

*From Here to a Penalty: Anatomy of EPA Civil Administrative Enforcement*<sup>®</sup>

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*Attachment 1 - Review of Selected Major Federal Environmental Statutes - Administrative Penalty Authorities*

*Attachment 2 - Excerpt from “Fiscal Year 2010/EPA Enforcement & Compliance Annual Results”*

*Attachment 3 - Selected EPA and State Environmental Inspection Protocols*

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On one typically ordinary day, you are casually opening the morning mail and find a letter on U.S. Environmental Protection Agency (EPA) letterhead (with that distinctive logo) signed by some kind of “division director.” Attached to the letter is a legal-looking document with the word “Complaint” emblazoned prominently across the first page. The sunlit room suddenly seems to go dim around you and you start to feel your ears getting warm and your stomach tightening, especially when you get to the part with the heading “Civil Penalty.” It quickly sinks in that you are about to embark on a potentially long and nerve-racking odyssey: *Yes...It’s time for “from here to a penalty!”*<sup>1</sup>

## **I. Introduction/Preliminary Matters**

EPA enforcement activity, including administrative penalty orders, has been relatively steady in the last few years, although in 2010, EPA posted a slight decline in its statistics. *See* the excerpt from “*Fiscal Year 2010/EPA Enforcement & Compliance Annual Results*” in Attachment 2 to this paper. Although new budget cuts may take a bite out of EPA’s enforcement initiatives, enforcement is expected to remain an agency priority. *See* EPA’s “*National Enforcement Initiatives for Fiscal Years 2011-2013*,” especially the one relating to “toxic air pollution” associated with “excess emissions caused by facilities’ failure to comply with EPA’s leak detection and repair requirements and restrictions on flaring, and to address excess emissions during start-up, shut-down, and malfunction events.”<sup>2</sup>

### **A. Purpose**

The purpose of this paper is to:

1. Provide a simplified and conversational overview of the basic elements of EPA's current civil administrative<sup>3</sup> enforcement program that are common to the major federal pollution control statutes (i.e. air, water, and waste), including inspections, information requests, self-disclosures, administrative complaints and compliance/penalty orders;
2. Discuss strategies for resolving conflict short of hearing/litigation, including negotiated settlements/consent orders and penalty avoidance/mitigation; and
3. Identify some positive and negative terms and conditions in settlements from the defense perspective.

The ultimate objective of the paper is to provide the reader with a very basic, practical overview of EPA's administrative penalty enforcement process from a systemic perspective. Since the regulated community will see administrative enforcement far more often than judicial enforcement, this is an important area with which to be familiar.

## **B. Limitations**

We want to emphasize that this is a basic and selected overview of the administrative penalty assessment process. The EPA administrative enforcement process has a great many legal nooks and crannies that will not be covered here.<sup>4</sup> So, the simplified discussion here should not be understood to imply that the system is simple from a legal standpoint. In many ways, it can frequently mirror the same type of arcane detail as the public is used to seeing in the judicial system. Accordingly, it is always prudent to promptly consult with competent legal counsel when faced with a formal enforcement action.

This paper also will not focus on administrative compliance orders that do not assess civil penalties, such as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") §106 (abatement of imminent and substantial endangerment from release of hazardous substances), the Resource Conservation and Recovery Act ("RCRA") §7003 (abatement of imminent and substantial endangerment from release of solid or hazardous waste), RCRA §3013 (monitoring, analysis, and testing related to substantial hazard) Clean Air Act §303 (abatement of imminent and substantial endangerment from pollution source) Clean Water Act §309(a) (abatement of permit violations), or Safe Drinking Water Act §300i(a) (abatement of imminent and substantial endangerment to drinking water supply). Such orders do not afford an administrative hearing/appeal process and have been held to preclude even court review prior to becoming binding on the respondent.<sup>5</sup>

Finally, we note that most of the primary federal environmental pollution control programs are delegated to, or administered by, state agencies and, consequently, a major portion of administrative enforcement of these programs is frequently conducted under state law and administrative procedures rather than directly by EPA. Although there are wide variations in the nature of boards and commissions that conduct administrative enforcement at the state or regional level, state administrative enforcement is generally very similar in substance and procedure to EPA administrative enforcement. Consequently, many of the observations made in this paper will have relevance at the state level as well (i.e. settlement terms, SEPs, contested cases). Of course, some federal programs, e.g. regulation of fuels and fuel additives, 40 C.F.R. Parts 79 and 80, are enforced only at the federal level.

## **II. Overview of Statutory Authority for EPA Administrative Penalty Enforcement**

It should be noted at the outset that we do not mean to suggest by the title of the paper that civil penalties are always a foregone conclusion in the administrative enforcement process. However, the imposition of penalties and other affirmative obligations on the regulated entity are

certainly EPA's expected conclusion and we believe that full penalty avoidance, when it happens, is usually not achievable without litigation (administrative or judicial) with the agency.

*The best time for full penalty avoidance in the administrative realm without litigation is usually before a complaint gets issued, especially where the possibility of enforcement is known, e.g. following an information request or inspection.* The time between an inspection and issuance of an administrative complaint can be potentially be used to meet with the agency and provide reasons why an enforcement action should not be instituted. After complaint issuance, it is exceedingly difficult for the involved agency personnel to concede that the whole enforcement process was invoked for a fundamentally meritless claim or claims even if that is the case.

## **A. Statutory Penalties Generally**

All of the major federal environmental statutes (such as the Clean Air Act and the Clean Water Act) contain penalty provisions establishing the maximum penalties that may be sought by the United States for violations of these acts. EPA is the federal agency that primarily administers the federal environmental statutes and is given the authority to take enforcement actions, including filing administrative complaints, issuing administrative enforcement orders, and seeking and collecting penalties under the federal environmental statutes through administrative, i.e. non-judicial, enforcement actions. Certain of the environmental statutes, such as the Clean Air Act and the Clean Water Act, contain penalty "caps" limiting the amount of penalty dollars that EPA may seek administratively. Generally, in these situations, if EPA seeks an amount in excess of a penalty cap, EPA must refer the case to the U.S. Department of Justice ("DOJ") for the filing of a judicial lawsuit (subject to certain exceptions).

