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## Report of Audit E1G8E9-05-0087-9100485

Capping Report on The  
Computation, Negotiation,  
Mitigation, and Assessment  
of Penalties Under EPA Programs

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

SEP 27 1989

OFFICE OF  
THE INSPECTOR GENERAL

**MEMORANDUM**

**Subject:** Audit Report No. E1G8E9-05-0087-9100485  
Capping Report on the Computation, Negotiation,  
Mitigation, and Assessment of Penalties Under EPA  
Programs

**FROM:** Ernest E. Bradley III *Ernest E. Bradley III*  
Assistant Inspector General for Audit

**TO:** Edward E. Reich  
Acting Assistant Administrator for Enforcement  
and Compliance Monitoring

**SCOPE AND OBJECTIVES**

We have prepared a "capping" report summarizing previously issued audit reports regarding the computation, negotiation, mitigation, and assessment of penalties under EPA programs. This "capping" report primarily covers the Clean Air Act (CAA), the Clean Water Act (CWA), and the Resource Conservation and Recovery Act (RCRA). The report was prepared to apprise senior EPA management of the recurring problems identified in our individual regional audit reports, and to recommend action or policy changes at the Headquarters level to alleviate similar problems in the future. The objectives of our reviews were to report on:

1. Whether sufficient controls have been established over the computation, negotiation, mitigation, and assessment of penalties in EPA programs.
2. Whether the regions are operating within these established controls.

In developing our findings and recommendations, we used and relied on prior audit results contained in the issued audit reports listed below. Some of these report results are also discussed in this "capping" report. The audit results pertain to (1) violations of media specific programs and (2) the computation, negotiation, mitigation, and assessment of penalties. We used this data in conjunction with our field work to help develop our findings. Appropriate issues contained in the reports are summarized in Exhibit 1.

Office of Mobile Sources' Establishment,  
Mitigation, and Collection of Penalties  
(E1G16-05-0058-61560), September 1986

Region 5's Stationary Sources of Air Pollution  
Compliance and Enforcement Program  
(E1K67-05-0449-80743), March 1988

Consolidated Report on EPA's Administration  
of the Asbestos National Emission Standard  
for Hazardous Air Pollutants (NESHAP)  
(E1GM7-05-0571-80821), March 1988

Non-Community Water System Program  
(E1HW7-03-0171-81928), September 1988

Region 5's National Pollutant Discharge  
Elimination System Permit Enforcement Program  
(E1H2D8-05-0293-9100164), January 1989

Report of Region 4's National Pollutant  
Discharge Elimination System Permit  
Enforcement Program  
(E1HWD8-04-0207-9100462), September 1989

Report on National Pollutant Discharge Elimination  
System Permit Enforcement Program in Region 2  
(E1HW8-02-0133-9100476), September 1989

Report of Region 9's Administration of the  
State of Hawaii's Grant Programs for Fiscal  
Years 1986 through 1988  
(E1F58-09-0184-9100446), August 1989

Consolidated Report on Review of EPA's  
Controls Over Administrative Penalties Under  
the RCRA Enforcement Program  
(E1G68-09-0188-9100479), September 1989

GAO Report--Hazardous Waste...Many  
Enforcement Actions Do Not Meet EPA  
Standards (GAO/RCED-88-140), June 1988

GAO Report--Inland Oil Spills...Stronger Regulation and  
Enforcement Needed to Avoid Future Incidents  
(GAO/RCED-89-65), February 1989

The audits listed above and summarized in this report were issued  
by our audit office and the U.S. General Accounting Office and  
were performed in accordance with the Standards for Audit of  
Governmental Organizations, Programs, Activities and Functions

issued by the Comptroller General of the United States. This "capping" report represents a summarization of the findings contained in these reports.

The cases covered in our issued reports were judgmentally selected from various media program universes. We tended to select large dollar amount cases for further evaluation. Thus, statistical projections cannot be made of the remaining cases in the universe. However, while our findings cannot be statistically inferred to the larger universe of all penalty cases, our samples were sufficient to satisfy our audit objectives.

Our review also covered penalty assessment activities for a number of closed cases from the Clean Air and Clean Water programs in Regions 6, 7, and 9. Penalties for these cases were initiated and negotiated during FY 1986 through FY 1988. We did not issue reports on these reviews, but did discuss the details with appropriate regional officials.

We performed the review in accordance with the Government Auditing Standards issued by the Comptroller General of the United States (1988 revision). Fieldwork was conducted from September 24, 1988 through July 13, 1989. We reviewed reports, policies and procedures, regional files, and held discussions with regional and Headquarters enforcement officials to determine the extent of guidance, training, and supervision provided over the negotiation process.

Some of the major internal controls in place relative to the setting and negotiation of civil judicial and administrative penalties under the media programs include:

1. Uniform Civil Penalty Policy (February 1984).
2. Agencywide Compliance and Enforcement Strategy and Strategy Framework for EPA Compliance Programs (May 1984).
3. RCRA Civil Penalty Policy (May 1984)
4. CAA Civil Penalty Policy (September 1984, Revised March 1987)
5. CWA Civil Penalty Policy (February 1986)
6. Quick Look Reports.

Our review did not include an evaluation of the internal controls associated with the input and processing of information into automated records systems, although we did use information contained in these records.

Significant instances of noncompliance with applicable Agency policies and procedures were detailed in the issued reports and some examples are included in this report. No other issues came to our attention which were significant enough to warrant expanding the scope of our review.

The Office of Enforcement and Compliance Monitoring (OECM) and the Office of Policy, Planning, and Evaluation (OPPE) comments and actions taken or planned in response to our findings are discussed in the body of this report. Also, their formal comments dated August 31 and September 1, 1989, to our draft report are attached as appendices to this report. Their actions, if properly implemented, will substantially correct the deficiencies found during our review. We are recommending that the OECM Acting Assistant Administrator ensure that the planned corrective actions are completed.

### SUMMARY OF FINDINGS

The Agency needs to take more assertive actions to fully meet the Administrator's goals. These actions include (1) the computation and recovery of economic benefits which violators receive from not complying with EPA's regulations; (2) fully documenting the rationale for reducing calculated penalties; (3) increased reporting and oversight of states' enforcement actions; and (4) inserting penalty results of concluded cases in EPA's Strategic Planning and Management System.

EPA Administrators have continually advocated a position of strong enforcement of EPA regulations. In the 1987 Agency Guidance Document, the Administrator stated: "My goal is to ensure a strong enforcement presence in all our Agency programs. It is extremely important that we maintain a vigorous enforcement and compliance program which is fully integrated into each media program and which addresses localized environmental problems." In 1988 he further stated: "We will enforce environmental laws vigorously, consistently, and equitably to achieve the greatest possible environmental results."

In February 1989 Administrator Reilly set Agency goals to "vigorously" enforce air, water, and waste-disposal laws. Polluters, he stated, "are not going to get away with it" and has pledged to seek stiffer fines. He believes that the heart of the integrity of EPA is vigorous and energetic enforcement. Enforcement, he feels, will help EPA to do the job in the short run that is expected of it by the statutes it administers. Enforcement will also improve the climate for voluntary compliance if people know that EPA means business as enforcers.

1. EPA Needs To Fully Comply With Its Enforcement Penalty Policy

Appropriate penalties were either not calculated and assessed at all, or inadequately calculated. Also, calculated penalties were reduced during negotiations, in some cases in excess of 90 percent and amounting to millions of dollars, with little or no documentation to support the reductions. In many cases the financial benefits the violators received from delayed or avoided costs were not recovered.

Inadequate calculation of penalties and insufficient documentation to support penalty reductions greatly raises the potential for fraud or abuse in EPA's penalty program. Also, GAO's standards for internal control systems, which require that all transactions and events be clearly documented and the documentation available and easily accessible for examination, were not met. In addition, the Agency did not obtain maximum deterrence and fair and equitable treatment of the regulated community in all cases. These violators may have gained an economic and competitive advantage over those who complied with the Agency's regulations.

Generally, the above condition exists because of a lack of attention by Agency personnel to fully complying with the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), or the Clean Air Act (CAA) civil penalty policies in all cases. For example:

- A prime contractor and subcontractor were cited for failure to (a) provide notification of intent to remove asbestos-containing material, (b) wet asbestos-containing material prior to removal, and (c) store asbestos-containing material in sealed, labeled, leak-tight containers (the material was dumped into an open-bodied truck). However, a penalty was not computed nor assessed for these major violations.
- A region computed an economic benefit of \$342,000 for a CAA violation. This amount was included in the litigation report. Subsequently, the region recomputed the economic benefit as \$12,091 (a 96 percent reduction). The region had no documentation, nor could it satisfactorily explain to us how the \$329,909 (\$342,000 - \$12,091) deduction was determined.

In addition, the U.S. General Accounting Office (GAO) reported in its June 1988 report on "Many Enforcement Actions Do Not Meet EPA Standards" that penalties assessed may not be large enough to offset economic benefits of noncompliance. GAO could not determine whether the three EPA regions covered in its review assessed penalties as prescribed by the RCRA penalty policy because of the lack of documentation in the files. GAO reviewed



31 enforcement cases and found only 2 cases in which it could verify that the economic benefit was calculated in accordance with the penalty policy.

GAO also reported in its February 1989 report on "Inland Oil Spills--Stronger Regulation and Enforcement Needed to Avoid Future Incidents", that overall, fines were rarely used. In fact, seven of the ten regions had never issued penalties even though they had found violations of the regulations.

The Agency, in assessing penalties, had not complied with either the letter or intent of the various penalty policies in all cases. Thus, EPA's goals of deterrence and fair and equitable treatment of the regulated community may not have been fully met. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at an economic and competitive disadvantage. This, in effect, creates a powerful disincentive for compliance. The Agency needs to make a stronger commitment to the implementation of the penalty policies in all cases.

In some cases our issued reports covered state activities related to the computation, negotiation, mitigation, and assessment of penalties. To a large degree, we found that states were not properly administering either EPA's or their own penalty policies for the cases we reviewed.

The Acting Assistant Administrator for OECM substantially agreed with our draft report recommendations that his office and media program Assistant Administrators reemphasize to Agency personnel the need to adhere fully to media program penalty policies. He also agreed to a more aggressive oversight of regional activities. He believes this can best be accomplished through expanding the existing media program oversight audits conducted periodically by each program office with his office's participation.

We are recommending that the Acting Assistant Administrator for OECM ensure that the planned corrective actions are completed.

2. Penalty Information Needs To Be Part Of EPA'S Strategic Planning And Management System Report

EPA information on civil, judicial, and administrative penalties was not part of the Strategic Planning and Management System Report (SPMS). Nor was penalty information aggregated by the Agency in such a fashion to make it useful in reviewing all of the various issues and concerns associated with the negotiation and assessment of penalties against violators. For example, EPA statistics did not capture the penalties computed and the millions of dollars mitigated by EPA and DOJ negotiators. As a result, senior management cannot adequately judge the success of

the program nor fully identify those areas needing improvement in the computation, negotiation, mitigation, and assessment of penalties.

A measure of the effectiveness of EPA's enforcement program is the percentage of the regulated community in compliance with EPA's regulations. Likewise, a measure of EPA's enforcement effectiveness is the action taken and penalties assessed against those relatively few concerns which do not comply with EPA regulations. It is EPA policy to hit these non-compliers hard with high dollar penalties. The success in bringing them into compliance is an additional benefit of EPA's enforcement policy. EPA's SPMS report does not capture the effectiveness of its enforcement program. Generally, SPMS only shows the status of total cases; nothing is shown regarding penalties.

We recommended in our draft report that OECM implement a SPMS reporting requirement to include the penalty results of concluded cases by media program. SPMS should show computed penalties, reductions by EPA staff, reductions by Department of Justice (DOJ) and EPA attorneys, and the final collected amounts.

The OECM Acting Assistant Administrator believed that requiring the information outlined in our recommendation would result in a significant workload increase. The Assistant Administrator for OPPE would rather use our specific recommendation as part of OECM's management of the Agency's penalty program(s) rather than incorporating such specific details in SPMS.

The information we are asking for, as contained in our recommendation, is already supposed to be produced via the penalty negotiation process; thus, we do not see a major increase in workload.

We are recommending that the OECM Acting Assistant Administrator coordinate with the OPPE Assistant Administrator to assure that Federal penalty results of concluded cases by media programs are accumulated. The data should show computed penalties, reductions by Agency staff, reductions by DOJ and Agency staff, and the final assessed amounts. A decision by appropriate officials can be made at a later date as to whether the data should be made part of SPMS.

#### ACTION REQUIRED

In accordance with EPA Order 2750, the action official is required to provide this office a written response to the audit report within 90 days of the audit report date.

We have no objection to the further release of this report at your discretion.

## BACKGROUND

EPA is responsible for the administration of environmental statutes mandated by Congress. These administrative responsibilities include: the establishment of compliance standards and permits; the monitoring and reporting of compliance; the establishment of strategies for accomplishing compliance; and the actual methods of enforcing compliance.

