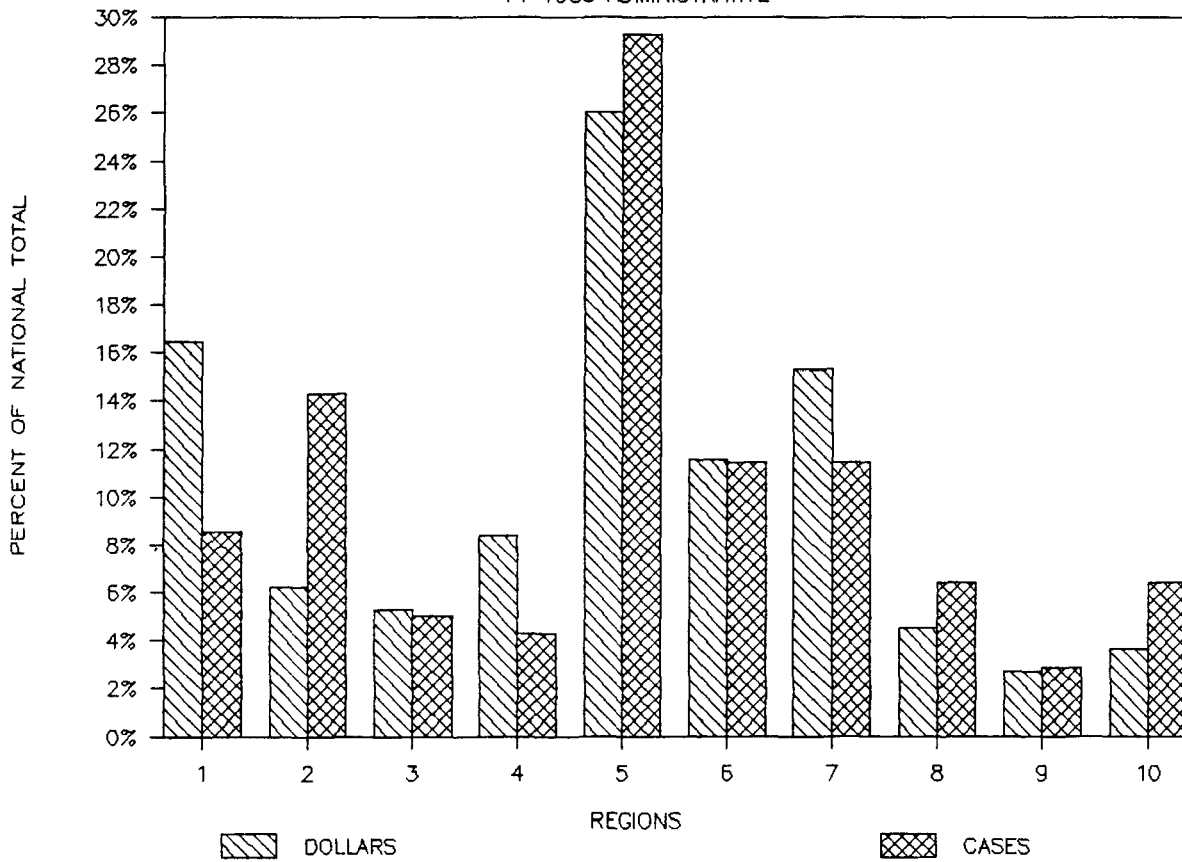
III. Regional Analysis (for FY88)

Region	Total Dollars	Number of Cases with Penalty	Number of Cases w/o Penalty	Total Cases	% Total with Penalty	Average Penalty	Average for all Concluded Cases	Median Penalty	Median for all Concluded Cases	Highest Administrative Penalty
I	405,289	12	0	12	100	33,774	33,774	20,992	20,992	90,000
II	152,447	20	0	20	100	7,622	7,662	5,324	5,324	23,000
III	130,000	7	0	7	100	18,571	18,571	14,750	14,750	48,000
IV	206,800	6	2	8	75	34,466	25,850	11,000	8,500	150,000
V	640,445	41	6	47	87	15,620	13,626	12,500	8,520	60,000
VI	283,225	16	2	18	88	17,701	15,734	8,500	6,250	109,600
VII	376,297	16	4	20	80	23,518	18,814	8,812	5,250	130,560
VIII	110,800	9	0	9	100	12,311	12,311	7,500	7,500	26,000
IX	66,000	4	1	5	80	16,500	13,200	13,000	8,000	35,000
X	89,350	9	0	9	100	9,928	9,928	4,375	4,375	55,000
Totals:	2,460,653	140	15	155	90%	17,576	15,875	9,440	7,667	150,000