One other significant, introductory note about federal statutory penalties: periodically, the stated maximum penalty is increased pursuant to the Federal Civil Penalties Inflation Adjustment Act as amended by the Debt Collection Improvement Act of 1996.<sup>6</sup> EPA implements these adjustments by rules set forth in 40 CFR Part 19. The maximum statutory penalty that would apply to any particular violation would be dependent upon the date of the violation and the amount of the penalty at that time. As of the writing of this paper, the most recent adjustment was implemented by the 2008 Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75340-46 (Dec. 11, 2008), effective January 12, 2009. The penalty amounts that are discussed in this paper reflect the amounts in that rule.

## **B. Administrative Penalty Authority**

Because this paper focuses on the EPA administrative process (and also only on civil, not criminal scenarios), included as Attachment 1 is a discussion on some of the major federal statutes to illustrate, in greater detail, EPA's authority to assess and collect civil penalties without the filing of a judicial lawsuit. We refer to this authority as "administrative penalty authority."

Although Attachment 1 discusses the maximum penalties allowed by law, the maximum penalty is not necessarily EPA's starting point, as we will discuss below in the section

concerning EPA's penalty policies. Moreover, the final penalty is also subject to negotiation in a settlement context, as discussed below in the section concerning settlement negotiation.

### **III. Enforcement Entry Points**

Of course, before any enforcement action begins, EPA must learn or discover that a violation or potential violation has occurred (or is occurring). How does such information get to EPA? There are a number of ways that EPA can gather or receive facts that would lead EPA to use one or more of the enforcement tools in its arsenal. The primary ones are discussed below.

#### **A. Inspections**

EPA inspections are very often a precursor to enforcement. Below we examine the sources of EPA's inspection authority, some of the different types of inspections and EPA's guidance on inspection protocols, and company protocols for handling inspections.

##### ***1. Statutory Authorities***

The major federal environmental statutes provide EPA with very broad authority to inspect regulated facilities. These statutes vary on precisely what inspection authority EPA is granted. For example, the Toxic Substances Control Act requires a written notice with specified information while other statutes do not require any notice at all. For reference, below are the citations to some of the major federal environmental statutory inspection provisions:

- Clean Water Act: 33 U.S.C. § 1318(a)(B);
- Clean Air Act: 42 U.S.C. § 7414(a)(2);
- RCRA: 42 U.S.C. § 6927(a);
- CERCLA: 42 U.S.C. § 9604(e); and
- Toxic Substances Control Act ("TSCA"): 15 U.S.C. § 2601(a).

Agency inspectors can appear with or without a court-issued search warrant.<sup>7</sup> In connection with civil enforcement, warrantless searches are the norm.

##### ***2. A Few Words about Warrantless EPA Searches***

The Fourth Amendment to the U.S. Constitution protects citizens' privacy from unreasonable searches and seizures that are unsupported by a warrant based on probable cause. If evidence is seized in violation of the Fourth Amendment it is potentially inadmissible against a defendant at trial. As a general rule, a warrantless inspection of a private dwelling without proper consent is unconstitutional.<sup>8</sup> The U.S. Supreme Court extended this general rule to protect business owners and operators because they also have an expectation of privacy against unreasonable administrative searches of their commercial property.<sup>9</sup> However, the rule is not absolute and the U.S. Supreme Court has created numerous exceptions to the search warrant requirement. In addition, as indicated above, many environmental statutes provide for

warrantless administrative searches and courts have been generally unwilling to find these statutes unconstitutional.

With respect to the regulated community, the exception that is most often applied is the “pervasively regulated business” exception. The exception is also sometimes referred to as the “longstanding governmental regulation” exception.<sup>10</sup> It provides that a warrantless inspection of a pervasively regulated business is reasonable when: (i) the underlying regulatory scheme is supported by a substantial government interest; (ii) the warrantless administrative search is necessary to further the regulatory scheme; and (iii) the scheme provides a constitutionally adequate substitute for a warrant.<sup>11</sup>

In view of the preceding case law, EPA enforcement staff generally takes the position that any refusal to grant access for a warrantless inspection constitutes a violation of the relevant statute. As a practical matter, however, pursuing such a claim would take the agency longer to achieve than simply getting a search warrant or issuing a compliance order for access. Therefore, absent extraordinary circumstances, most respondents acquiesce to a requested inspection to avoid compelled entry by EPA. Acquiescence, however, is not necessarily the same as consent and facility personnel need to remain mindful that inspectors can expand the legally-justifiable scope of an inspection by securing the consent of facility personnel to expand the inspection beyond the matters on which it was originally based.

### **3. *Other Authorities***

Other sources of EPA inspection authority can be found in documents such as:

- Judicial consent decrees;
- Administrative compliance orders (unilateral or consent); and
- Facility permits.

These sources of inspection authority frequently will have provisions granting EPA and state agencies the authority to gain access and inspect records. Refusals to permit access can lead to allegations of violation under these authorities as well. In the case of administrative consent orders, a refusal to grant access can lead to imposition of stipulated penalties. In the case of judicial decrees, refusals to grant access can even lead to contempt of court actions.

### **4. *Numerous Types of Agency Inspections***

There are numerous types of inspections that EPA can conduct under the statutory authorities, any of which could lead to information that could be the subject of an EPA administrative enforcement action. The following are some examples:

- Under RCRA, EPA regularly conducts “Compliance Evaluation Inspections (“CEI”). A CEI is an on-site evaluation of a hazardous waste handler's compliance with RCRA regulations and permit standards. The purpose of the CEI is to gather information necessary to determine compliance and support

enforcement actions. The inspection may include: (i) a characterization of the handler's activities; (ii) identification of the types of hazardous wastes managed on-site; (iii) a record review of reports; (iv) documents, and on-site plans; and (v) the identification of any units that generate, treat, store, or dispose of hazardous waste.