EPA's enforcement goal is to achieve compliance with environmental laws, regulations and program requirements. One essential element of an enforcement program is the effective use of civil and administrative penalties which punishes the violators and deters future violations. The effectiveness of the enforcement program is measured by the rate of compliance with program goals. The assessment of penalties that are sufficiently burdensome is a critical tool in reaching compliance in a timely manner.

Civil penalties play an important role in an effective enforcement program. Deterrence of noncompliance is achieved through: (1) the perceived likelihood of detecting a violation; (2) the speed of the enforcement response; and (3) the likelihood and severity of the penalty. While penalties are the critical third element in creating deterrence, they can also contribute to greater equity among the regulated community by recovering the economic benefit a violator gains from noncompliance over those who do comply.

### The Clean Water Act (CWA)

The Rivers and Harbors Act of 1899 was the first Federal legislation covering water pollution. Fifty-seven years later, Congress enacted the 1956 Federal Water Pollution Control Act (FWPCA), under Public Law (PL) 84-660. FWPCA made Federal grant funds available for the planning, design, and construction of wastewater treatment facilities. The Department of Health, Education and Welfare administered the construction grant program until 1966 when it was transferred to the Department of Interior. The construction grant program was subsequently transferred to the Environmental Protection Agency (EPA) in 1970.

In 1972, the FWPCA was amended and gave way to the CWA, PL 92-500. This resulted in extensive changes to the construction grant program. In addition, the 1972 amendments mandated a strong enforcement program, state and area-wide planning, and the issuance of discharge permits based on approved water quality standards or stringent technology-based effluent limits for all dischargers.

The National Pollution Discharge Elimination System (NPDES) permit establishes the discharge limits which are used to measure compliance with CWA. The CWA required increasingly stringent technology-based effluent limitations for industrial users which are established in the National Effluent Guidelines, 40 CFR 400. For publicly-owned treatment works (POTW), the CWA required secondary treatment limits, or any additional treatment levels necessary to protect water quality, based on effluent limits required to meet the State's Water Quality Standards.

NPDES permits are issued to all point source discharges, which are those POTWs and industrial facilities which discharge directly into navigable waters. Facilities are classified as either major or minor depending on the volume or effluent discharged. Permits require monitoring by the permittee to verify compliance with the effluent limits. A Discharge Monitoring Report (DMR) is usually submitted monthly by the permittee to the administering agency. The DMR is reviewed to determine the permittee's compliance or noncompliance with the permit. Title 40 CFR 123.45 requires administering agencies to report the compliance status of facilities with NPDES permits in Quarterly Noncompliance Reports. The regulations provide criteria for the types of violations that are to be reported in the Reports. Also, any violation or instance of noncompliance is subject to enforcement action.

The CWA includes administrative, civil, and criminal enforcement remedies for noncompliance. EPA can sue civilly in court for \$25,000 per day per violation, as well as injunctive relief under Section 309(d) of the Act, or seek criminal penalties under Section 309(c). Administratively, EPA can issue an administrative compliance order to the violator under Section 309(a) of the Act. The 1987 amendments to the CWA gave EPA the ability to assess penalties administratively. Under Section 309(g) of the Act, the EPA Administrator can impose civil penalties of up to \$125,000 for noncompliance with program requirements.

#### The Resource Conservation and Recovery Act (RCRA)

RCRA was passed as Public Law 94-580, an amendment to the Solid Waste Disposal Act, on October 21, 1976. Congress' overriding purpose in enacting RCRA was to establish the statutory framework for a national system that would ensure the proper management of hazardous waste. Regulation of these materials was intended to prevent future hazardous waste problems and reduce threats to the public health and the environment. RCRA was amended in 1980 and 1984 increasing EPA's enforcement authorities and substantially increasing the implementing requirements for the regulated community. Section 3008 of RCRA gives the EPA Administrator the

authority to assess civil penalties of up to \$25,000 per day per violation for noncompliance with program requirements or with an order.

### The Clean Air Act (CAA)

Since the mid-1950's, the nation has maintained a commitment to protecting the environment and public health from the adverse effects of air pollution. This commitment is important because air pollution, brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare.

Direct sources of air pollution are generally categorized as either stationary or mobile. Stationary sources include factories, power plants, and smelters, while mobile sources include automobiles, buses, and trucks. Some facilities, like highways and shopping centers, are called indirect sources because they attract mobile sources of pollution. This report only focuses on cases dealing with stationary sources of pollution and the related assessed fines.

Congress enacted the CAA in 1963, under PL 88-206, as the basic statute governing the nation's effort to protect the public health and welfare from the harmful effects of air pollution. The CAA was substantially amended in 1970 and 1977. The CAA requires both EPA and state and local governments to assume responsibility for the implementation of measures for prevention and control of air pollution at its source. EPA establishes air quality standards, conducts research, and provides technical and financial assistance to state and local governments. States are responsible for developing plans describing how they will control pollutant emissions from stationary sources in order to meet and maintain air quality standards.

The CAA includes administrative, civil, and criminal enforcement remedies to correct instances of noncompliance. EPA can administratively issue a notice of violation and assess a civil penalty. Civil relief may take the form of an injunction requiring compliance with applicable regulations. Significant monetary penalties may also be assessed with civil relief measures. Section 113(b) of the Act authorizes the EPA Administrator to assess penalties of up to \$25,000 per day per violation for noncompliance with program requirements.

### Civil Penalty Policy

In February 1984, EPA issued the Uniform Civil Penalty Policy. It established a consistent agency-wide approach to the assessment of civil penalties. This policy established a single

set of goals for penalty assessment in administrative and judicial enforcement actions. These goals, which are incorporated in current program specific policies, are:

- deterrence;
- fair and equitable treatment of the regulated community; and
- swift resolution of environmental problems.

The first and primary goal of penalty assessment is deterrence. A penalty should provide specific deterrence by persuading a violator to take all necessary precautions against falling into noncompliance a second time; and it should engender general deterrence among the regulated community, i.e., dissuading others from violating the law.

The second goal is fair and equitable treatment of the regulated community. This requires that penalties be consistent and flexible. Consistent because otherwise penalties will be seen as arbitrary and violators will vigorously defend themselves and tie-up scarce EPA resources, and flexible so that adjustments to reflect legitimate differences between similar violations can be made.

The third goal is the swift resolution of environmental problems. The primary mission of EPA is to protect the environment including the public health.

The establishment of an agency-wide general penalty policy eventually led to the issuance of program specific penalty policies. In May 1984, the Office of Solid Waste issued the RCRA Civil Penalty Policy. In September 1984, the Office of Air and Radiation issued its initial CAA Civil Penalty Policy, which was revised in March 1987. The Office of Water, which issued a general principles policy in 1980, formulated its program specific CWA Civil Penalty Policy in February 1986.

The above documents set forth the Agency's policy for assessing penalties under their respective programs. The purpose of the policies is to assure that: (1) persons are deterred from committing violations; (2) penalties are appropriate for the gravity of the violations committed; (3) economic incentives for noncompliance are eliminated; (4) penalties are assessed in a fair and consistent manner; and (5) compliance is achieved. This system of penalty assessment adheres to the Agency policy by requiring: (1) calculation of a preliminary deterrence amount consisting of a gravity component; (2) determination of the economic benefits of noncompliance; and (3) application of adjustment factors within specified boundaries to account for differences between cases.

## FINDINGS AND RECOMMENDATIONS

### FINDING NO. 1- EPA NEEDS TO FULLY COMPLY WITH ITS ENFORCEMENT PENALTY POLICY

Appropriate penalties were either not calculated and assessed at all, or inadequately calculated. Also, calculated penalties were reduced during negotiations, in some cases in excess of 90 percent and amounting to millions of dollars, with little or no documentation to support the reductions. In many cases the financial benefits the violators received from delayed or avoided costs were not recovered.

Inadequate calculation of penalties and insufficient documentation to support penalty reductions greatly raises the potential for fraud or abuse in EPA's penalty program. Also, GAO's standards for internal controls systems, which require that all transactions and events be clearly documented and the documentation available and easily accessible for examination, were not met. In addition, the Agency did not obtain maximum deterrence and fair and equitable treatment of the regulated community in all cases. These violators gained an economic and competitive advantage over those who complied with the Agency's regulations.

Generally, the above condition exists because of a lack of attention by Agency personnel to fully complying with the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), or the Clean Air Act (CAA) civil penalty policies in all cases. For example:

- A prime contractor and subcontractor were cited for failure to (1) provide notification of intent to remove asbestos-containing material, (2) wet asbestos-containing material prior to removal, and (3) store asbestos-containing material in sealed, labeled, leak-tight containers (the material was dumped into an open-bodied truck). However, a penalty was not computed nor assessed for these major violations. (EPA Audit Report No. E1GM7-05-0571-80821)
- While reducing the proposed penalty of \$500,000 down to \$75,000 (an 85 percent reduction), the region did not document its basis for the reduction. In fact, the region requested and received an Administrative Law Judge (ALJ) ruling that held the company liable for the complaint facts supporting the proposed penalty. However, our discussions with regional program personnel indicated that they did not expect to pursue the full proposed penalty during settlement negotiations. In part, they were concerned that, even with the ruling, the ALJ would not support the region's desired penalty and would only allow a penalty of \$10,000. The

region's desired or target penalty was established at \$100,000, or 20 percent of the proposed penalty. The basis for the desired penalty was not documented in the region's records. We found no evidence to substantiate the region's concern about the ALJ not supporting them in adjudicating the case.

We noted that the region's proposed penalty of \$500,000 was a reduction from its first penalty calculation of \$6,885,000. The first penalty calculation considered 306 days of violations. The region's justification for the reduction to \$500,000 was "to account for any efforts made by the company and to reflect the civil penalty policy concerns with deterrence and fair and equitable treatment of the regulated community". We found little evidence of self-initiated efforts by the company to substantiate this significant pre-complaint reduction.

The final penalty of \$75,000 represented only 1 percent of the original pre-complaint calculated penalty and only 15 percent of the proposed penalty. (EPA Audit Report No. E1G68-09-0188-9100479)

A region computed an economic benefit of \$342,000 for a CAA violation. This amount was included in the litigation report. Subsequently, the region recomputed the economic benefit as \$12,091 (a 96 percent reduction). The region had no documentation, nor could it satisfactorily explain to us how the \$329,909 (\$342,000 - \$12,091) deduction was determined. (EPA Audit Report No. E1K67-05-0449-80743)

In addition, the U.S. General Accounting Office (GAO) reported in its June 1988 report on "Many Enforcement Actions Do Not Meet EPA Standards" that penalties assessed may not be large enough to offset economic benefits of noncompliance. GAO could not determine whether the three EPA regions covered in its review assessed penalties as prescribed by the RCRA penalty policy because of the lack of documentation in the files. GAO reviewed 31 enforcement cases and found only 2 cases in which it could verify that the economic benefit was calculated in accordance with the penalty policy.

GAO also reported in its February 1989 report on "Inland Oil Spills--Stronger Regulation and Enforcement Needed to Avoid Future Incidents," that overall, fines were rarely used. In fact, seven of the ten regions had never issued penalties even though they had found violations of the regulations.



The Agency, in assessing penalties, had not complied with either the letter or intent of the various penalty policies in all cases. Thus, EPA's goals of deterrence and fair and equitable treatment of the regulated community were not fully met.

Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at an economic and competitive disadvantage. This, in effect, creates a powerful disincentive for compliance. The Agency needs to make a stronger commitment to the implementation of the penalty policies in all cases.

In some cases our issued reports covered state activities related to the computation, negotiation, mitigation, and assessment of penalties. To a large degree, we found that states were not properly administering either EPA's or their own penalty policies for the cases we reviewed.

#### Penalties Need To Be Calculated

EPA's General Enforcement Policy, dated February 1984, establishes a single set of goals for penalty assessment in administrative and judicial enforcement actions:

- deterrence;
- fair and equitable treatment of the regulated community; and
- swift resolution of environmental problems.

The most important mechanisms for achieving consistency are the systematic methods for calculating the economic benefit component (i.e., the financial benefit the violator received from delayed or avoided costs) and the gravity component (which reflects the actual or potential harm to the environment, importance of the regulatory scheme, and the size of the violator) of the penalty. If the Agency is to promote consistency, it is essential that penalties be calculated and each case file contain a complete description of how each penalty was developed.

The following examples taken from our issued reports and our field work show a lack of computation of a penalty amount and assessment of a penalty, or an insufficient penalty calculation for major violations of EPA regulations.

- A region issued a Finding of Violation to a contractor citing failure to provide notice of renovation operations, including asbestos material, and removal of friable asbestos material in a manner that broke up the friable asbestos material. This finding resulted from an EPA inspector's observation of the renovation process. His inspection report stated, "Ceiling of most rooms pulled down to expose

HVAC ducting. Asbestos laden materials in piles on floor. High dust levels. Workmen left door open for ventilation while they were working. No respiratory protection used."