Figure 3

REGIONAL DISTRIBUTION RCRA PENALTIES

FY 1988 ADMINISTRATIVE



II. Judicial Penalty Profile

RCRA civil penalties ranged from no penalty to \$1,100,00. The penalties imposed under civil judicial penalty authority in FY88 under the RCRA program are:

Fiscal Year	Region	Case	Penalty
88	1	Stanley Plating	\$230,000
88	1	Susan Bates	\$197,000
88	1	Plainville Electroply	\$230,000
88	2	Dupont	\$ 25,000
88	2	Proteco	\$850,000
88	4	Jim Walter Resources	\$110,000
88	5	Ashland Chemical	\$ 78,000
88	5	Buckeye Products	\$ 82,000
88	5	Du-Wel Hartford	\$ 30,066
88	5	Hull Pottery	\$ 18,000
88	5	Keystone	\$280,000
88	5	Northland Products	\$ 9,500
88	5	Avesta	\$175,000
88	6	BFI-CECOS	\$1,100.000
88	8	American Ecological	\$ 15,715
88	8	Wycoming Refining	\$ 25,000
88	9	IT Corporation	\$260,000
88	9	Quemetco Industries	\$ 60,000

There was also one CERCLA penalty.

The Inmar case in Region II brought a penalty of \$315,000.

Comparison of Regions

Total regional judicial penalty dollars for FY88 are displayed in Tables 1, 2, 3. Region VI is recorded as having the highest judicial penalty total; it is followed in decreasing order of total dollars by Region II, V, I, IX, IV, and VIII. Region VI had the highest single judicial penalty recorded for FY88 (\$1,100.000).

Use of Penalties

Twenty-two (22) judicial actions are currently recorded as having been concluded under the Federal RCRA program during FY88. Of the 22 judicial actions, 18 are recorded as being concluded the seven (7) seen in the last Federal Penalty Practice Report penalties combined fiscal years 1986 and 1987. Generally, penalties have been high this year with an outstanding penalty recorded at \$1,100,000.

TABLE 4

RCRA PROGRAM

FY88 3008(A) CIVIL JUDICIAL ADMINISTRATIVE PENALTIES

\$ TOTAL	NO. OF CASES WITH PENALTY	NO. OF CASES W/O PENALTY	TOTAL CASES	% OF CASES WITH PENALTY	AVERAGE PENALTY	AVERAGE ALL CONCL. CASES	MEDIAN PENALTY	MEDIAN ALL CONCL. CASES	LOWEST	HIGHEST
3,776,239	18	4	22	82%	209,791	171,647	96,479	69,000	40,715	1,100,000

TABLE 5

RCRA PROGRAM

NUMBER AND DISTRIBUTION OF CIVIL JUDICIAL ADMINISTRATIVE PENALTIES

NUMBER OF PENALTIES \$0	NUMBER OF PENALTIES <= \$5,000	NUMBER OF PENALTIES < \$10,000	NUMBER OF PENALTIES < \$25,000	NUMBER OF PENALTIES < \$50,000	NUMBER OF PENALTIES < \$100,000	NUMBER OF PENALTIES < 1 MILL	NUMBER OF PENALTIES >OR = 1 MILL	TOTAL
4	0	1	2	3	3	8	1	22