- Under RCRA, EPA may also conduct a “Compliance Sampling Investigation” where samples are gathered in conjunction with a CEI, or separately.
- Other types of RCRA inspections are Comprehensive Groundwater Monitoring Evaluations, Case Development Inspections, and Operations and Maintenance Inspections.
- Under the Clean Air Act, EPA may conduct Clean Air Act Evaluations, either full or partial.
- Under the Clean Water Act, EPA may perform, among other types of inspections, compliance evaluation inspections, compliance sampling, and performance audits.
- EPA’s National Enforcement Investigations Center (“NEIC”) performs multi-media inspections cutting across the spectrum of pollution control statutes.

#### **5. *Agency Inspection Guidance/Protocols***

EPA has published guidance and manuals to outline the procedures and policies it will (or may) follow in an inspection. For example, see:

- “NPDES Compliance Inspection Manual,” EPA 305-X-04-001 (July 2004);
- “3007 Inspection Authority Under RCRA,” OSWER Directive #9938.0 (April 1986);
- “Guidance for Conducting Risk Management Program Inspections Under Clean Air Act Section 122(r),” EPA 550-K-11-001 (January 2011);
- “Clean Air Act Evaluations.” *See* this link: <http://www.epa.gov/compliance/monitoring/inspections/>;
- “Multi-Media Investigation Manual,” OECA/NEIC Document #EPA-330/9-89-003-R (Revised March 1992); and
- “Process-Based Investigation Guide,” OECA/NEIC Document #EPA-330/9-97-001 (March 1997).

#### **6. *Company Inspection Policies and Protocols***

Many companies have well-developed policies and protocols for handling regulatory inspections. Having such policies and protocols in place can facilitate and expedite cooperation with the agency and afford the company with a predictable framework in which to protect its rights. These policies and protocols vary but typically there are common potential elements. *See* Attachment 3 for a compilation of such potential elements. It is well to keep in mind, however, that no set of protocols can be expected to cover the full range of inspection scenarios. There is no “one size fits all” approach. Consequently, care should be taken to apply them in a way that is appropriate in a given situation. Moreover, when delaying commencement of an inspection, or any phase of an inspection, to follow relevant protocols, care should be taken to avoid making



any delay substantial enough to amount to a refusal of access, unless authorized personnel have determined that such delay is warranted under the circumstances.

## **B. Information Requests**

Another common tool EPA uses to gather information that can become the basis for an administrative enforcement action is an information request. Below we briefly identify the sources of information request authority, and provide a note about company responses to the same.

### ***1. Statutory Authority for Information Requests***

The following statutory provisions (among others) provide EPA with authority to request information from regulated entities:<sup>12</sup>

- Section 114(a) of the Clean Air Act, 42 U.S.C. § 7414(a);
- Section 308(a) of the Clean Water Act, 33 U.S.C. § 1318(a);
- Sections 8(a) 11(a) and (b) of the Toxic Substances Control Act, 15 U.S.C. §§ 2607(a) and 2610(a) and (b);
- Section 3007(a) and 9005(a) of the Resource Conservation and Recovery Act; U.S.C. §§ 6927(a) and 6991(a);
- Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9604(e); and
- Sections 1445(a) and (b) of the Safe Drinking Water Act, 42 U.S.C. § 300j-4(a) and (b).

### ***2. Responding to Information Requests***

The judicial case law applicable to the scope of EPA's powers to request information, and the nature of a respondent company's rights to object to such requests has historically been limited. Unfortunately, the scope of EPA's information gathering authority under environmental statutes does not have the same definition as that imposed under judicial rules of procedure regarding discovery in civil cases. It seems justified to expect that EPA's powers to obtain information under its statutory authorities should have some reasonable parameters and that such parameters should bear at least some similarity to the nature and scope of information than can be obtained in judicial proceedings.<sup>13</sup>

Accordingly, in consultation with legal counsel, respondents will want to consider objecting to such requests when, for example, they are overly burdensome or oppressive, vague or ambiguous, seek legally-privileged information, or do not allow adequate time for response. Bottom line: Do not assume that there are no possible defenses or objections to a given information request. In addition, it often is important to also provide qualifications to a response or responses. EPA's requests sometimes seek a very broad and ill-defined universe of documents and data going back years that would be impossible for a respondent to satisfy with certainty.

In addition, respondents should always consider the need for, and promptly request from EPA, additional time to respond where an information request is voluminous or the respondent has other pressing obligations (such as a turnaround) that may delay a response. EPA is usually open to requests for reasonable additional time to respond.

Notwithstanding the preceding strategies, it is well to keep in mind that EPA has the authority to seek penalties for deficiencies or refusal to provide information, and so EPA information requests need to be taken seriously in consultation with legal counsel.<sup>14</sup> For instance, in one case a court upheld \$1,908,000 in civil penalties against the president of a refinery for failure to timely and adequately respond to information requests under CERCLA.<sup>15</sup>

### C. Self-Disclosures

Another way EPA may learn of a violation is where a party voluntarily contacts the agency to disclose an apparent non-compliance at a facility. Upon becoming aware of a non-compliance, one of the first questions a company and its legal counsel should ask (after “Is there an immediate reporting or notification requirement?”) is “Would there be any benefit in self-disclosing the issue to EPA?” EPA has developed a significant incentive for self-evaluation and voluntary reporting - penalty forgiveness.

Under EPA’s “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,” (the “Audit Policy”),<sup>16</sup> EPA will not seek gravity-based penalties against a party who has met all of nine conditions set forth in the policy. EPA retains its discretion to collect any economic benefit that may have been realized as a result of noncompliance. The distinction between gravity-based penalties and economic benefit are discussed in Section III.B.1 below.