In this instance not only the workers, but the general public was exposed to asbestos fibers. The region's enforcement action was limited to an Administrative Order requiring the contractor to comply with asbestos NESHAP regulations in the future. Based on the guidance in the Asbestos Demolition and Renovation Civil Penalty Policy, a penalty of \$37,000 would have been appropriate. (EPA Audit Report No. E1GM7-05-0571-80821)

There was no documentation in the region's files that it had estimated the economic benefits of noncompliance in three of the four cases we reviewed. For example, the region filed a complaint against a company which included 18 RCRA violations. The complaint included a variety of RCRA violations including: ignitable waste operating practice violations, failure to prepare and submit various plans and records, no financial assurance for closure or accidental occurrences, and no groundwater monitoring. We found no evidence that the region had calculated the estimated economic benefits. For the types of violations cited in the complaint, it is reasonable to expect that the company substantially benefited from avoiding the costs of compliance with the groundwater monitoring and financial assurance requirements. (EPA Draft Audit Report No. E1G68-09-0188)

In addition, GAO reported in its June 1988 report on "Hazardous Waste...Many Enforcement Actions Do Not Meet EPA Standards" that penalties assessed may not be large enough to offset the economic benefits of noncompliance. GAO could not determine whether the three EPA regions covered in its review assessed penalties as prescribed by the RCRA penalty policy because of the lack of documentation in the files. GAO reviewed 31 enforcement cases and found only 2 cases in which it could verify that the economic benefit was calculated in accordance with the penalty policy. For the remaining 29 cases GAO found:

- The economic benefit was not shown in the penalty calculation of 15 cases.
- Documentation was not available on the penalty calculation for 5 cases.
- The economic benefit calculation was not considered necessary by the GAO reviewers in 9 cases.

The EPA Office of Waste Programs Enforcement responded to GAO's finding. Among the corrective actions planned was:

- Reemphasis of the importance of adequate documentation of penalty calculation.
- The development of a manual that includes computer tracking and regular supervisory review of active cases.
- Training on developing administrative records.
- Focus on the quality of case files during bi-annual reviews of regions, including penalty calculations.

In addition, GAO issued a report, "Inland Oil Spills--Stronger Regulation and Enforcement Needed to Avoid Future Incidents" in February 1989. The CWA authorizes fines of up to \$5,000 per day for each violation of EPA's Oil Pollution Prevention regulations. GAO reported that there is no national guidance on the imposition of fines and the regional offices have adopted inconsistent policies. GAO further reported that overall, fines were rarely used, although EPA's data indicate that the rate of noncompliance with the regulations may be high. In fact, seven of the ten EPA regions had never issued penalties even though they had found violations of the regulations. Among the GAO recommendations was that EPA establish a policy for fining violators.

#### Need To Fully Justify Reduction To Penalty Calculations

A major objective of the various penalty policies is to negate the "economic incentives for noncompliance". This is accomplished by calculating a component for the economic benefits of noncompliance, and adding to it a gravity-based penalty component. Thus, it shields the economic benefits component from any mitigating adjustments during negotiations of the final penalty. If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty negates the violator's enhanced position relative to those who have complied in a timely fashion.

The various media penalty policies require that when the assessed penalty fails to remove the economic benefit, the case development team must explain in the case file why it failed to do so. The policies also provide that documentation for deviations from the program-specific guidance should be contained in both the case file and in any memoranda that accompanies the settlement. This point was reiterated in a joint Region 5 memorandum issued by the Regional Counsel and the Director of the Water Division to the Air, Water, Toxic, and General Law Branch staff and the Water Division Technical Enforcement staff, on "Revisions of Bottom Line Penalties in Water Cases". The

memorandum stated that, when a consensus was reached on revisions to a penalty amount, the rationale for the decision should be covered in a memorandum to the Assistant Administrators for OECM and Water. The clear intention of these policies is to make the negation of the violator's economic benefits the primary focus of the penalty process.

The various penalty policies provide guidelines within which enforcement personnel may mitigate penalties. The adjustments usually apply to the gravity-based penalty component and not to the economic benefit component. The intent of this limitation is to shelter at least for most typical cases, the economic benefit component from the negotiations to ensure that the violator gains no competitive advantages from the noncompliance. The various program specific policies include the acceptable justifications for mitigating penalties as: (1) good faith efforts to comply; (2) degree of willfulness or negligence; (3) history of noncompliance; (4) financial ability to pay; and (5) other unique factors.

Each media penalty policy has its own parameters for adjustments to the gravity-based component. For the CWA program there are three suggested ranges of adjustment:

- 0 to 20%: within the absolute discretion of the litigation team;
- 20 to 30%: only appropriate in unusual circumstances; and
- 30% plus: only appropriate in rare circumstances.

The two suggested ranges of adjustments for the RCRA program are:

- 0 to 25%: within the absolute discretion of the litigation team; and
- 26 to 40%: only appropriate in unusual circumstances.

For the CAA program the three suggested ranges of adjustment are:

- 0 to 30%: within the absolute discretion of the litigation team;
- 31 to 50%: only appropriate in unusual circumstances;
- 50% plus: only appropriate in rare circumstances.

The mitigation or adjustment of penalties must be documented and is appropriate only to the extent that the violator clearly demonstrates an entitlement to the adjustment. The burden of proof rests squarely upon the violator. Without such proof the

various penalty policies prohibit enforcement personnel from making any mitigating adjustments to the calculated penalty amount. The Clean Water Act policy, however, allows use of "litigation considerations" that are not limited and do not put the burden of proof on the violator.

The following examples taken from our issued reports show a lack of documentation for significantly reducing computed penalties. Additional examples are in Exhibit 2.

Clean Water Act Case (EPA Audit Report No. E1HWD8-04-0207-9100462)

- The city was one of the region's worst violators. The region computed a penalty of \$3,684,360 consisting of a \$614,060 recalcitrance figure, an economic benefit figure of \$574,300, and a gravity-based component of \$2,496,000. Citing litigation considerations of \$2,947,488 and ability to pay considerations of \$700,028, the region computed a settlement amount of \$36,844. There was no support to show the method used to arrive at the litigation consideration figure (\$2,947,488). It seemed to be an arbitrarily arrived at figure designed to reduce the amount recommended for the penalty. The case remained unresolved at the close of our audit work and the facility remained in non-compliance.

Resource Conservation and Recovery Act Case (EPA Audit Report No. E1G68-09-0188-9100479)

- The negotiators reduced the proposed penalties of \$2,488,775 down to \$90,000 or a reduction of 96 percent. The proposed penalties included \$2,425,000 (\$25,000 per day for 97 days) for operating a hazardous waste surface impoundment without a permit or interim status, and \$63,775 for several other counts including inadequate liability coverage and illegal international shipments of hazardous waste.

Regional negotiators offered to reduce the penalty from \$25,000 per day to \$9,500 per day based on a reassessment of the potential harm. No documentary evidence to support this reassessment could be found in the region's records.

As negotiations proceeded, the region set a target penalty settlement of \$200,000. The basis for the settlement target was not clearly documented in the region's records. The region settled on a final assessed penalty of \$90,000 to be paid in installments over three years. Justification for settling on \$90,000 over three years was not documented in the region's case files.

Clean Air Act Case (EPA Audit Report No. E1K67-05-0449-80743)

A company accrued economic benefits of \$900,000 over a two and one-half year period of violations, but the region reduced the amount to \$14,000 because the company exceeded its emission standard for only 15 days during this time. Even though there were only 15 days of violation, the company saved \$900,000 by delaying the installation of the pollution control equipment.

The region stated that the company did not continuously violate the CAA and the civil penalty policy assumes continuous violation of the statute is necessary. We believe it is of little consequence that the violations were on occasions or on a continuous basis, the economic benefit from delayed investment in pollution control equipment is the same. EPA's policy is to recover the savings the violator received from delayed and avoided costs. The CAA authorizes EPA to assess penalties of up to \$25,000 per day per violation for noncompliance with program requirements; in this case \$375,000 (15 days times \$25,000 per day). There should have been a higher collection to offset the economic benefits in this case.

Most Agency personnel agreed that there were lapses in documenting the penalty calculations and subsequent penalty adjustments. Some regions, to correct this situation, issued instructions for the computation and documentation of all penalties in the future.

We noted that in March 1986, the OECM Associate Enforcement Counsel, Air Enforcement Division, informed all Regional Counsels of the need to document settlements of penalty cases. The memorandum instituted the requirements that: (1) all new air enforcement litigation reports contain the calculations which support the penalty recommended as the minimum settlement penalty, and (2) regional case files contain documentation of the rationale for changes in the penalty from the time a case is referred until a consent decree is signed.

Further, the memorandum provided that:

After an enforcement action has been referred, regional case attorneys should record in their case files any change in the settlement penalty based on negotiations with the source or new information related to the merits or the equities of the case which came to light after the litigation report was written. The record should reflect the date and Headquarters person who approved the change, as required by policies GM-26 and GM-39 in the General Enforcement Policy

Compendium. This procedure carries forward, after the referral date, EPA's ability to show that penalties are determined in a logical and rational manner.

#### Other Media Programs

Although we did not perform detail work in other media programs, our analysis of the files supporting OECM's claimed \$24 million assessed penalties in FY 1987 showed significant reductions to recommended penalties in the Toxic Substance Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) programs. We computed, by program area for TSCA and FIFRA, the following reductions from the regions' recommended penalties.

<u>Program Area</u>	<u>No. of Cases Reviewed</u>	<u>Recommended Penalties</u>	<u>Assessed Penalties</u>	<u>Percent of Recommended Penalties Reduced</u>
<u>All FY 1987 Closed Cases</u>				
TSCA	741	\$27,571,485	\$5,057,829	82
FIFRA	198	1,093,458	248,539	77

In reply to our draft report, the Acting Assistant Administrator for OECM stated that within the relatively short time to review this issue, OECM has evaluated these statistics with the Office of Pesticides and Toxic Substances' Office of Compliance Monitoring and has reached the following conclusions.

#### TSCA

A large percentage (over 50%) of the 741 cases settled during FY 1987 involved violations of the Asbestos In Schools regulations, 40 CFR 763 et seq. Because the regulated community consists entirely of public and private educational institutions, the Agency penalty policy recommended that the penalties be substantially mitigated or even fully abated if the school undertook asbestos abatement actions, which were not required under TSCA or the Part 763 rules.

Also, TSCA penalties must be reduced by statute, whenever they may substantially affect a facility's "ability to continue in business" or if there is a financial condition which prevents its ability to pay the fine from cash reserves. Before EPA will consider reducing a penalty based upon ability to pay, EPA enforcement offices are instructed

to obtain credible financial information, such as tax returns, corporate balance sheets or other similar financial documentation.

Finally, TSCA penalties have been reduced in settlement to obtain leverage for environmentally beneficial expenditures as a condition of settlement. Generally, "settlements with conditions" involve the implementation of compliance or abatement activities which are unrelated to correcting the violation that is the subject of the enforcement action (that is a cost that can not be used to reduce the penalty) or implementation of a compliance audit. An example of a penalty mitigation project might involve the accelerated removal and disposal of PCB electrical equipment. A dollar for dollar credit is not given. Some offices have given a \$1.00 reduction for each \$3.00 spent up to a maximum penalty reduction. With the increased emphasis in EPA on "pollution prevention", it is anticipated that a greater number of cases may be settled with conditions like these and care must be taken to insure that adequate documentation is maintained in the official file and that certification of completion is submitted and verified to ensure that settlement terms are met.

To insure that penalty reductions are appropriately documented, the TSCA Civil Penalty Policy, published at 45 F.R. 24358 September 10, 1980, requires that the published work sheet be completed to document each penalty reduction.

#### FIFRA

In the FIFRA program, a civil penalty matrix and categories of violations were published in the Federal Register in 1974. This guidance provides that the civil penalty to be imposed must take into account the size of the violator's business. EPA must then impose a graduated penalty based upon 5 category sizes of business, the largest category being over \$1,000,000 in gross sales. EPA regional offices endeavor to place the violator into the appropriate category through reliance on the most readily accessible data, which are Dun and Bradstreet financial reports. Often, however, at settlement conferences, FIFRA violators are able to demonstrate through actual tax returns or accounting statements that the Dun and Bradstreet reports, which are advisory and not based on actual certified tax returns are inflated. Under FIFRA, by statute, EPA is precluded from asking for tax returns or financial or sales data at the time of inspection.

FIFRA penalties may also be reduced for factors similar to TSCA (settlements with conditions or abatement activity), although to a much lesser degree. Finally, a significant



factor in many FIFRA reduction concerns that type of violation actually involved. The more hazardous misuse of pesticides violation, by statute, are to be handled by the state lead agencies. This leaves Federal enforcement efforts to concentrate on violations of misbranding (i.e., false labels or false claims) or failure to submit annual production reports under FIFRA. In a large proportion of these cases, perhaps 35 percent are marginal businesses or businesses which are about to, or have, ceased operations. In these cases, very minor fines may be collected along with terminations or surrender to the Registrant's FIFRA establishment number.