TABLE 6
FY 1988 CIVIL JUDICIAL PENALTIES

REGIONAL ANALYSIS

REGION	\$ TOTAL	NO. OF CASES WITH PENALTY	NO. OF CASES W/O PENALTY	TOTAL CASES	% OF CASES WITH PENALTY	AVERAGE PENALTY	AVERAGE ALL CONCL. CASES	MEDIAN PENALTY	MEDIAN ALL CONCL. CASES	HIGHEST
I	657,000	3	0	3	100%	219,000	219,000	230,000	230,000	230,000
II	875,000	2	0	2	100%	437,500	437,500	437,500	437,500	850,000
III	NONE									
IV	110,000	1	0	1	100%	110,000	110,000	110,000	110,000	110,000
V	673,524	7	4	11	63%	96,218	61,229	78,000	18,000	280,000
VI	1,100,000	1	0	1	100%	1,100,000	1,100,000	1,100,000	1,100,000	1,100,000
VII	NONE									
VIII	40,715	2	0	2	100%	20,358	20,358	20,358	20,358	25,000
IX	320,000	2	0	2	100%	160,000	160,000	160,000	160,000	260,000
X	NONE									
TOTAL	3,776,239	18	4	22	82%	209,791	171,647	96,479	69,000	1,100,000



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, DC 20460

OFFICE OF
PESTICIDES AND
TOXIC SUBSTANCES

JAN - 3 1989

MEMORANDUM

SUBJECT: FIFRA/TSCA FY 88 Penalty Report

FROM: A. E. Conroy II, Director
Office of Compliance Monitoring

Frederick F. Stiehl
Associate Enforcement Counsel
Pesticides and Toxic Substances
Enforcement Division

TO: Gerald A. Bryan, Director
Office of Compliance Analysis
and Program Operations

Per discussions between Tony Ellis of OCM's staff and George Alderson of your staff, we are filing our portion of the FY 88 Penalty Report subsequent to the December 1, 1988, date agreed upon by our respective staff members.

If you have any questions about the contents of this report, feel free to contact Mr. Jerry Stubbs (382-7835) or Mr. Mike Walker (475-8690) of our respective staff.

Attachments

TSCA/FIFRA: Use and Levels of Penalties

o Program Description

o Toxic Substances Control Act (TSCA)

The TSCA of 1976 authorized civil administrative penalties. Judicial civil actions are limited to injunctive relief, seizures and collection actions and so are not included in this report. The administrative authority allows penalties up to a maximum of \$25,000 per day per violation.

TSCA lists several statutory factors which must be considered by EPA in developing the penalty, including nature, circumstances, extent and gravity of the violation. TSCA also lists the ability of a violator to pay, the impact of a penalty on the violator's ability to continue in business, his culpability, past compliance history as well as such other factors as justice may require. TSCA permits the compromise, modification or remittance of a penalty with or without conditions.

In addition to the basic penalty, the Office of Pesticides and Toxic Substances (OPTS) also has developed specific penalty policies for each regulation, these include: policies regarding violations of PCB's, dioxin, and asbestos-in-schools (all pursuant to Section 6 of the Act), as well as Section 4 (Test Rules), Section 5 (Premanufacture Notification), and Sections 8, 12, and 13 (Reporting and Recordkeeping Information).

In FY 1988, the asbestos program underwent a transition from the Asbestos-In-Schools Rule (AIS) to the Asbestos Hazard Emergency Response Act (AHERA). Pursuant to section 207 of AHERA, EPA can assess civil penalties up to \$5,000 per day per violation against Local Education Authorities (LEA's). Under TSCA title I, as amended by section 3(b) of AHERA, EPA may utilize all enforcement remedies provided under title I against "other persons" who violate the provisions of AHERA and its regulations (e.g., persons who design or conduct response actions that are not accredited to perform air monitoring or do not follow test protocols), including civil penalties of up to \$25,000 per day. Most of the AHERA regulations did not become effective until October 12, 1988.

- o Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)

The 1972 FIFRA amendments authorized civil administrative penalties for violations, and judicial civil actions for injunctive relief, seizures, and for noncompliance with a final order.

The civil administrative penalty authority allows penalties up to a maximum of \$5,000 per offense for registrants, commercial applicators, wholesalers, dealers, retailers, or other distributors. Penalties up to a maximum of \$1,000 can be assessed against private applicators following a prior citation for a violation or written warning from the Administrator. Private, "for hire" applicators may be fined \$500 for the first offense and \$1,000 for subsequent offenses.