The nine (9) conditions for mitigation of 100% of a gravity-based penalty under the Audit Policy are:

- **Systematic discovery of the violation through an environmental audit or the implementation of a compliance management system.** The Audit Policy states that, in order to satisfy the Condition 1, the non-compliance must be discovered through an environmental audit or through an objective, systematic, documented procedure or practice reflecting the company's "due diligence" in preventing, detecting, and correcting violations. "Due diligence" is a defined term under the Audit Policy . Generally it means systematic efforts to prevent, detect and correct violations through, for example, policies and procedures, assignment of responsibility, mechanisms for evaluating how well the policies and procedures work and modifying them when appropriate, communication of policies and procedures to employees and incentives to comply. The burden is placed on the company to demonstrate how this is accomplished.

Often violations are discovered through means other than an audit or other process that would qualify as systematic under the Audit Policy. In recognition of

this fact, and to encourage self-reporting even under such circumstances, the Audit Policy can still be used to gain up to 75% mitigation of gravity-based penalties even if this Condition 1 is not met. However, all other conditions must be met.

- **Voluntary discovery.** This means the violation was not detected as a result of a legally required monitoring, sampling or auditing procedure.
- **Prompt disclosure in writing to EPA within 21 days of discovery.** Discovery occurs when any officer, director, employee or agent of the facility has an objectively reasonable basis for believing that a violation has or may have occurred.
- **Independent discovery and disclosure** before EPA or another regulator would likely have identified the violation through its own investigation or based on information provided by a third-party.
- **Correction and, if necessary, remediation, must be completed within 60 calendar days from the date of discovery.** The Audit Policy normally requires a certification in writing that the violation was corrected within 60 days of discovery of the violation. However, EPA guidance acknowledges that there are circumstances where correction is not possible and, in those circumstances, the violator must adopt specific and appropriate measures to prevent recurrence and takes any other steps necessary to address the violation.
- **Prevent recurrence of the violation.**
- **Repeat violations are ineligible.** The specific (or closely related) violations cannot have occurred at the same facility within the past 3 years, or as part of a pattern at multiple facilities owned or operated by the same entity within the past 5 years. In order for a "violation" to have occurred for this purpose, EPA guidance states that EPA or a third party must have given the violator "notice" of a violation, such as through notices of violation, warning letters, complaints, consent orders, transmittal of an inspection report noting violations, citizen suits, and receipt of penalty mitigation.
- **The violation cannot result in serious actual harm, present an imminent and substantial endangerment, or violate the specific terms of an administrative or judicial order or consent agreement.**
- **The disclosing entity must cooperate with EPA.**

Even if a self-disclosure does not meet the conditions of the Audit Policy, it might still be warranted depending upon the circumstances. Most of EPA's policies concerning calculation of

penalties allow significant penalty reductions, sometimes as much as 50%, where a party has demonstrated good-faith and cooperation through a voluntary disclosure. The decision often hinges on factors such as the magnitude of the discovered violation, the steps necessary to correct the violation, and the likelihood that the violation would be apparent to EPA in the future through inspections, document review, etc. For example, a small, easily corrected deviation might not rise to the level of non-compliance that would make self-disclosure incrementally more beneficial than simply correcting the issue.

One limiting factor on self-disclosures to EPA either under the Audit Policy or otherwise is that the benefits of the disclosure will only be available where EPA has primary jurisdiction over the violation. (Note, however, that EPA can still enforce even where a program has been delegated to a state.) For example, a hazardous waste program violation at a Texas refinery would be within the jurisdiction of the Texas Commission on Environmental Quality (“TCEQ”). Any penalty associated with that violation likely would come from the TCEQ, so a self-disclosure, if any, would be more appropriately made to the TCEQ. However, there are significant, relevant regulatory programs applicable to refiners, such as the fuels standards and Spill Prevention Control and Countermeasure Plan requirements, which are federal programs administered by EPA. Also, many states have implemented audit policies which, in some cases such as the “Texas Environmental Health & Safety Audit Privilege Act,” provide for immunity from penalties.

#### **D. Whistleblowers and Other Parties**

Occasionally regulated entities come to the attention of EPA by company employees or contractors. It is important for management to remain mindful of this pathway to enforcement and that good environmental management practices are prudent insurance against this sort of concern.<sup>17</sup> Members of the public and citizen groups are also frequently the source of enforcement actions. Good community relations can serve to reduce the potential for enforcement from these sources.

### **IV. Enforcement Process and Exit Points**

As indicated at the outset, once EPA has elected to take civil enforcement action, there will be two main routes it can pursue: judicial action or administrative action. The following is a discussion of both, with the bulk of the attention on administrative enforcement.

#### **A. Referral to DOJ**

One outcome of an inspection or information request is an EPA decision not to undertake administrative enforcement but rather to refer the case to the U.S. Department of Justice (“DOJ”) for the filing of a civil or criminal action in federal court. As mentioned in Attachment 1, in some cases a given statute (e.g. the Clean Air Act) requires a referral. In the case of a civil action, where a referral is being made, DOJ, as a matter of policy, will explore a possible settlement. *See Process for Conducting Pre-Referral Settlement Negotiations, GM-73 (March 9, 1988)*. Often,

negotiation with DOJ will result in the lodging of a Consent Decree simultaneous with the filing of the Complaint.

## **B. Administrative Litigation**

In the event that EPA decides that it has sufficient information to proceed with an administrative enforcement action, EPA can choose a number of different vehicles to pursue a penalty depending upon the statutory basis for the action. Those vehicles can range from a lowly field citation, to a notice of violation, all the way up to a formal pleading that is similar to the filing of a lawsuit in a federal judicial court, but is filed in an EPA administrative docket instead. This process is formalized by a hearing process set forth in EPA's Consolidated Rules of Practice,<sup>18</sup> as described below. Unlike negotiations with DOJ in a referral context which can progress at a speed determined by DOJ, negotiations with EPA in administrative litigation must take place during a regimented process and schedule.