### State Penalty Practices

Some of our issued reports covered state activities related to the computation, negotiation, mitigation, and assessment of penalties. To a large degree, we found that states were not properly administering either EPA's or their own penalty policies for the cases we reviewed. It should be noted, however, that EPA policy does not require states to follow EPA's penalty policy.

### Clean Water Act

1. From our judgmental sample of 10 cases in which a penalty should have been assessed, we found that a state calculated and assessed penalties in only two cases. We arbitrarily selected 10 other cases in which penalties were assessed which gave us a total of 12 cases (10 + 2) in which penalties were calculated and assessed. Penalties were not calculated in accordance with the state guidelines in 9 of the 12 cases. In the remaining three cases the economic benefit was recovered only in one case.

From our judgmental sample of 10 cases, we found another state had calculated and assessed penalties in only 6 cases. There was no calculation of penalties in the remaining four cases. The computed economic benefit of \$637,775 for the 6 cases was mitigated to \$88,000, a reduction of \$549,775, or 86 percent.

The region having oversight responsibility over these two states told us that it has instituted a tracking and quarterly reporting system for state penalties. This will enable the region to ensure that the states are collecting sufficient penalties. Additional documentation of how penalties are calculated will also be requested from the states to show that assessed penalties comply with national and state policies. (EPA Audit Report No. E1H2D8-05-0293-9100164)

2. The company experienced at least three illegal discharges in violation of its NPDES permit conditions in 1986 and 1987. No monetary penalties were proposed for any of the violations although the permit provides for civil penalties not to exceed \$10,000 (prior to February 1987) and \$25,000 (after February 1987) for each violation.

As a result of the first of the three discharges, the state issued a Notice of Violation (NOV) to the company on December 2, 1986 for the discharge of 13,500 gallons of process water. The second discharge, involving 4 million gallons of mill sludge occurred on February 27, 1987, and was due to the failure of the facility's main holding pond embankment. The state issued another NOV to the company on April 8, 1987. The state inspection report relating to the discharge stated: "The discharge was a major event which had a severe impact on the area surrounding the discharge point."

The third discharge occurred on March 31, 1987 and involved 400,000 gallons of process wastewater. As a result of this discharge, the state issued a letter of minor violation to the company on April 8, 1987. This letter was issued on the same date that the NOV was issued for the second discharge. We believe that serious questions are raised about the state's enforcement policies when it issues a NOV and a letter of minor violation on the same date to the same violator and neither action includes a monetary penalty. It is also difficult to understand how the state can rationalize that the two discharges were not indicative of serious violations of permit conditions; especially since the facility had three discharge violations in a 4-month period. (EPA Audit Report No. E1F58-09-0184-9100446)

Safe Drinking Water Act (EPA Audit Report No. E1HW7-03-0171-81928)

- The four states covered by our review did not (1) issue timely violation notices to the suppliers, (2) obtain evidence of public notification, (3) perform any significant enforcement actions against non-community water systems (NCWS), (4) develop or implement enforcement strategies against NCWS, and (5) comply with Federal reporting requirements concerning enforcement actions. Some states were not able to provide statistics for the number of enforcement actions regarding NCWS. We were informed by various personnel that enforcement resources were limited at best and were generally directed at community water systems.

The delegated agencies in a state did not commit themselves to EPA's civil penalty policy, differed among themselves as to the severity of cash penalties, and resolved major violations without assessing cash penalties. One agency based their initial penalty calculation on the EPA civil penalty policy, but the amount was automatically reduced 90 percent prior to making a settlement proposal to the violator. In addition, if the violator was cooperative and agreed to take corrective action, the penalty assessment was frequently reduced or waived during the settlement process.

Also, penalties were not always assessed. For example:

1. A prime contractor and subcontractor were cited for the following violations during the renovation of a building.
  - Failure to provide notification of intent to remove asbestos-containing material.
  - Failure to wet asbestos-containing material prior to removal.
  - Failure to store asbestos-containing material in sealed, labeled, leak-tight containers (the material was dumped into an open-bodied truck).

Even though the violators did not follow asbestos NESHAP regulations and gained significant economic benefits and posed potentially serious health hazards to the public, a penalty was not computed nor assessed for these major violations.

2. An asbestos abatement company was cited for the following violations during the renovation of an elementary school.
  - Failure to wet asbestos-containing material prior to removal.
  - Storage of dry asbestos material in unsealed bags. Even though the violator did not follow asbestos NESHAP regulations and gained significant economic benefits and posed potentially serious health hazards to the public, a penalty was not computed nor assessed for these major violations.

State agencies were not aggressively enforcing the asbestos NESHAP regulations with penalties. Low or no penalties could lead to repeat violations.

The company was consistently in violation of the visible emissions air standard for opacity since at least 1980. Although the company was fined \$500 in 1980 for its air standards violations, it was not placed on a compliance schedule at the time. As a result, violations continued. A state inspection report issued in October 1985 noted that the company was in continuous violation of the opacity limit. However, no penalty was assessed as a result of the inspection.

In April 1986, a compliance schedule was agreed to by the state and the company. The schedule required the company to construct a scrubber to control visible emissions from the bypass burner boiler by July 1988. In June 1987, the state revised the compliance schedule and extended the scrubber installation date to July 1989. In May 1988, the state again revised the schedule and this time extended the scrubber installation date to July 1990. Thus, during the 10-year period 1980 and 1990, the company will have continuously violated air standards and paid a total penalty of only \$500. It is apparent such a nominal penalty does not meet EPA's enforcement policies. More importantly, the state enforcement policies have almost no impact on eliminating this source of air pollution.

#### Need for Continuing Education Regarding Negotiation Skills

OECM has offered "Negotiation Skills Training" courses to regional attorneys. This 2-day course was provided six items during FY 1988 and seven times in FY 1989, but not to all attorneys. The course covers a variety of areas including:

- Basic concepts as applied to environmental enforcement negotiations.
- Planning for negotiations.
- Pressure points.
- Defensive tactics.

We reviewed the training courses taken by attorneys in Regions 5, 6, 7 and 9 who were involved in negotiations of penalties. Of the 12 attorneys we interviewed, 5 did not have the "Negotiation Skills Training".

In December 1988, a National FY 1988 Regional Counsel Audit Report was issued by OECM and General Counsel. The report is a compilation of individual audits and a separate report was issued to each Regional Counsel. The report's primary finding regarding resource issues was the high turnover of professional and support staff. The turnover rate was very serious in some regions. For example, over the past 2 years Region 1 has experienced close to a 50 percent turnover and Region 3 a 40 percent turnover.

Negotiation of penalties is a very important aspect of an attorney's duties. It is an area covered in each attorney's performance standards. Because of the high turnover of attorneys in some regions, OECM should strongly consider providing the training to all appropriate Regional Counsel staff. The training should be a requirement for attorneys assigned penalty negotiation cases. Such training is essential if the regions are going to enforce environmental laws vigorously, consistently and equitably.

\* \* \* \* \*

Penalties play an important role in an effective enforcement program. Deterrence is achieved to a major degree by the likelihood and severity of a penalty. The regulated community has had ample time to become aware of EPA's rules and to implement internal controls to ensure compliance. Now is the time for the Agency to strengthen its enforcement actions against those violators and impose penalties large enough to punish them and bring about compliance.

In addition, it is essential that the best results are obtained by EPA from each violator of Federal statutes. Otherwise the violator will use settlements on prior cases as a negotiation factor during litigation. For example, during the litigation of one case, we found references to a previously settled case concerning another violator. The defendant stated that it attempted to analyze and compare its situation with that of another company with a similar situation. Their analysis disclosed that the volume of effluent from the other company's three very large plants was about twice the volume of its relatively small eight plants and the approximate severity of the violation of metals standards in the other company's effluent was about four times its own. Yet, the penalty proposed to them is about two and two-thirds times the penalty assessed the other company. Along these lines, we were informed by a regional staff attorney that legal counsel for violators contact one another to exchange insights and legal strategies for their clients defense against EPA civil actions.

In reviewing the effectiveness of a program in accomplishing its goals and objectives, it is important to evaluate it in light of the program's internal controls. Internal control standards

define the minimum level of quality acceptable for internal control systems, and constitute the basis against which systems are to be evaluated. The GAO general and specific standards that apply to EPA programs include the following:

- Internal control systems, all transactions and events are to be clearly documented, and the documentation available and easily accessible for examination.
- Transactions and other significant events are to be promptly recorded and classified.
- Transactions and other significant events are to be authorized and executed only by persons acting within the scope of their authority.
- Competent personnel, adequately trained and assessed on their implementation of necessary internal controls.

Regarding the first three standards, our reviews showed a need for Agency personnel to fully document the transactions and events pertaining to the computation, negotiation, mitigation, and assessment of penalties. There is also a need for "Negotiation Skill Training" for all attorneys engaged in enforcement negotiations.

#### Draft Report Recommendations

We recommended that the OECM Acting Assistant Administrator in coordination with the Office of General Counsel and the Assistant Administrators for the program Offices of (1) Air and Radiation, (2) Solid Waste and Emergency Response, (3) Water, and (4) Pesticides and Toxic Substances:

1. Re-emphasize to Agency personnel the need to fully adhere to media program penalty policies.
2. Institute a more aggressive oversight program of regional activities. Such a program would include expanded reviews of regional penalty programs to include adequacy of penalty computations, Agency reductions to the computed amounts, negotiations of further reductions by Department of Justice and Agency attorneys during negotiations with violators, and the adequacy of documentation to support the decisions.

The regional oversight of state activities should be part of the Headquarters expanded reviews. These reviews would also ensure that the various regional offices have established procedures in place that implement the media programs' civil penalty policy.

3. Institute a regional reporting and oversight program of state penalty assessment activities to ensure that proper penalties are levied.
4. Coordinate with the Office of General Counsel and provide "Negotiation Skills Training" to appropriate Regional Counsel staff on a regular and timely basis. Consideration should be given to making this training mandatory for all attorneys engaged in enforcement negotiations.

#### Agency Reply To OIG Draft Report

The Acting Assistant Administrator for OECM agreed with our recommendations. Regarding more aggressive oversight of regional activities, he believes this can best be accomplished through expanding the existing media program oversight audits conducted periodically by each program office with his office's participation.

With respect to "Negotiation Skills Training", OECM will review the implications of making this training, or its equivalent, mandatory for those attorneys engaged in enforcement negotiations.

#### Recommendation

We recommend that the Acting Assistant Administrator for OECM ensure that the planned actions are completed.

FINDING NO. 2- PENALTY INFORMATION NEEDS TO BE PART OF EPA'S STRATEGIC PLANNING AND MANAGEMENT SYSTEM REPORT

EPA information on civil, judicial, and administrative penalties was not part of the Strategic Planning and Management System Report (SPMS). Nor was penalty information aggregated by the Agency in such a fashion to make it useful in reviewing all of the various issues and concerns associated with the negotiation and assessment of penalties against violators. For example, EPA statistics did not capture the penalties computed and the millions of dollars mitigated by EPA and DOJ negotiators. As a result, senior management cannot adequately judge the success of the program nor fully identify those areas needing improvement in the computation, negotiation, mitigation, and assessment of penalties.

A measure of the effectiveness of EPA's enforcement program is the percentage of the regulated community in compliance with EPA's regulations. Likewise, a measure of EPA's enforcement effectiveness is the action taken and penalties assessed against those relatively few concerns which do not comply with EPA regulations. It is EPA policy to hit these non-compliers hard with high dollar penalties. The success in bringing them into compliance is an additional benefit of EPA's enforcement policy. EPA's SPMS report does not capture the effectiveness of its enforcement program. Generally, SPMS only shows the status of total cases; nothing is shown regarding penalties.

The Quick Look Report -- Consolidated Docket Enforcement System - which OECM and the media program staff rely upon to monitor the status of civil cases could be used to accumulate the appropriate penalty information for the SPMS report. Data for each case include the dollar amount for the computed economic benefit, the gravity component, proposed penalty, and assessed penalty. However, it is not uncommon for the economic benefit and gravity component amounts to be missing. This area is discussed below.

OECM's Quick Look Report Not Complete

Both the EPA Uniform Civil Penalty Policy of February 1984, and the various program specific penalty policies (CAA, CWA and RCRA), mandate the inclusion of the economic benefits of noncompliance gained by a violator in the calculation of the proposed and assessed penalties. The various policies require that an "economic benefit component" be calculated and added to the gravity-based penalty component when a violation results in (significant) economic benefit to the violator. RCRA policy defines a significant economic benefit, in monetary terms, as one that exceeds \$2,500; while the CAA policy defines it as one that exceeds \$5,000.



We obtained a report, as of October 1988, that the Agency uses in managing its penalty universe (Quick Look Report--Consolidated Enforcement System). We found that the management information was significantly lacking in data on the computation of economic gains and gravity amounts (See Exhibits 3, 4, and 5 for examples of CWA, RCRA, and CAA print outs, respectively).