FIFRA lists several "factors" for consideration in the development of the penalty, including size of the violator's business, the penalty's impact on his ability to continue in business and the gravity of the violation.

OPTS's basic guidelines and procedures for assessing civil penalties under FIFRA were first published in 1974 and have been periodically amended. Its main feature is an assessment schedule matrix whose individual cells contain a penalty based upon the gravity of the violation and the size of the business.

- o Statutory Changes to Penalty Authorities: None

- o Possible Influences on the Use and Levels of Penalties

- o FIFRA: No new influences.

- o TSCA: On August 5, 1988, Office of Compliance Monitoring issued a final enforcement response policy for Section 5 of TSCA. This policy will influence the size of penalties for certain categories of violators. For instance, in the past, manufacturers who produced and used (processed) illegal chemical substances were assessed two separate per day violations for each of these acts. Under the new penalty policy "production and use" are consolidated into one violation for a chemical producer. Additionally, the new \$5 penalty policy is more "risk" oriented. It penalizes violators of chemical substances that are of less toxic concern to the Agency at lower monetary rates.

On January 1, 1988, OPTS issued an "Interim Final Enforcement Response Policy for Violations of the Immediately Enforceable Provisions of AHERA". This policy (and subsequent final policy) will influence the size of penalties in the asbestos program since (1) it includes a new category of violators, "other persons" who can be fined up to \$25,000 per day per violation; (2) it includes a broader range of violations for LEA's than did the AIS penalty policy; and (3) it includes a maximum \$5,000 penalty per violation per school for an LEA whereas the AIS penalty policy fined schools a maximum \$13,000 penalty per violation per school for the LEA. This interim policy was modified on September 2, 1988 to encourage the regions to hold the issuance of civil penalties to LEA's until the final Enforcement Response Policy for AHERA is issued. However it advises the regions to continue issuing complaints to "other persons".

- o Average Penalties Collected: In 1988 the average penalty collected increased slightly (\$719) from the previous year, i.e., the difference between \$8615 in 1988 and \$7896 in 1987. The majority of the cases settled were equal to or under \$5,000 (445 out of 604) and continues to be as a result of the small penalty cases for the asbestos-in-schools program. Forty five per cent of the cases closed in FY 1988 (270 out of 604) were asbestos-in-schools cases. These asbestos cases however, represented only 5% of the total penalties collected under TSCA (\$236,988 out of \$5,126,057).
- o Use of Penalties
 - o FIFRA: In FY 1988, there were 215 Federal administrative cases which were closed. Of these cases, 185 or 86% were settled with a monetary payment made by the respondent.
 - o TSCA: Under this statute there were 604 administrative cases which were closed in FY 1988. Ninety nine per cent of these cases or 595 were settled with a monetary penalty.
- o Judicial Penalty Profile
 - o EPA did not file any cases in District Court under TSCA or FIFRA during 1988 seeking the imposition of civil penalties.

- o There are no provisions in either TSCA or FIFRA for the imposition of civil penalties by District Court Judges. All penalties must be administratively assessed.
- o Administrative Penalty Profile
 - o Highest Penalties FIFRA: The highest Federal administrative penalties imposed in FY 1988 were at Headquarters for \$27,720 and \$12,600 respectively. Both of these cases involved respondents who failed to maintain underlying data in support of some of their pesticide registrations.
 - o Highest Penalties TSCA: The highest Federal penalties in FY 1988 were \$1,281,950 and \$500,000 both collected by Headquarters. The former penalty collection was the largest collected by the Agency for a \$5 related violation. The latter penalty was for violations of the PCB rule.
 - o Typical Penalties FIFRA: The average penalty for FY 1988 was \$1,716. The median penalty was \$1,200. Because the majority of the Federal pesticide actions are taken under \$7 of FIFRA (a violation which incurs a maximum penalty of \$3,200) most of the cases concluded, 172 out of 215, were settled for equal to or less than \$5,000.
 - o Typical Penalties TSCA: The average penalty for FY 1988 was \$8,615. During this time the median penalty was \$1,500. As explained earlier, these figures reflect the small penalty collections from the asbestos-in-schools program.
- o Comparisons of Regional Use and Levels of Penalties
 - o FIFRA: Differences in use and levels of penalties can be primarily attributed to differences in types of violations and violators. Region VII and VIII have a greater mix of cases because they still maintain primacy in Nebraska and Colorado while Headquarters takes cases of first impression or national significance. Other regions' caseload mix varies depending upon the amount of referrals under \$26 and \$27 from states operating under Federal grants. Differences in the use of penalties also arise under the \$7 program because some regions focus their enforcement in this area more than others do and/or they have a higher violation rate.
 - o TSCA: Significant differences in use and levels of penalties arise because of the various types of violations and