### ***1. Complaint and Answer***

The service of a Complaint by EPA actually initiates the administrative litigation process that is intended to culminate in a trial-type hearing--even though most of these proceedings get settled before the formal litigation stages unfold.<sup>19</sup> The Complaint is typically accompanied by a Compliance Order and a civil penalty assessment. The recipient of the Complaint and Compliance Order, called a Respondent, will generally have 30 days to file a response, including an Answer and Request For Hearing. If the Respondent fails to file an Answer and Request For Hearing within the 30-day period, the complaint will be deemed admitted and the Order will become final and fully enforceable according to its terms.

### ***2. Contents of Answer***

The Answer must specifically admit, deny, or otherwise specifically respond to each allegation in the Complaint. A motion to dismiss some or all of EPA's complaint may also be filed at this stage.<sup>20</sup> In addition, the Respondent must request a hearing to preserve its rights to a hearing to contest EPA's allegations.

*Special Note:* It is important to engage legal counsel who understands the substantive law and can work with the defendant (called a "respondent" in this type of proceeding) in marshalling the essential facts and legal defenses that will need to be pled. Do not think you can submit an Answer and Request for Hearing without legal support.

### ***3. Preliminary Settlement Discussions***

Often an Answer and Request for Hearing will be filed (as in regular court proceedings) and the parties will jointly request a stay of further proceedings for some period of time—maybe 30 or 60 days—to complete settlement negotiations. Usually, the Complaint and Answer will be filed at the EPA regional level, although some proceedings can be initiated out of EPA Headquarters.

#### **4. *ALJ Assignment***

Once the Answer is filed, the responsible (usually regional) hearing clerk will transfer the file to the Office of Administrative Law Judges in Washington, D.C. for assignment to an Administrative Law Judge (ALJ).<sup>21</sup> From that point forward, the ALJ is responsible for all proceedings through a final post-hearing decision, including scheduling of pre-hearing submissions, presiding over discovery, and scheduling the hearing.

#### **5. *Alternative Dispute Resolution***

At any time after the complaint is filed, the parties can elect to engage in alternative dispute resolution procedures (ADR). This election does not automatically stay the proceedings in the absence of an order to that effect by the ALJ. ADR procedures can range from informal telephone exchanges among the parties and the ALJ to more formal proceedings before an outside the agency third party neutral person. *See* EPA rules and guidance documents on ADR.<sup>22</sup>

#### **6. *Pre-hearing Exchange, Discovery, and Motions***

Similar to pre-trial practice in a court proceeding, the EPA and Respondent need to exchange relevant documents and information supporting the claims and defenses. This is known as “the pre-hearing exchange.” It can get quite voluminous depending on the nature of the claims and defenses.<sup>23</sup>

The parties may also perform other types of discovery, including document requests, interrogatories, and depositions, although the availability of these additional discovery processes is more limited than in judicial proceedings.<sup>24</sup> The ALJ has the power to subpoena witnesses for deposition and hearing.<sup>25</sup>

Similar to judicial proceedings, the parties also may submit various motions regarding aspects of the case, including motions to dispose of some or all of the claims by EPA or defenses by the respondent.

#### **7. *The Hearing***

As indicated above, the hearing is a trial-type proceeding with the calling of witnesses and introduction of other forms evidence. The ALJ is the both the finder of fact and the applicator of law. ALJ hearings are typically conducted in courtrooms at state or federal courthouses at locations designated by the ALJ. The parties can propose locations that will facilitate the attendance of necessary parties.<sup>26</sup> Witnesses, including expert witnesses, can be subpoenaed.<sup>27</sup>

#### **8. *The Final Decision***

Following conclusion of the hearing, the ALJ issues an Initial Decision that contains findings of fact and conclusions of law. That decision becomes a final order unless a party moves to reopen or set aside the decision, appeals, or the Environmental Appeals Board elects to

review the decision on its own.<sup>28</sup> The ALJ also determines the appropriate final relief, including denial, in whole or in part, of EPA's requested relief and/or approval of a final order requiring (i) the payment of civil penalties and (ii) performance of compliance and/or remedial measures (often referred to by attorneys as "injunctive relief").

## **9. *Appeal Right***

Appeals from a final decision may be made to the EPA Environmental Appeals Board (EAB). The board currently consists of three (3) judges who are appointed by the EPA Administrator. It has appellate jurisdiction over enforcement cases and permit actions under designated statutes, including the Clean Air Act, Clean Water Act, and RCRA. In certain circumstances, the EAB may refer an appeal directly to the Administrator of EPA.<sup>29</sup>

## **C. *Settlement By Consent Agreement and Final Order***

At almost any time in the course of an administrative enforcement action, but preferably early on, the parties can seek to settle the action before it goes to a hearing and final resolution. Unlike settlement of judicial actions which requires consent of a court, some administrative settlements can be reached and finalized between EPA and the respondent alone, while others that have reached the stage where an ALJ has been assigned must be blessed by the ALJ. Below is a discussion of settlement considerations after an administrative complaint has been filed by EPA. As you would expect, penalties are at the forefront of settlement negotiations.

### **1. *The Basics***

EPA and the Respondent can negotiate a settlement of the enforcement action by entering into an agreement (consent agreement) that is embodied in a legally enforceable administrative order on consent (final order). Together, these settlement components are referred to as a "Consent Agreement and Final Order" or by the acronym "CAFO."

To conclude a mutually agreeable CAFO, the parties have to negotiate both the civil penalty and the compliance corrective/remedial measures that will need to be undertaken to resolve the issues raised in the Complaint (and maybe some issues that were not identified in the Complaint). The compliance and remedial measures are usually referred to as the "injunctive relief" part of the CAFO.

### **2. *Penalty Negotiation/Penalty Policies***

Typically, one of the first steps in negotiating an agreed settlement on penalties is a principled discussion on the application of EPA's various civil penalty policies.