Our analysis of the report information showed the following:

<u>Program</u>	<u>No. Of Cases</u>	<u>No. Of Cases</u>		<u>Percent</u>	
		<u>Penalty Not Shown</u>	<u>Benefit Gravity</u>	<u>Benefit</u>	<u>Gravity</u>
CWA	274	220	226	80	82
RCRA	89	87	83	98	93
CAA	282	189	183	67	65

Our analysis shows that for the 274 CWA cases, the regions were not providing benefit and gravity information for the Quick Look Report in 80 and 82 percent of the cases, respectively.

Regarding the 89 RCRA cases, our analysis shows that the regions did not provide benefit component information in 87 cases (98 percent) and gravity component information in 83 cases (93 percent). For the 282 CAA cases, our analysis shows that the regions were not providing benefit and gravity information in 67 and 65 percent of the cases, respectively. The failure to include the information in the Quick Look Report indicates that the amounts may not have been computed.

We also analyzed the information contained in the Quick Look Report by region to determine whether economic benefit and gravity amounts are computed and included in the case information data in all cases by region. The following is the result of our analysis.

<u>Region</u>	<u>Percent Data Were Not Included</u>					
	<u>CWA</u>		<u>RCRA</u>		<u>CAA</u>	
	<u>Benefit</u>	<u>Gravity</u>	<u>Benefit</u>	<u>Gravity</u>	<u>Benefit</u>	<u>Gravity</u>
1	78	78	100	100	83	83
2	53	47	100	100	28	25
3	90	93	100	100	83	70
4	62	75	86	100	56	37
5	91	91	97	87	87	90
6	82	82	100	92	50	50
7	80	80	100	100	56	56
8	85	92	100	100	78	78
9	100	100	100	100	73	73
10	81	81	100	100	50	50

As shown above the problem of not including the economic benefit and gravity amounts in the Quick Look Report is national.

The Quick Look Report is incomplete. Relevant data for tracking each case is, in many instances, missing. This information must be computed, in a timely manner, for each case and included in the data base for management's use and review. It would also serve as a checkpoint to ensure that relevant penalty data is computed.

### Enforcement Accomplishments

The Agency annually reports on its enforcement accomplishments. However, the statistics do not capture the effectiveness of EPA's enforcement program as discussed below.

OECM's "FY 1988 Environmental Accomplishments Report" stated that Federal environmental enforcement activity is proceeding at levels unmatched since the Environmental Protection Agency was created in 1970 to enhance the protection of human health and the environment from the risks resulting from environmental pollution. The report further stated that in FY 1988, EPA established new high-watermarks for both Federal civil and criminal judicial enforcement actions with 372 civil cases and 59 criminal cases referred to DOJ. Since FY 1984, EPA has collected \$71.2 million in civil judicial penalties and 39.1 million in administrative penalties. The report further stated that as part of the effort to deter noncompliance, EPA's enforcement programs have developed penalty policies designed to assess penalties which recoup the economic benefit that a noncomplying facility has realized, and assess additional penalties commensurate with the gravity of the violation(s).

The above types of statistics only show the number of referred cases and penalty dollars collected, which demonstrates only a minor measure of program effectiveness. We believe the effectiveness of the Agency's use of penalties depends on the premises associated with the use of this enforcement tool. In order to be an effective deterrent, civil penalties should be large enough to hurt the offender financially. Premises pertinent to enforcement are as follows:

- Penalties are punitive in nature and intent.
- In order to be punitive, penalties must be large enough to punish the wrongdoer and to deter him and others from committing the offense.
- Penalties that do not negate the economic benefits derived from violations of program requirements are not fair to those who comply with the program and do not deter future violations.

The assessment of penalties that are sufficiently burdensome to be a deterrent to future violations is a critical tool in reaching EPA's goals. It must be made clear to the regulated community that the cost of noncompliance will be greater than that of compliance. Penalties should be punitive in nature rather than remedial. Penalties should deter future noncompliance, by both violators and potential violators, and not just bring a violator back into compliance.

A strong and well managed national program on assessment of penalties against violators of EPA regulations needs reliable summary information to judge the success or failure of the program and to identify those critical areas needing immediate management attention. SPMS, a management tool, whose principal clients are the Administrator and Deputy Administrator, is designed to provide a framework for the setting of goals and priorities, the development of annual guidance for program implementation, and for the evaluation of performance in meeting program objectives. Senior managers review SPMS reports to help them determine accomplishments, problem areas and possible corrective actions. Thus, EPA's management controls need to track the statutory penalty, the economic benefit and gravity-based components, the proposed penalty, the assessed penalty, and any reductions to each.

#### Draft Report Recommendation

We recommended that the OECM Acting Assistant Administrator, coordinate with the Assistant Administrator for the Office of Policy, Planning, and Evaluation (OPPE), and implement a Strategic Planning and Management System (SPMS) reporting requirement to provide for the penalty results of concluded cases by media program. SPMS should show computed penalties, reductions by Agency staff, reductions by Department of Justice and Agency staff, and the final assessed amounts. We recommended also that the Acting Assistant Administrator ensure that the Quick Look Report is complete.

#### Agency Reply To OIG Draft Report

The Acting Assistant Administrator for OECM disagreed with our recommendation primarily because it would require a significant workload increase. The Assistant Administrator for OPPE agreed partially with our recommendation and stated that they have already initiated discussions with OECM concerning this recommendation. However, OPPE would rather see the management of the OECM functions strengthened and use the specific reporting recommendation as part of OECM's own management of Agency penalty program(s) rather than incorporating such specific details in SPMS.

### Auditor's Comments

The information we are asking for is already supposed to be produced via the penalty negotiation process; thus, we do not see a major increase in workload. This data should be accumulated in a fashion so that the effectiveness of the media penalty negotiation process can be better evaluated by senior EPA management. A good start would be to ensure that OECM's Quick Look Report, which already contains various penalty information, is complete. The Quick Look Report could be expanded to increase the other information contained in our draft report recommendation. The expanded and complete Quick Look Report would then contain the accumulated media penalty data, which could very easily be incorporated into SPMS.

### Recommendation

We recommend that the OECM Acting Assistant Administrator coordinate with the OPPE Assistant Administrator to assure that Federal penalty results of concluded cases by media programs are accumulated. The data should show computed penalties, reductions by Agency staff, reductions by DOJ and Agency staff, and the final assessed amounts. A decision by appropriate officials can be made at a later date as to whether the data should be made part of SPMS.

SUMMARY OF ISSUED REPORTS

1. "Office of Mobile Sources' Establishment, Mitigation, and Collection of Penalties" (E1G16-05-0058-61560)

The penalties proposed by the Office of Mobile Sources' (OMS) on violators of EPA's unleaded gasoline regulations have not changed since 1975 and may need revision. Proposed penalties are in some cases only 5 to 10 percent of the amount allowed by the Clean Air Act. The effectiveness of EPA's unleaded gasoline regulations and future enforcement efforts against fuel additive violations could be improved by a formal periodic review of the proposed penalty tables to ensure penalties are large enough to encourage compliance. The effects of noncompliance with EPA's unleaded gasoline regulations are significant.

OMS has not finalized its draft February 1985 Civil Penalty Policy for fuel and tampering violations. Each EPA program office, in a joint effort with the Office of Enforcement and Compliance Monitoring (OECM), is to revise existing policies or write new policies to ensure conformance with the Agency's February 1984 Policy on Civil Penalties. However, OMS has not submitted its policy to OECM for review.

If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. The penalties used by OMS are over 10 years old. Thus the regulated community has had ample time to comply with EPA's rules. OMS needs to coordinate its draft penalty policy with OECM to assure its enforcement program is consistent with the Agency's Policy on Civil Penalties.

2. "Region 5's Stationary Sources of Air Pollution Compliance and Enforcement Program" (E1K67-05-0449-80743)

The Region and two States were not timely enforcing stationary sources for air pollution violations. The violations occurred in cities which are not meeting National Ambient Air Quality Standards. Consequently, the environment was harmed because significant violations were allowed to continue beyond timeframes

established by EPA. Also, EPA's goal of fair and of equitable treatment of violators was not being achieved. Many of the violators exceeded EPA's target resolution date by over 1 year. Assessment of about \$3.3 million in cash penalties for the cases reviewed was delayed.

Regional officials were not calculating and assessing penalties for stationary source violations of the Clean Air Act. Most collected penalties did not recover the savings the violator received from delayed and/or avoided costs (economic benefit). Further, we found cases with no support as to how the penalty was calculated. We also found cases with substantial unsupported reductions to calculated penalties. Consequently, EPA's goals of deterrence and fair and equitable treatment of violators are not being achieved.

We judgmentally selected 12 of the 18 significant cases that were settled with penalties during fiscal year 1986. We compared the calculated penalty contained in the litigation report to the Agency's civil penalty guidance. Only four litigation reports contained penalty calculations that followed the civil penalty policy. Three of the remaining eight cases had no documentation as to how the penalty was calculated. In one case the penalty calculation did not include an amount for a serious violation component even though the company was in violation for 10 years. The collected penalty, in only two of nine applicable cases, was greater than the economic benefit the company received from not complying with the Clean Air Act. Further, cases were found where the calculated penalty amount was significantly reduced without any documentation.

3. "Consolidated Report on EPA's Administration of the Asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP)" (E1GM7-05-0571-80821)

The Agency needs to enforce NESHAP regulations with greater penalties. The assessment of penalties for violations of NESHAP regulations in the regions was generally inadequate because of a lax attitude toward penalizing violators. Also, State enforcement programs varied in thoroughness, and States were not fully carrying out their delegated responsibilities.

Consequently, the primary purpose of penalties, namely to deter violations of EPA's regulations and to remove any economic benefit resulting from noncompliance, was less likely to be accomplished.

4. "Non-Community Water System Program" (E1HW7-03-0171-81928)

EPA was not enforcing water quality standards aboard interstate carrier conveyances (ICC) (airplanes, trains and buses) serving drinking water to the public. Consequently, passengers traveling on these ICCs were being exposed to unnecessary health risks. Over 650,000 passengers are served on board aircraft daily, many of whom consume drinking water in the form of hot and cold drinks. According to the Safe Drinking Water Act, suppliers of this drinking water must comply with testing and reporting requirements. These requirements are necessary even if the water was obtained from a public water system that has complied with all Federal regulations. The additional testing by the ICCs is essential because the water could become contaminated in transporting or storing the water aboard the facilities.

The four states covered by our review did not (a) issue timely violation notices to the suppliers, (b) obtain evidence of public notification, (c) perform any significant enforcement actions against non-community water systems (NCWS), (d) develop or implement enforcement strategies against NCWS and (e) comply with Federal reporting requirements concerning enforcement actions. Some states were not able to provide statistics for the number of enforcement actions regarding NCWS. We were informed by various personnel that enforcement resources were limited at best and were generally directed at community water systems.

5. "Review of Region 5's National Pollutant Discharge Elimination System Permit Enforcement Program" (E1H2D8-05-0293-9100164)

The Region did not follow the Agency's civil penalty policy in assessing penalties for violations of NPDES permit requirements issued under the Clean Water Act in three of the six cases reviewed. Penalties were substantially reduced with very little documentation to support the reductions. The assessed penalties did not always recover the economic benefit of noncompliance the violators received. A double standard has been

established for industrial and municipal violators, and the standards themselves are not being implemented on a consistent basis. As a result, EPA's goals of deterrence and fair and equitable treatment of violators are not being met.

Six of 11 NPDES cases settled with penalties during FY 1987 were reviewed to determine whether penalties were calculated and assessed in accordance with Agency guidance. Five of the six cases reviewed included documentation to show economic benefit of delayed compliance and to support the recommended penalty. However, the penalties assessed (\$202,500) in three of the five cases were about \$10.9 million less than the economic benefit (\$11,134,000) the violators received by not complying with the Clean Water Act. In addition, the files contained little documentation to justify the substantial reductions.

6. "Report of Region 4's National Pollutant Discharge Elimination System Permit Enforcement Program" (E1HWD8-04-0207-9100462)

Region 4 and the states of Georgia and Alabama were not always effectively enforcing National Pollutant Discharge Elimination System (NPDES) permits. Neither the region nor the two states had adequate enforcement management systems. Regional and state personnel were reluctant to take the necessary enforcement measures needed to prevent and eliminate permit violations. Enforcement actions were not always timely, and actions were not escalated when situations warranted. Financial penalties were not effectively used. As a result, some of the region's most significant and chronic NPDES permit violators avoided the expense of complying with the Clean Water Act with little or no penalty.

Because the region and the states did not effectively enforce NPDES requirements, the statutory goals of Congress and EPA were not fully met in Region 4. Agency Operating Guidance for fiscal year 1988 specifically stated that "a high priority for surface water programs in 1988 is to protect human health and the environment by controlling toxicity in all waters where designated uses are not being attained due to the presence of toxic discharges from either point or nonpoint



sources". Less than aggressive enforcement of the NPDES requirements negatively impacts the Nation's waterways, causing a danger to their aquatic life and limiting their recreational use.