violators among regions and headquarters. TSCA §§5 and 8 cases, many of which account for proportionally larger penalties than other TSCA violations, were done in FY 1988 by Regions II, III, V and headquarters. Also, the level of penalties is influenced by a region's use of "settlement with conditions", a practice which can result in the reduction or remittance of a penalty in conjunction with environmental enhancements such as self-audits, special training and outreach programs.

FY 1988 Federal Penalty Report for TSCA
Data Analyses

I. Judicial Penalties*

<u>FY</u>	<u>Total Dollars</u>	<u>Number of Cases with Penalty</u>	<u>Number of Cases w/o Penalty</u>	<u>Total Cases</u>	<u>Average Penalty</u>	<u>Average for all concluded Cases</u>	<u>Median Penalty</u>	<u>Median for all concluded Cases</u>
88	None	None	None	None	None	None	None	None

II. Administrative Penalties

<u>FY</u>	<u>Total Dollars</u>	<u>Number of Cases with Penalty</u>	<u>Number of Cases w/o Penalty</u>	<u>Total Cases</u>	<u>Average Penalty</u>	<u>Average for all concluded Cases</u>	<u>Median Penalty</u>	<u>Median for all concluded Cases</u>
88	\$5,126,057	595	9	604	\$8,615	\$8,487	\$1,500	\$1,500

* Civil penalties can not be sought in judicial actions under TSCA, with the exception of actions to collect civil penalties that were administratively imposed but not paid to the U.S. Treasury. In FY 88, seven cases were referred to collect civil penalties. For example, in U.S. vs. Holloway Oil N.D. NJ, the Court ordered Holloway to pay the assessed civil penalty of \$26,000.

FY 1988 Federal Penalty Report for TSCA
Data Analyses

III. Regional Analysis (FY 88)

<u>Region</u>	<u>Total Dollars</u>	<u>Number of Cases with Penalty</u>	<u>Number of Cases w/o Penalty</u>	<u>Total Cases</u>	<u>% Total with Penalty</u>	<u>Average Penalty</u>	<u>Average for all concluded Cases</u>	<u>Median Penalty</u>	<u>Median for all concluded Cases</u>
I	\$ 467,439	24	0	24	100%	\$ 19,477	\$ 19,477	\$ 9,000	\$ 9,000
II	\$ 730,205	108	3	111	97%	\$ 6,761	\$ 6,578	\$ 3,225	\$ 3,075
III	\$ 311,416	32	0	32	100%	\$ 9,732	\$ 9,732	\$ 5,600	\$ 5,600
IV ^{1/}	\$ 201,585	29	1	30	97%	\$ 6,951	\$ 6,720	\$ 2,948	\$ 2,895
V	\$ 448,027	119	1	120	99%	\$ 3,765	\$ 3,734	\$ 1,400	\$ 1,300
VI	\$ 109,100	42	1	43	98%	\$ 2,598	\$ 2,537	\$ 750	\$ 725
VII	\$ 81,075	51	1	52	98%	\$ 1,590	\$ 1,559	\$ 200	\$ 200
VIII	\$ 196,880	112	0	112	100%	\$ 1,758	\$ 1,758	\$ 500	\$ 500
IX	\$ 254,130	38	1	39	97%	\$ 6,688	\$ 6,516	\$ 4,250	\$ 4,125
X	\$ 248,435	32	1	33	97%	\$ 7,764	\$ 7,528	\$ 1,105	\$ 1,103
HQ	\$ 2,077,765	8	0	8	100%	\$ 259,721	\$ 259,721	\$ 67,025	\$ 67,025
TOTALS	\$ 5,126,057	595	9	604	99%	\$ 8,615	\$ 8,487	\$ 1,500	\$ 1,500

^{1/} With respect to Region IV there could be up to an additional \$116,000 and 59 cases that were not in the national reporting system at the time this report was prepared.