When deciding what penalty amount to seek in an administrative enforcement action, EPA is instructed by the federal environmental statutes to take into account factors such as the nature, circumstances, extent and gravity of the violation, or violations, and the violator's ability to pay, prior history of violations, degree of culpability, economic benefit or savings, and other matters as justice may require. Rather than developing regulations to implement these

instructions, EPA has issued penalty policies intended to give the public notice of EPA's internal efforts to follow these statutory mandates.

***a. Types of Penalty Policies***

Under the umbrella of EPA's "Policy on Civil Penalties,"<sup>30</sup> EPA has developed separate penalty policies relating to appropriate settlement amounts for actions under each of the major federal environmental statutes and, in some cases, has separate policies for different programs within a statute. The policies are applied nationally by EPA and are intended to provide national consistency in penalty calculations.

Among the penalty policies that a refining company may encounter in an administrative penalty action are:

- The Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act (August 1998);
- The Unleaded Gasoline Civil Penalty Policy for Administrative Hearings (January 1, 1993);
- The Clean Air Act Stationary Source Civil Penalty Policy (October 25, 1991);
- The Interim Diesel Civil Penalty Policy (January 14, 1993);
- The RCRA Civil Penalty Policy;
- The EPCRA Sections 304, 311 and 312 and CERCLA Section 103 Enforcement Response Policy (September 30, 1999); and
- The Volatility Civil Penalty Policy (December 1, 1989).

All of these policies are available on EPA's website.<sup>31</sup> These and other EPA penalty policies vary on the methods for calculating a penalty, and we will not go into depth on any one policy. However, there are common general concepts and similarities between the policies which we will review.

***b. Penalty Components***

Under the policies, penalties are derived from a combination of two major components: (i) gravity-based penalties and (ii) economic benefit penalties. The gravity-based component is intended to reflect the seriousness of the violation. Many of the penalty policies use a matrix where the extent of the violation and the potential for harm are defined for a particular violation, and a penalty amount or range is identified. The policies all provide for adjustment factors, upward and downward, for things such as culpability, history of prior violation, good-faith efforts to comply, the ability of the violator to pay the penalty (which EPA determines through the use of a computer model referred to as "ABEL"), willfulness or gross negligence, litigation considerations, and other factors "as justice may require." Finally, many of the penalty policies make specific reference to possibility of mitigating some portion of the gravity-based penalty through the performance of an environmentally-beneficial project referred to as a "Supplemental Environmental Project" or "SEP," discussed below.



***c. Economic Benefit Component***

The economic benefit component of the penalty addresses EPA's belief that delayed or avoided compliance can provide an unfair economic advantage to a violator. EPA uses a computer model referred to as "BEN" to calculate the amount of savings a violator may have enjoyed as a result of its delayed or avoided compliance. (EPA's various enforcement computer models, such as ABEL and BEN are all available online.) Economic benefit can include things such as capital costs, operations and maintenance costs, and the time-value of money based on applicable interest rates. It is not uncommon for the economic benefit portion of a penalty to exceed or far exceed the amount of the penalty calculated for the gravity-based portion. Also, no adjustments or mitigation through performance of a SEP is allowed for the economic benefit component of the penalty under the civil penalty policies. EPA must, however, remain within its statutory penalty authority which does act as a limit on the amount that EPA can seek either administratively or judicially.

***d. Supplemental Environmental Projects***

Many of EPA's civil penalty policies contain a section concerning the opportunity for a respondent in an enforcement action to reduce the cash amount of a penalty due to the United States by paying some portion of an administrative penalty toward an environmentally-beneficial project or supplemental environmental project ("SEP"). EPA's policy on SEPs, the May 1, 1998 "Supplemental Environmental Projects Policy" ("SEP Policy"), defines a SEP as an environmentally-beneficial project that a respondent agrees to undertake in settlement of an enforcement action but which the respondent is not otherwise legally required to perform. The SEP Policy encourages the use of SEPs in settlement of enforcement actions that are consistent with the SEP Policy.

***i. Legal Requirements for SEPs***

To be consistent with the SEP Policy, the project must meet certain legal requirements, and fall into one of seven defined categories of SEPs. The legal requirements are:

- The project is not inconsistent with any provision of the underlying statutes.
- The project advances the objectives of the underlying statutes and has a relationship or "nexus" to the violation. Nexus exists if one of the following is true: (i) the project is designed to reduce the likelihood that similar violations will occur in the future; (ii) the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or (iii) the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.
- EPA may not play a role in managing or controlling the funds to be used for the project and may not retain authority to manage or administer the SEP.

- The type and scope of the project must be defined in a signed settlement agreement.
- The project cannot (i) satisfy a statutory obligation of the EPA; (ii) provide EPA with additional resources to perform an activity for which the legislature has specifically appropriated or earmarked funds; (iii) provide additional resources to support specific activities performed by the EPA or its contractors; or (iv) provide a federal grantee with additional funds to perform a specific task identified in an assistance agreement.

*ii. Approved Categories of SEPs*

The SEP Policy specifies seven categories of projects that EPA acknowledges are legitimate SEPs. Others can be approved under special circumstances. The seven categories are:

- public health;
- pollution prevention;
- pollution reduction;
- environmental restoration and protection;
- assessments and audits;
- environmental compliance promotion; and
- emergency planning and preparedness. EPA has the authority to approve other types of projects of merit.

In a settlement negotiation, one of the key points of contention is always how much total credit will EPA give to the respondent for expenditures relating to the project. There are two considerations here: (i) what percentage of the total penalty will EPA require to be paid in cash (sometimes called the “cash cost”); and (ii) how much credit will EPA grant for each dollar spent on the project (referred to as “penalty mitigation credit”). For cash cost, the SEP Policy states that the amount must be equal to or greater than the economic benefit component of the penalty plus 10% of the gravity-based penalty, or 25% of the gravity-based penalty, whichever is greater.