7. "Report on National Pollutant Discharge Elimination System Permit Enforcement Program in Region 2" (E1HW8-02-0133-9100476)

The two states reviewed for this report did not follow the Agency's and/or their own civil administrative policies in assessing penalties for violations of NPDES permits. The review disclosed (a) penalty assessments did not include an economic benefit component for violator noncompliance, recover the States' administrative cost of enforcement, or consider other relevant factors; (b) penalties for previous violations were suspended if violators complied with current Consent Order provisions; (c) penalty assessments were inconsistent for municipal and industrial violators and for similar violations; (d) stipulated penalties were not always included in Orders; and (e) cases files lacked adequate documentation to support original or compromised penalty amounts. These conditions occur because of inadequate or failure to implement existing policies and procedures pertaining to penalty assessments, computations and documentation. As a result, EPA's and the State's goal of fair and equitable treatment of violators was not always being met. In addition, the imposition of penalties did not serve as an effective means for deterring continued violator noncompliance.

8. "Report of Region 9's Administration of the State of Hawaii's Grant Programs for Fiscal Years 1986 through 1988" (E1F58-09-0184-9100446)

Facilities in the State of Hawaii have been able to discharge pollutants into the water and air in violation of requirements without concern that significant enforcement actions would be taken against them. This condition was due to a lack of a serious commitment by the Department of Health (DOH) to establish an effective enforcement program. This weakness was compounded by the fact that the Region had not assumed its responsibility to direct DOH to implement an effective enforcement program, or otherwise taken primary responsibility for enforcement of water and air requirements in the state. Although we noted a number of examples of facilities in the state with long histories of water and air

discharge violations, DOH had not proposed or collected meaningful monetary penalties against them. For example, one air discharger had violated requirements for at least eight years with only a \$500 penalty being proposed during the entire period. Also, for FY 1987, the Region indicated that of the \$276,000 of water pollution penalties proposed by the state, only \$2,000 had been collected. In view of the significance of the violations observed and their duration, it is our opinion that the low penalty rates did not meet the goals of EPA's General Enforcement Policy. The goals of the policy require an enforcement approach that provides a deterrent effect and swift resolution of environmental problems.

Monetary penalties for violations of NPDES permit requirements were generally not proposed by DOH, and violator compliance schedules were often not enforced. As a result, only a fraction of the violations which occurred over the last several years have resulted in a penalty, and many did not result in timely correction of the pollution problem. With respect to penalties, one-third of the 27 Notice of Violations (NOVs) issued by the DOH under the water pollution control program in FY's 1986 and 1987 did not include a proposed penalty. Further, there was no documentation explaining why penalties were not proposed against the violators that received NOVs. However, our review disclosed that many of the NPDES violations reported in the NOVs were repeat violations that had continued over long periods of time.

We concluded that DOH has not enforced air pollution control standards in the State of Hawaii in an effective manner. DOH has generally extended violator compliance schedule due dates, rather than initiate enforcement actions when compliance schedules are not met. Also, when monetary penalties are proposed, they are generally not sufficient to accomplish the goals of EPA's enforcement policies.

9. "Consolidated Report on Review of EPA's Controls Over Administrative Penalties Under the RCRA Enforcement Program" (E1G68-09-0188-9100479)

Regional offices are not, as a general rule, including the value of the economic benefits of noncompliance in proposed and assessed administrative penalties against RCRA violators. As a result, violators gain financially from noncompliance with RCRA statutory and regulatory requirements. Of the 20 cases reviewed where it appeared that a value for the economic

benefits of noncompliance should have been assessed, only one case had a final assessed penalty that was sufficient to eliminate the violators economic benefits. To illustrate the potential benefits that can be derived, the violator in one of the cases reviewed had estimated economic benefits of \$229,000 because it did not comply with RCRA requirements. The affected region, however, settled that case with a final assessed penalty of only \$45,000, resulting in a net gain to the violator of \$184,000.

Sufficient gravity-based RCRA penalties are not being consistently proposed to reflect the seriousness, duration of noncompliance, nor all of the violations disclosed. This condition results in penalties inadequate to provide an effective deterrent to noncompliance by the RCRA regulated community. To illustrate, cases were reviewed where groundwater monitoring violations, improper discharges of hazardous waste, and other significant RCRA violations occurred for periods of up to three years, resulting in proposed gravity-based penalties as small as \$6,500. In one case, the proposed gravity-based penalty amounted to \$29 per day for 34 months of noncompliance and in another case only \$11 per day for a six month period of noncompliance. These conditions were largely attributable to the regions either not considering lengthy periods of noncompliance in computing gravity-based penalties or not proposing penalties for all distinguishable violations, as required by the RCRA penalty policy.

Regional negotiators are mitigating RCRA penalties in excess of the parameters contained in existing Agency policy. Final negotiated RCRA administrative penalties, for cases settled during the period reviewed ranged from an average of 14 to 67 percent of proposed penalties with a national average of only 37 percent. Cases reviewed included penalty reductions of as much as \$2 million and reductions for individual violations ranged up to 100 percent. Excessive reductions of penalties diminish the deterrent effects of the enforcement program on the regulated community. Reduced fines can also undermine EPA's efforts to return significant noncompliers to compliance. In effect, achievement of the Agency's penalty policy goals, deterrence and fair and equitable treatment of the regulated community, is questionable.

Regional offices are not documenting the proposed penalty calculations or the specific negotiated adjustments to proposed penalties, or including a statement in the executed consent agreements of the

reasons for mitigating the penalties. Of the 20 cases reviewed, 19 cases had at least one of these two conditions. In some instances, significant reductions in penalties were made without documentation explaining or justifying the reduction. To illustrate, one case had a proposed penalty that was \$6.3 million less than the recommended maximum penalty calculated by the region's enforcement personnel. However, there were no regional records explaining or justifying the difference. We attribute the lack of documentation as required by the RCRA penalty policy, in part, to regional concerns that the availability of detailed information on penalty adjustments could jeopardize future negotiations. The RCRA penalty policy requires such documentation as one of the controls to assist in precluding excessive or improper penalty mitigations without regional management's full understanding. Such documentation also increases the assurance that the regulated community is being fairly and equitably treated.

10. GAO Report--Hazardous Waste...Many Enforcement Actions Do Not Meet EPA Standards (GAO/RCED-88-140)

Penalties assessed by EPA and the states against violators of RCRA requirements may not be large enough to offset the economic benefits of noncompliance. According to the Enforcement Response Policy, the EPA regions are required to follow guidelines contained in RCRA Civil Penalty Policy (RCPP) when assessing penalties against violators of RCRA regulatory requirements. The RCPP was issued in May 1984 to ensure that RCRA penalties are equitably applied and provide an adequate deterrent to noncompliance. The policy provides that, with four exceptions, a penalty should be large enough to remove the economic benefits waste handlers might gain by not complying with RCRA requirements. The Enforcement Response Policy, however, does not require the states to use the RCPP when calculating penalties. State penalty policies were not uniform in how they consider the economic benefit of noncompliance in penalty calculations and that existing EPA and state policies and procedures for calculating penalties were not being properly documented.

Consequently, there was no assurance that EPA and state penalty policies are being properly implemented and that the economic benefit of noncompliance is being adequately calculated and included in the final penalty assessment. As a result, final penalty assessments may not be large enough to offset the economic benefit of noncompliance and thus deter future noncompliance in the regulated community.

In general, GAO could not determine whether the EPA regions issued penalties as prescribed by the RCPP because of the lack of documentation in the files. The regions reviewed issued proposed penalties in 40 of the high-priority enforcement cases included in the review. GAO reviewed 31 of these penalties and found only 2 cases in which they could verify that the economic benefit was calculated in accordance with RCPP.

In nine cases GAO found that conditions related to one of the four exceptions applied, and thus there was no need to include the economic benefit in the proposed penalty. However, GAO found no documentation supporting these determinations. In 15 cases GAO reviewed the penalty calculations, but did not find sufficient evidence or documentation to show that the economic benefit of noncompliance had been considered in the penalty calculation. For the remaining five cases, GAO found no documentation on penalty calculations to review. Thus, in these 29 cases GAO was unable to determine whether the proposed penalties adequately considered the economic benefit of noncompliance.

11. GAO Report--Inland Oil Spills...Stronger Regulation and Enforcement Needed to Avoid Future Incidents  
(GAO/RCED-89-65)

In the absence of national guidance on the imposition of fines for violations of EPA's Oil Pollution Prevention regulations, the regional offices have adopted inconsistent policies. Overall, fines are rarely used, although EPA's data indicate that the rate of noncompliance with the regulations may be high.

CASE SUMMARY EXAMPLES

Clean Water Act Cases

1. A company was discharging untreated process wastewater directly into a nearby river and to a publicly-owned treatment works through the sanitary sewer system. The company did not have a NPDES permit to discharge into the river. State authorities estimated that the company was continuously discharging into the river since 1976. The company was also not authorized to discharge into the sanitary sewer. The company completed construction of a connection to the sanitary sewer in March 1980. The company had stated that it was discharging only sanitary waste, instead of untreated process water.

In June 1983, the region requested that the state initiate enforcement action. When the state did not take action, the region referred the case for civil action on August 5, 1983. The region initially calculated an economic benefit of \$839,852 and a gravity-based penalty component for recalcitrance of \$900,000. However, these amounts were reduced to a recommended penalty of \$100,000 due to the company's inability to pay. A consent decree was signed on November 23, 1986, and included a \$100,000 penalty. The company complied with the provisions of the consent decree, but the assessed penalty of \$100,000 had not been paid at the time of our audit. (EPA Audit Report No. E1H2D8-05-0293-9100164)

2. A company operates a manufacturing plant which discharged, on a daily basis, between 50,000 and 200,000 gallons of waste water into the river. Between January 1983 and January 1985, the company violated its NPDES permit limits for various common effluents and also dangerous substances, such as cyanide and copper.

The company had a history of noncompliance. The state environmental authority issued a compliance order in 1979 to the company for similar violations. The order included a \$2,500 penalty. The state also issued a new permit to the company with less stringent effluent limits. The company continued to violate its new permit and compliance order. The state requested that the region take enforcement action since further administrative action would not be sufficient to obtain compliance.

The region referred the case for civil action, seeking a civil penalty of \$150,000, on June 27, 1985. The proposed penalty did not even cover the calculated economic benefit of \$183,000. The Consent Agreement/Final Order (CA/FO) included a penalty of \$137,500. The company has, to date, substantially complied with the CA/FO. (EPA Audit Report No. E1H2D8-05-0293-9100164)

3. The region proposed a \$7,332,000 penalty for the city. The amount included \$1,222,000 for the recalcitrance factor because of the permittee's failure to develop a definite compliance plan "after much prompting from EPA". The city had continually violated its permit conditions. The region initiated a civil referral in September 1987 when it was evident the facility was not going to meet the July 1, 1988 compliance deadline. In addition to the \$1.2 million for recalcitrance, the civil referral showed an economic benefit of \$5,845,000 because of the 84-month delay in compliance and a gravity component of \$265,000. The region computed a settlement penalty of \$733,200. The region adjusted the original \$7 million downward by 10 percent for the city's inability to pay and 80 percent for litigation considerations (an assumption the government would save time and expense by quickly settling). (EPA Audit Report No. E1HWD8-04-0207-9100462)

#### Resource Conservation and Recovery Act Cases

1. The regional negotiators mitigated the proposed penalty of \$77,630 down to \$7,500, or a reduction of over 90 percent. The region's complaint against the company included the following counts and proposed penalties:

- a. Failure to characterize on-site waste, \$9,000;
- b. Accumulating waste on-site for longer than 90 days;
- c. Failure to demonstrate adequate liability insurance coverage, \$22,500; and
- d. Failure to make timely payments to the financial assurance trust fund, \$37,130.

Documentation in the region's enforcement files indicated that the company had been violating the RCRA regulations cited in the complaint for a period of three to five years.

The company's response to the complaint attempted to justify reasons why the facility should not comply instead of taking positive actions to bring the facility into compliance. In our opinion, the company clearly exhibited a reluctance to comply as well as a substantial history of noncompliance.

Regional negotiators, in settling the case, adjusted the proposed penalties down to \$7,500. Counts (1), (2), (4), with proposed penalties totaling \$55,130, were reduced to \$0. Count (3), with a proposed penalty of \$22,500, was reduced 67 percent to \$7,500. In our discussions with regional negotiators, they provided the following reasons for the penalty reductions:

- a. Past cooperation and future corrective actions to be done by the company;
- b. The company assertions that it had characterized the waste and had a manifest for transporting the waste;
- c. Questionable applicability of regulations because the company asserted it was a recycling and reprocessing facility;
- d. Conflicting information told by regional inspectors on whether the company was regulated or not;
- e. Avoidance of a complicated trial; and
- f. The company just didn't want to pay the penalties.