FY 1988 Federal Penalty Report for TSCA
Data Analyses

IV. Distribution of size of penalties

FY	Number of Penalties		Number of Penalties*		Number of Penalties*		Number of Penalties*		Number of Penalties*		Total Cases
	\$0	< or = \$5,000	< \$10,000	< \$25,000	< \$50,000	< \$100,000	<1 million	> or = 1 million			
88	9	445	53	70	15	9	2	1	604		

* Number of penalties which are larger than the previous range and less than the number stated.
For example, the number of penalties equal to or greater than \$10,000 and less than \$25,000.

FY 1988 Federal Penalty Report for FIFRA
Data Analyses

I. Judicial Penalties*

<u>FY</u>	<u>Total Dollars</u>	<u>Number of Cases with Penalty</u>	<u>Number of Cases w/o Penalty</u>	<u>Total Cases</u>	<u>Average Penalty</u>	<u>Average for all concluded Cases</u>	<u>Median Penalty</u>	<u>Median for all concluded Cases</u>
88	None	None	None	None	None	None	None	None

II. Administrative Penalties

<u>FY</u>	<u>Total Dollars</u>	<u>Number of Cases with Penalty</u>	<u>Number of Cases w/o Penalty</u>	<u>Total Cases</u>	<u>Average Penalty</u>	<u>Average for all concluded Cases</u>	<u>Median Penalty</u>	<u>Median for all concluded Cases</u>
88	\$317,494	185	30	215	\$1,716	\$1,477	\$1,200	\$ 600

* Civil penalty sanctions can not be sought in judicial actions under FIFRA. EPA referred seven cases to the Department of Justice in FY 88 to collect civil penalties that had been administratively imposed but not paid into the U.S. Treasury.

FY 1988 Federal Penalty Report for FIFRA
Data Analyses

III. Regional Analysis (FY 88)

<u>Region</u>	<u>Total Dollars</u>	<u>Number of Cases with Penalty</u>	<u>Number of Cases w/o Penalty</u>	<u>Total Cases</u>	<u>% Total with Penalty</u>	<u>Average Penalty</u>	<u>Average for all concluded Cases</u>	<u>Median Penalty</u>	<u>Median for all concluded Cases</u>
I	\$ 19,600	2	0	2	100%	\$ 9,800	\$ 9,800	\$ 9,800	\$ 9,800
II	\$ 17,860	13	4	17	76%	\$ 1,374	\$ 1,051	\$ 1,600	\$ 825
III	\$ 32,800	15	0	15	100%	\$ 2,187	\$ 2,187	\$ 1,870	\$ 1,870
IV	\$ 5,650	6	2	8	75%	\$ 942	\$ 706	\$ 1,000	\$ 280
V	\$ 16,720	10	1	11	91%	\$ 1,672	\$ 1,520	\$ 1,125	\$ 900
VI	\$ 47,916	54	16	70	77%	\$ 887	\$ 685	\$ 800	\$ 480
VII	\$ 38,992	44	5	49	90%	\$ 886	\$ 796	\$ 325	\$ 250
VIII	\$ 17,764	12	0	12	100%	\$ 1,480	\$ 1,480	\$ 750	\$ 750
IX	\$ 49,572	22	1	23	96%	\$ 2,253	\$ 2,155	\$ 1,960	\$ 1,710
X	\$ 3,000	1	0	1	100%	\$ 3,000	\$ 3,000	\$ 3,000	\$ 3,000
HQ	\$ 67,620	6	1	7	86%	\$ 11,270	\$ 9,660	\$ 8,150	\$ 6,300
TOTALS	\$ 317,494	185	30	215	86%	\$ 1,716	\$ 1,477	\$ 1,200	\$ 600