To determine what penalty mitigation credit will be granted, agreement must be gained about the actual cost of the project to the respondent. The net present after tax cost is the maximum that EPA will take into consideration in determining penalty mitigation credit. EPA uses a computer model called “PROJECT,” and guidance documents, to calculate this amount. (Note: if the project has a negative cost during the period of performance of the SEP, then the project is deemed to be profitable to the respondent, and not appropriate for use as a SEP.) The SEP Policy states that, ordinarily, the mitigation credit percentage should not exceed 80% of the SEP cost (i.e. 80 cents credit for each dollar spent up to the maximum SEP cost). However, according to the SEP Policy and related guidance memoranda, in the following two situations, the percentage may be as high as 100% (i.e. dollar-for-dollar) if the project is demonstrated

to be of “outstanding quality:” (i) when a small business performs a project, or (ii) when the project falls into the pollution prevention category.

Although EPA officially supports the use of SEPs, experience has shown it to be increasingly difficult to negotiate a SEP for which reasonable penalty mitigation credit will be given by EPA. This may be a function of the times, including shrinking budgets.

*e. Stipulated Penalties*

One mechanism used by EPA to encourage compliance with a settlement agreement, and to penalize non-compliance, is stipulated penalties. A stipulated penalty is an amount agreed upon by the parties in advance that will be paid by the respondent, without the need for EPA to bring a separate enforcement action, if EPA finds a violation of a settlement agreement. Stipulated penalties often are escalating so that the penalties increase the longer a non-compliance continues. Even if EPA insists on a stipulated penalty provision in a settlement agreement, there are a number of points relating to stipulated penalties that can be the subject of negotiation (with widely varying chances for success). In seeking to negotiate a favorable stipulated penalty provision, there are things you can do, including:

- Minimizing the number of milestones and other actions subject to penalties;
- Comparing penalties in other similar enforcement actions, especially in the same EPA Region;
- Avoiding EPA’s ability to “double dip” on statutory penalties in addition to stipulated penalties;
- Exploring provisions allowing the respondent to do a SEP (see above) in lieu of some portion of the penalty;
- Providing that EPA has the discretion not to seek stipulated penalties;
- Ensuring that stipulated penalties are subject to dispute resolution, and avoiding accrual of stipulated penalties during the dispute resolution period;
- Trying to secure an opportunity to cure a violation before stipulated penalties accrue;
- Requiring EPA to give notice of a violation before stipulated penalties can accrue; and
- Seeking a reasonable period of time in which to pay stipulated penalties that are due.

**3. Injunctive Relief**

Although penalties tend to monopolize settlement considerations, it is important not to overlook the fact that EPA will almost certainly seek to impose compliance/performance obligations in the settlement in addition to any penalties. These obligations, referred to as injunctive relief, must be examined closely by a respondent to determine whether they are, in

fact, achievable, and to plan for the cost of such relief. Additionally, EPA will impose a schedule for complying with the injunctive relief that almost always is very ambitious. The cost, components, and schedule of any injunctive relief should be the subject of serious consideration and discussion, and should be given as much weight as the cash penalty under discussion in the settlement negotiation.

**4. Settlement Terms (Helpful and Unhelpful Terms and Conditions)**

Although EPA has published a number of model settlement documents for specific situations, and every negotiated document is different, there are common provisions that will appear in most administrative settlement agreements. Below is a brief comparison of the differing approaches that are taken in negotiating these common settlement provisions.

<b>Type of Settlement Provision</b>	<b>EPA Will Seek:</b>	<b>Respondent Will Seek:</b>
Scope of Settlement	To make settlement as narrow as possible and reserve future freedom of action; To limit settlement to the violations specifically alleged.	To extend settlement as broadly as possible based on all of the information EPA gathered in an inspection or otherwise to avoid further conflict.
Admissions	To have respondent admit jurisdiction, fact allegations and conclusions of law. Sometimes proposes “neither admits nor denies.”	To avoid admitting allegations and conclusions of law because of potential legal implications outside of the immediate proceeding.
Parties Bound	To bind not only the respondent but a broad array of parties including successors, assigns, consultants, agents, attorneys, etc.	To narrow the binding effect only on the respondent, i.e. the party who is responsible for ensuring compliance
Waivers	To have respondent waive (i) any right to contest the allegations, (ii) any right to appeal the proposed final order contained; and (iii) defenses that were raised or could have been raised.	To limit waiver such that it does not negate future defenses.
Findings of Fact/Conclusions of Law	To describe broadly the facts (sometimes in a biased or inflammatory way) and make broad conclusions about the relationship between facts and the law.	To ensure accuracy, delete irrelevant statements, and limit to only those findings and conclusions necessary to support the action.

Sampling/Site Access/Document Availability	To gain access to all information kept by the respondent and broad access to the respondent's facility.	(i) To limit the access to documents and information to those required under the settlement and exclude access to legally-privileged information; (ii) To gain reciprocal access to all information gathered or developed by EPA (including split samples).
Financial Responsibility	(i) To obtain approval rights over instrument choices; and (ii) To require financial assurance for every action required under the settlement.	(i) To limit financial responsibility demonstrations to long-term expenditures; (ii) To avoid having to fund financial responsibility mechanisms while also paying to perform (i.e. double payment); and (iii) To maintain flexibility to choose mechanisms/instruments.
Stipulated Penalties	(i) Impose high daily penalties that escalate as a violation continues, (ii) To reserve of rights to take any other enforcement as well, and (iii) To collect penalties during dispute resolution.	(i) To lower daily penalties, (ii) To slow escalation, if any, (iii) Limitation on taking other penalty action, i.e. "double-dipping," (iv) A provision authorizing EPA <b>not</b> to seek stipulated penalties in its discretion. <i>See also</i> Section IV.C.2.e. herein on Stipulated Penalties.
Notice and Payment Periods	Short time periods to provide required notices, payments, and other submittals under the settlement.	(i) To lengthen periods to time reasonably necessary to perform the required action; (ii) To make deadlines and manner of submission clear.
Dispute Resolution	(i) To limit the amount of time allotted to dispute resolution, and collect stipulated penalties even though they are disputed; (ii) To prohibit judicial review of disputes unless and until enforcement action is brought.	(i) To add an informal discussion period at the beginning of dispute resolution, (ii) To provide sufficient time to present reasoned argument on point in dispute, (iii) To avoid imposition of disputed stipulated penalties during initial consultative stage of dispute resolution process even if respondent's position not upheld.