Documentation in the region's case files did not provide support for several of the above reasons. We found no evidence that the company had made efforts to correct violations independently of the region's enforcement/inspections. The violator seemed to have ignored the region's prior attempts at encouraging RCRA compliance. We found no evidence to substantiate the performance of waste characterization, that the wastes were not hazardous, or that the shipments had been manifested. The problem with conflicting information being given to the facility by permitting personnel versus enforcement personnel, in our opinion, is not a valid basis for excessively reducing penalties. The region's 90 percent reduction of the proposed penalties appears to have exceeded the guidelines contained in the RCPP and were not justified based on available documentation. (Draft Audit Report No. E1G68-09-0188)



2. The regional negotiators adjusted the proposed penalty of \$550,000 (\$525,00 for not manifesting and \$25,000 for illegal discharges) down to \$45,000, or a 92 percent adjustment. The region's explanation for reducing the penalty was that the case evidence was inadequate to prove that all 85,000 gallons of wastes disposed of were hazardous. According to the penalty policies, the burden of proof rests with the violator. Thus, once cited, the company should have had to prove that all 85,000 gallons of waste were not hazardous.

The region had laboratory results from one grab sample which showed the hazardous waste characteristics of the company sample. The EPA inspector indicated that the sample was representative of the company's waste stream. The inspector also found that the company disposed of hazardous wastes for 21 days without the required RCRA manifests, which would be an egregious violation. Regional records also showed that, just prior to the subject infractions, the company violated similar hazardous waste regulations by failing to analyze generated solid wastes for hazardous characteristics and failing to prepare hazardous waste manifests. This was documented in a complaint issued against the company in June 1983. A CA/FO was executed with the company on August 29, 1983, in which the company agreed to comply with the RCRA generator regulations and submit waste analyses to the regional office. However, the company continued to violate the RCRA regulations while the terms of the previous CA/FO were still in effect. Thus, the evidence showed the company to be a repeat violator of RCRA and to have improperly disposed of hazardous waste for 21 days.

The company, in response to the complaint, did not present sufficient evidence to show that any of the generated wastes were not hazardous. The company's behavior could be described as concealment and compliance avoidance with program regulations. We believe that the Region had a preponderance of evidence that strongly supported the proposed penalties. Regional personnel claimed, however, that the region's evidence would not hold up before an Administrative Law Judge hearing. In our opinion, this conclusion was speculative and an inadequate basis to reduce the proposed penalty so extensively.

The \$45,000 final assessed penalty appeared to be an arbitrary settlement for both violations cited in the complaint. With regard to the mitigation of the \$25,000 improper disposal penalty for the second violation, no

documentation was found to support the region's mitigation of this penalty. We found no justification to reduce the proposed penalties by more than \$210,000 in total. The region, however, reduced the proposed penalties by a total of \$505,000. (Draft Audit Report No. ElG68-09-0188)

### Clean Air Act (CAA) Cases

#### Stationary Sources

1. A company accrued economic benefits of \$900,000 over a two and one-half year period of violations, but the region reduced the amount to \$14,000 because the company exceeded its emission standard for only 15 days during this time. Even though there were only 15 days of violation, the company saved \$900,000 by delaying the installation of the pollution control equipment.

The region stated that the company did not continuously violate the CAA and the civil penalty policy assumes continuous violation of the statute is necessary. It is of little consequence that the violations were on occasions or on a continuous basis, the economic benefit from delayed investment in pollution control equipment is the same. EPA's policy is to recover the savings the violator received from delayed and avoided costs. The CAA authorizes EPA to assess penalties of up to \$25,000 per day per violation for noncompliance with program requirements; in this case \$375,000 (15 days times \$25,000 per day). There should have been a higher collection for the economic benefits in this case. (EPA Audit Report No. ElK67-05-0449-80743)

2. A region investigated and documented numerous complaints and violations at a facility engaged in open air sandblasting operations. This activity led to improper emissions affecting adjoining property owners.

The region issued a notice of violation in July 1985 and an administrative order in October 1985. The administrative order required the company to take substantive control measures by erecting barriers or enclosing those areas in which sandblasting was done to prevent further violations. In August 1986 the region referred the case to the Department of Justice (DOJ) for prosecution. A proposed civil penalty of \$60,791 was sought. The proposed penalty included amounts for failure to take prompt corrective action and a history of recalcitrance in complying with the administrative order. The region established a proposed bottom line figure of \$20,000 for inability to pay.

During negotiations, four additional complaints were lodged against the company for open-air sandblasting. The region and DOJ offered to settle the case for \$33,701 with credits totaling \$28,701 for cooperativeness and agreement to proposed stipulated penalties in the CA/FO. The case was settled for a total penalty assessment of only \$5,000.

The CA/FO required the company to construct enclosures for its sandblasting operation by April 1, 1989. These enclosures had not been built as of April 1, 1989. Inspections by regional officials have documented other violations of the CA/FO. These documents support the company's recalcitrance actions and apparent disregard for the terms of the CA/FO. The company has for three years violated the CAA without significant or apparent corrective compliance action and has paid only minor penalties of \$5,000 for these violations. (Example from expanded audit fieldwork.)

Asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP)

1. A region was notified of demolition work on buildings containing asbestos. The contractor was aware that all work was to be performed in accordance with the asbestos NESHAP demolition and renovation regulations.

The region conducted an inspection of the site and found dry asbestos in a torn container and on the ground, indicating that the material had not been adequately wetted during removal.

The region initiated proceedings against the contractor and proposed a penalty of \$39,279. The penalty included a 100% upward adjustment to the gravity component for recalcitrance in violating the regulations in the first instance and in continuing to violate them after inspectors discussed the initial violation with company representatives. The region settled for \$1,500, based upon the contractor's alleged inability to pay the proposed penalty. Regional case files did not contain documentation supporting the financial inability to pay, nor did the files show that delayed penalty payments were considered in lieu of a straight deduction. (Example from expanded audit fieldwork.)

QUICK LOOK REPORT  
CONSOLIDATED DOCKET ENFORCEMENT SYSTEM  
"S" SENSITIVE DATA - EPA INTERNAL USE ONLY  
ALL CASES WITH REFERRALS TO DOJ FROM 8/31/86 TO PRESENT  
SORTED BY HEADQUARTER DIVISION AND LAW (FSDOJ)

LAW	SECTION	TYPE	CIV TO DOJ	BENEFIT COMPONENT	GRAVITY COMPONENT	PROPOSED PENALTY	ASSESSED FEDERAL PENALTY	CIV OVERALL STATUS	DESCRIPTION
CHA	301A	CIV	7/29/86			95,000	27,500	CONCLUDED	
CHA	301	CIV	5/12/86			100,000	60,000	CONCLUDED	
CHA	309	CIV	8/01/86			100,000		FILED IN C	
CHA	301A	CIV							
CHA	301B								
CHA	307A								
CHA	307B								
CHA	309A								
CHA	307	CIV	8/08/86			60,000		CASE CLOSE	
CHA	301	CIV	11/06/86					FILED IN C	
CHA	307								
CHA	309								
CHA	402								
CHA	309B	CIV	2/26/87			240,000	150,000	CONCLUDED	
CHA	309C								
CHA	301	CIV	3/31/87	500,000	500,000	300,000		FILED IN C	
CHA	309								
CHA	402								
CHA	301	CIV	4/27/87			63,000		31,500 FILED IN C	
CHA	309								
CHA	301	CIV	5/12/87	120,000	120,000			FILED IN C	
CHA	307								
CHA	309								
CHA	402								
CHA	301	CIV	11/23/87			25,000		FILED IN C	
CHA	309								
CHA	402								
CHA	301	CIV	2/23/88			75,000		FILED IN C	
CHA	301								
CHA	404								
CHA	307D	CIV	3/25/88			125,000		FILED IN C	
CHA	308								
CHA	301A	PRH	5/27/88	11,530,000		100,000		CASE CLOSE	
CHA	301	PRH	4/29/88	3,503,000		350,000		AT DOJ	
CHA	301A	CIV	7/07/88					AT DOJ	
CHA	404								
CHA	301	CIV	8/26/88					AT DOJ	
CHA	402								
CHA	301	CIV	9/30/88					AT DOJ	
CHA	404								
CHA	301	CIV	9/30/88					AT DOJ	
CHA	309								
CHA	404								

**EXHIBIT 4**  
**(See Page 30)**

## QUICK LOOK REPORT

# CONTROLLED DOCKET ENFORCEMENT SYSTEM

CONFIDENTIAL SOURCE - INTERNAL USE ONLY

ALL CASES WITH REFERRALS TO DOJ FROM 03/01/86 TO PRESENT  
SORTED BY HEADQUARTER DIVISION AND LAW (FSD0J)

LAWS	SECTION	TYPE	CIV TO DOJ	BENEFIT COMPONENT	GRAVITY COMPONENT	PROPOSED PENALTY	ASSESSED FEDERAL PENALTY	CIV OVERALL STATUS DESCRIPTION
RCRA	3000	CIV	6/28/88					AT DOJ
RCRA	3008A	CIV	7/30/86					FILED IN C
RCRA	3008A	CIV	9/27/87					AT DOJ
RCRA	3005E	CIV	7/29/86			128,000	110,000	CONCLUDED
RCRA	3010	CIV	9/22/87					FILED IN C
RCRA	3005A	CIV	2/24/88			1,027,540		FILED IN C
RCRA	3005E2							
RCRA	3008H							
RCRA	3004U							
RCRA	3005E	CIV	4/05/88					AT DOJ
RCRA	3008A	CIV	5/12/88	3,394,820				AT DOJ
RCRA	3005A							
RCRA	3005E							
CERCLA	107							
RCRA	3008	CIV	11/05/86				85,000	FILED IN C
RCRA	3005A							
RCRA	3005E2	CIV	4/23/86				280,000	CONCLUDED
RCRA	3005A							
RCRA	3008							
RCRA	3005	CIV	5/12/86					FILED IN C
RCRA	3008	CIV	5/12/86					CONCLUDED
RCRA	3005	CIV	5/12/86			25,000		FILED IN C
RCRA	3008	CIV	8/15/86			25,000		FILED IN C
RCRA	3005							
RCRA	3008							
RCRA	3005E							
RCRA	3004	CIV	9/29/88		76,000	5,925	5,925	AT DOJ
RCRA	3005							
RCRA	3008	CIV	6/29/88			43,250		AT DOJ
RCRA	3006C							
RCRA	30090							
RCRA	3010							
RCRA	3002							
RCRA	3004	CIV	3/24/87					62,034 CONCLUDED
RCRA	3005							
RCRA	3008	CIV	8/15/86			700,000		FILED IN C
RCRA	3005							
RCRA	3006H							
RCRA	3005	CIV	8/07/86			30,066		21,402 CONCLUDED

EXHIBIT 5  
(See Page 30)

QUICK LOOK REPORT  
CONSOLIDATED DOCKET ENFORCEMENT SYSTEM  
\*\* SENSITIVE DATA - EPA INTERNAL USE ONLY \*\*  
ALL CASES WITH REFERRALS TO DOJ FROM 03/01/86 TO PRESENT  
SORTED BY HEADQUARTER DIVISION AND LAW (19300J)

LAW	SECTION	TYPE	CIV	BENEFIT	GRAVITY	PROPOSED	ASSESSD	CIV
		CASE	TO DOJ	COMPONENT	COMPONENT	PENALTY	FEDERAL	OVERALL
							PENALTY	STATUS
								DESCRIPTION
CAA	112	CIV	6/24/88	1,600	10,000	11,600		AT DOJ
CAA	110	CIV	6/28/88			461,183		AT DOJ
CAA	111							
CAA	112							
CAA	112	CIV	6/30/88	11,025	21,000	32,025		AT DOJ
CAA	112C	CIV	6/30/88	1,063	14,000	15,063		AT DOJ
CAA	110	CIV	6/28/88	2,614,000	811,000	3,397,200		AT DOJ
CAA	111							
CAA	111	CIV	9/30/88	32,377	66,000	65,177		AT DOJ
CAA	111	CIV	9/30/88	11,608	156,000	120,608		AT DOJ
CAA	112	CIV	9/30/88	25,000	25,000			AT DOJ
CAA	111	CIV	9/30/88					AT DOJ
CAA	112	CIV	4/16/86	1,200	17,000	18,200		15,000 CONCLUDED
CAA	112	CIV	7/22/86			51,000		FILED IN C
CAA	112	CIV	7/18/86	9,279	30,000	39,279		1,500 CONCLUDED
CAA	110	CIV	8/29/86	2,701	34,000	60,971		5,000 CONCLUDED
CAA	111	CIV	9/03/86	63,051	55,000	110,051		160,519 CONCLUDED
CAA	112	CIV	4/14/87	5,174	5,000			10,000 CASE CLOSE
CAA	112	CIV	10/26/87					RET TO REG
CAA	112	CIV	2/17/87	7,000	18,500	19,627		24,500 CONCLUDED
CAA	114	CIV	5/05/87	3,627	16,000	15,500		20,000 FILED IN C
CAA	111	PRN	8/31/87					20,000 CONCLUDED
CAA	114	CIV	9/11/87			110,000		FILED IN C
CAA	114	CIV	9/24/87			65,500		FILED IN C
CAA	110	CIV	6/02/88			659,000		AT DOJ
CAA	114							
CAA	112	CIV	9/30/87	50,167	30,000	60,367		FILED IN C
CAA	112	PRN	5/17/88			75,592		RET TO REG
CAA	112	PRN	2/01/88			12,950	5,500	RET TO REG
CAA	112	PRN	5/18/88			11,200		RET TO REG
CAA	112	PRN	6/16/88			10,000		RET TO REG
CAA	167	CIV	3/28/86			216,765		CASE CLOSE
CAA	111	CIV	6/24/86	17,032	20,000	30,000		30,000 FILED IN C
CAA	112	CIV	9/17/87			340,004		RET TO REG
CAA	112	CIV	9/29/87			42,000		15,000 CONCLUDED
CAA	112	PRN	12/16/87			345,500		AT US ATTY
CAA	112E	CIV	9/19/88	65,000	253,200	319,000		AT DOJ
CAA	111	CIV	9/16/88					AT DOJ
CAA	110A	CIV	9/30/88			16,560,000		AT DOJ
CAA	112C	PRN	9/30/88					AT DOJ
CAA	110	CIV	3/31/86	55,014	43,000	60,014		32,000 CONCLUDED
CAA	110	CIV	3/31/86	3,393	35,000	24,393		20,000 CONCLUDED





APPENDIX 1  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460


9-5  
OA-1307

AUG 31 1989

OFFICE OF ENFORCEMENT  
AND COMPLIANCE  
MONITORING

MEMORANDUM

SUBJECT: Comments on Draft Audit Report  
No. E1GBE9-05-0087-91\*\*\*\*\* "Capping Report on the  
Computation, Negotiation, Mitigation and Assessment  
of Penalties Under EPA Programs

FROM: Edward E. Reich   
Acting Assistant Administrator

TO: Ernest E. Bradley  
Assistant Inspector General for Audit

Thank you for the opportunity to comment on this draft report. My staff has reviewed it and their comments are reflected in this memorandum. In addition to the following general comments, I am including media specific comments unique to TSCA and FIFRA as well as a 'pen and ink' mark-up of your report.

I agree with your first recommendation concerning the need for the Office of Enforcement and Compliance Monitoring (OECM) and media program Assistant Administrators to reemphasize to Agency personnel the need to adhere fully to media program penalty policies. I also agree with the recommendation for more aggressive oversight of Regional activities. I believe this can best be accomplished through expanding the existing media program oversight audits conducted periodically by each program office with OECM's participation. These program office reviews can be expanded and modified to assess the adequacy of penalty computations under applicable program penalty policies. It needs to be made clear, however, that Headquarters resources will not permit review of each penalty nor do we agree that this would necessarily be an appropriate use of resources. Oversight activities should include assuring that regions have in place and are implementing adequate systems for tracking and documenting penalty assessments and for



assuring adherence to the guidelines spelled out in our penalty policies. While your recommendation includes the Department of Justice (DOJ), I cannot commit them to providing documentation for reductions made in the course of negotiations with violators. We do intend, however, to discuss with DOJ the need for appropriate documentation of the rationale for final penalties in judicial cases.

The report also finds "[a]ppropriate penalties were either not calculated and assessed at all, or inadequately calculated," and "[t]he Agency, in assessing penalties, had not complied with either the letter or intent of the various penalty policies in all cases." Since none of the case examples described have any citation or identification, we were unable to address them specifically. The report found that the economic benefit and gravity components were not indicated on the Quick Look Report and asserts that "failure to include the information in the Quick Look Report indicates that the amounts may not have been computed." Relying on the Quick Look Report to reach this conclusion, however, shows a serious misunderstanding of how the docket system is used in relation to penalty calculations.

Because we do not rely primarily on the docket system to keep track of penalty calculations, no special emphasis is placed on maintaining those particular data fields. The docket mainly functions to keep track of the number of cases currently in the system, the government attorneys assigned to them, which provisions of the various statutes were violated, and other matters. There are more specific and effective procedures in place for keeping track of penalties of which you may not be aware.

Headquarters requires in its Civil Penalty Policy that all litigation reports contain penalty calculations which support the proposed minimum settlement amount. Further, all regional case files must contain documentation of the reasons for any changes in the proposed settlement amount from the time the case is initiated until a consent decree is signed. In addition, Headquarters approval of all minimum settlement amounts is required.

A Headquarters enforcement staff attorney is assigned to every civil judicial case. One of their primary functions is to monitor regional compliance with these procedures and the penalty policy. Therefore, there is case-by-case monitoring by Headquarters of regional compliance with the penalty policy in civil judicial cases.

Relative to State penalties, it is true that under the Agency's "timely and appropriate enforcement response" criteria, EPA can and does take independent enforcement action if a State fails to assess any penalty (or assesses one which is "grossly deficient") for violations for which program policy requires penalties to be assessed. The 1986 Revised Policy Framework on the State/Federal Enforcement Relationship requires States to keep sufficient documentation so that the Regions can determine whether an appropriate penalty was assessed.

In making this determination, EPA considers the State's own penalty authority and any applicable penalty policy. It should be noted, however, that while States are required to have adequate penalty authorities, (but not the same procedures as EPA), they are not required to assess the same penalty for a particular violation as would EPA. Agency policy is very clear on this point. However, EPA has been working with the States to increase their penalty assessments by reviewing specific cases through the oversight process, providing information on penalties which EPA assesses, providing training on EPA's computer program to compute the economic benefit of noncompliance, encouraging them to develop their own formal penalty policies, and providing information through the publication of a summary of the environmental penalty authority of all States.

Your recommendation that the Strategic Planning and Management System (SPMS) show computed penalties, reductions by Agency staff, reductions by DOJ and Agency staff and the final assessed amounts would result in a significant workload increase. In addition, there is tremendous opposition within the Agency to expanding the scope of our accountability system. The management emphasis is gradually shifting toward measures of real program effectiveness, not simply numerical activity indicators. I believe that the expanded program reviews discussed above would provide a preferable approach to oversight, striking a balance between available resources, needed penalty oversight, and measuring real environmental achievements.

We agree that the "Negotiation Skills Training" has been a very successful course. Your statement on page 23 of the report, however, noting that "[t]he course was last provided in FY 1987. . . ." is incorrect. The course was offered six times in FY 1988 and, so far, has been given seven times in FY 1989. OECM will review the implications of making this training, or its equivalent, mandatory for those attorneys engaged in enforcement negotiations. In addition, training on the BEN and ABEL computer models has been given twelve times since August of 1988, ten times in regional offices and twice at Headquarters. The models have also been presented in two States. We intend to continue to support such training.

- 5 -

I appreciate the opportunity to review this draft report and I hope you find these comments helpful. Should you desire clarification or additional information on any point please contact Pat Alberico of my staff on 382-4540.

Attachments

## ATTACHMENT

### Pesticides and Toxic Substances Enforcement

On page 19 of your report you note that although no detailed analysis was performed on penalties assessed under the Toxic Substances Control Act (TSCA) or the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the aggregate penalties for these programs in FY 87 were reduced, on average, by 82% in TSCA and by 77% in FIFRA. You recommended that OECM evaluate a sample of these cases to determine if problems exist with negotiations. Within the relatively short time to review this, OECM has evaluated these statistics with the Office of Pesticides and Toxic Substance's Office of Compliance Monitoring and has reached the following conclusions.

In the TSCA Program, a large percentage (over 50%) of the 741 cases settled during FY 87, involved violations of the Asbestos In Schools regulations, 40CFR 763 et seq. Because the regulated community consists entirely of public and private educational institutions, the Agency penalty policy recommended that the penalties be substantially mitigated or even fully abated if the school undertook asbestos abatement actions, which were not required under TSCA or the Part 763 rules. This approach was adopted by the Congress when it passed the Asbestos Hazard Emergency Response Act (AHERA) or TSCA Title II in 1987, to replace the Part 763 rule. Penalties under AHERA, by law, must be remitted for educational institutions or paid into an Asbestos Abatement Trust Fund which can be used by educational institutions for additional abatement.

TSCA penalties must be reduced by statute, whenever they may substantially affect a facility's "ability to continue in business" or if there is a financial condition which prevents their ability to pay the fine from cash reserves. These provisions are found in TSCA Section 15. Before EPA will consider reducing a penalty based upon ability to pay, EPA enforcement offices are instructed to obtain credible financial information, such as tax returns, corporate balance sheets or other similar financial documentation.

Finally, TSCA penalties have been reduced in settlement to obtain leverage for environmentally beneficial expenditures as a condition of settlement. Generally, "settlements with conditions" involve the implementation of compliance or abatement activities which are unrelated to correcting the violation that is the subject of the enforcement action (that is a cost that can not be used to reduce the penalty) or implementation

of a compliance audit. An example of a penalty mitigation project might involve the accelerated removal and disposal of PCB electrical equipment. A dollar for dollar credit is not given. Some offices have given a \$1.00 dollar reduction for each \$3.00 dollars spent up to a maximum penalty reduction. With the increased emphasis in EPA on "pollution prevention", it is anticipated that a greater number of cases may be settled with conditions like these and care must be taken to insure that adequate documentation is maintained in the official file and that certification of completion is submitted and verified to ensure that settlement terms are met.

To insure that penalty reductions are appropriately documented, the TSCA Civil Penalty Policy published at 45 F.R. 24358 September 10, 1980, requires that the published work sheet be completed to document each penalty reduction.

In the FIFRA program, a civil penalty matrix and categories of violations was published in the Federal Register in 1974. This guidance provides that the civil penalty to be imposed must take into account the size of the violator's business. EPA must then impose a graduated penalty based upon 5 category sizes of business, the largest category being over \$1,000,000 in gross sales. EPA Regional offices endeavor to place the violator into the appropriate category through reliance on the most readily accessible data, which are Dun and Bradstreet financial reports. Often, however, at settlement conferences, FIFRA violators are able to demonstrate through actual tax returns or accounting statements that the Dun and Bradstreet reports which are advisory and not based on actual certified tax returns are inflated. Under FIFRA, by statute, EPA is precluded from asking for tax returns or financial or sales data at the time of inspection.

FIFRA penalties may also be reduced for factors similar to TSCA; settlements with conditions or abatement activity, although to a much lesser degree. Finally, a significant factor in many FIFRA reduction concerns that type of violation actually involved. The more hazardous misuse of pesticides violation, by statute, are to be handled by the state lead agencies, leaving Federal enforcement efforts to concentrate on violations of misbranding (i.e. false labels or false claims) or failure to submit annual production reports under FIFRA. In a large proportion of these cases, perhaps 35%, failure to file production reports occurs in either very marginal businesses or businesses which are about to, or have, ceased operations. In these cases, very minor fines may be collected along with terminations or surrender of the Registrant's FIFRA establishment number.



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

OFFICE OF  
POLICY, PLANNING AND EVALUATION

MEMORANDUM

SUBJECT: Draft Audit Report No. E1GBE9-05-0087-91\*\*\*\*\* Capping  
Report on the Computation, Negotiation, Mitigation, and  
Assessment of Penalties Under EPA Program

FROM: Terry Davies, Assistant Administrator  
Office of Policy, Planning, and Evaluation

TO: Assistant Inspector General for Audit

The following is in response to your request for comments on the subject draft audit report. Our response is directed at Finding No. 2- PENALTY INFORMATION NEEDS TO BE PART OF EPA'S STRATEGIC PLANNING AND MANAGEMENT SYSTEM REPORT, pages 27 - 30 of the draft audit report.

We understand that the recommendation suggests that detailed operational information should be included in the Agency's Strategic Planning and Management System (SPMS) concerning the Office of Enforcement and Compliance Monitoring (OECM) and their management of "...computation, negotiation, mitigation, and assessment of penalties under EPA programs."

We agree partially with the recommendation in the draft report in that SPMS should include measures that reflect agency program and management performance of various functions including penalty assessment. We have already initiated discussions with OECM concerning this recommendation.

However, we would rather see the management of the OECM functions strengthened and use the specific reporting recommendation as part of their own management of agency penalty program(s) rather than incorporating such specific details in the agency-wide Strategic Planning and Management System (SPMS).

We believe that such specific information, such as: "...computed penalties, reductions by Agency staff, reductions by Department of Justice and Agency staff, and the final assessed amounts" should not be included in SPMS. Rather indicators of performance by OECM in these and other related management areas should be developed and included in SPMS.

The Accountability Systems Branch in the Office of Policy, Planning and Evaluation (OPPE) will continue these initial discussions with OECM and address the larger issues concerning availability of data from States and Regions, feasibility of collecting and reporting such data, and whether such data is appropriate for inclusion in SPMS.

With regard to the inclusion of economic benefits components in assessing penalties, the Office of Policy Analysis has developed the benefit of noncompliance (BEN) model which can be used to calculate these benefits. The report did not provide much detail on why economic benefits components are or are not being included in penalty assessments. If there is a need to advise the Regions on how to calculate economic benefit or to follow-up on the use of the BEN model, please contact Bill Painter (382-2756).

cc: Hank Schilling  
Pam Stirling  
Bob Currie  
Chuck Kent  
Dan Beardsley  
Pat Alberico, OECM

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