Force Majeure	To limit the definition of a force majeure event, including not allowing financial inability to qualify, and impose short deadlines on notice of force majeure to further inhibit ability to make a claim.	(i) To expand definition of force majeure event to include failure of an agency to issue necessary approvals, or delay in same, commercial unavailability of equipment; and impossibility of performance; (ii) To lengthen time allowed to give notice of claim; (iii) To specify that stipulated penalties will not accrue during delay caused by force majeure event; (iv) To allow dispute resolution if EPA disagrees that a force majeure event has occurred.
Termination Releases/Covenants?	(i) To keep the grounds for termination vague and open ended; (ii) To refuse liability releases or covenants not to sue.	(i) To build a predictable timeframe for completion and termination, including termination rights where appropriate; (ii) To derive reasonable consideration, or future protection from claims, for having resolved the action by consent.

**V. Conclusion**

As was the case in that celebrated film that won the Best Movie Oscar in 1953, the outcome of these EPA administrative penalty dramas may entail some heartbreak. However, the more familiar company environmental and business managers are with the process, the better able they will be to achieve an outcome that will be fair and workable. It is our hope that the preceding discussion, as well as the associated conference presentation, will contribute to that end.

If you have any questions about this paper, please feel free to contact the writers directly. Our contact information is included below.

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*Disclaimer: The information provided in this presentation is intended solely as an educational resource, does not constitute legal advice, and should not be used as a substitute for careful review of the rulemaking and enforcement actions themselves and consultation with competent legal and technical professionals as to site-specific circumstances. The views expressed in this paper are solely those of the authors and should not be construed as representative of the views of any other person or entity.*

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## ENDNOTES

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<sup>1</sup> Any similarity between the name of this paper and the celebrated motion picture that won the Oscar for “Best Picture” in 1953 is purely intentional. That connection, however, is the only one that our imaginations and copyright laws have allowed us to make in this paper (except at the very end). We sincerely regret any disappointment that we may cause.

<sup>2</sup> [www.epa.gov/compliance/data/planning/initiatives/initiatives.html](http://www.epa.gov/compliance/data/planning/initiatives/initiatives.html).

<sup>3</sup> As used in this paper, the term “administrative enforcement” refers to civil enforcement actions seeking the imposition of civil penalties that are prosecuted by and within the agency as opposed to “judicial enforcement” actions, which are prosecuted on behalf of the agency in a federal court. In the “judicial” type of action, EPA is represented by the U.S. Department of Justice before a federal judge or magistrate and enforcement can be for either civil or criminal purposes. In the “administrative” type of action, the agency is represented by its own attorneys before a neutral judicial officer appointed (and technically employed) by the agency, and the actions are exclusively civil. “Civil” actions exclusively entail the potential imposition of monetary penalties and affirmative compliance and remedial obligations (obligations typically referred to by attorneys as “injunctive relief.”) “Criminal” actions potentially involve imprisonment in addition to criminal monetary penalties and affirmative compliance obligations.

<sup>4</sup> For more detailed legal discussions of EPA’s administrative enforcement process, see, e.g., Lisa, Joseph J. “EPA Administrative Enforcement Actions: An Introduction to the Consolidated Rules of Practice,” 24 *Temple Journal of Sci. Tech, and Env’tl. Law* 1 (Spring 2005), at [www.temple.edu/law/tjstel/2005/spring/v24no1-Lisa.pdf](http://www.temple.edu/law/tjstel/2005/spring/v24no1-Lisa.pdf), and U.S. EPA Office of Administrative Law Judges, *Practice Manual*, (July 2011) at [www.epa.gov/oalj/orders/alj-practice-manual.pdf](http://www.epa.gov/oalj/orders/alj-practice-manual.pdf)

<sup>5</sup> The compliance orders also are not self-executing. If a party fails or refuses to comply with the order, the EPA must file suit to enforce. However, ignoring a compliance order may not be a realistic option because of the penalties for each day of non-compliance. For instance, just one month of non-compliance potentially subjects a party to penalties in the six figures under the Clean Water Act. Accordingly, several parties have sought “pre-enforcement review” of administrative compliance orders without having to first wait to be sued by the EPA. The parties often argue that the practical effect of the penalties for non-compliance violates their due process. The U.S. Supreme Court recently granted certiorari on this issue. In *Sackett v. EPA*, the U.S. Supreme Court will address whether: (1) delaying judicial review while waiting for EPA to bring an enforcement action violates due process in light of the CWA’s penalty scheme for non-compliance; and (2) the *Sackett* opinion conflicts with another circuit’s opinion involving a similar compliance order provision in the Clean Air Act. Accordingly, the future viability of this enforcement mechanism could be in doubt. An interesting discussion by EPA of its legal theory regarding the non-availability of judicial review of endangerment orders appears at USEPA, Office of Enforcement and Compliance Assurance, “Guidance On The Use of section 7003 of RCRA,” October 1997 at Attachment 5. [sss.epa.gov/compliance/resources/policies/cleanup/rcra/use-sec7003-mem.pdf](http://sss.epa.gov/compliance/resources/policies/cleanup/rcra/use-sec7003-mem.pdf).

<sup>6</sup> Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701.

<sup>7</sup> Criminal inspections, which are beyond the scope of this paper, are typically executed pursuant to a search warrant in an aggressive and coercive manner leaving little opportunity for consultation with the facility personnel.

<sup>8</sup> *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

<sup>9</sup> *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 322-24 (1978).



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<sup>10</sup> The most recent pronouncement from the U.S. Supreme Court on this exception is *New York v. Burger*, 482 U.S. 691 (1987).

<sup>11</sup> Another interesting exception to the requirement for a search warrant is known as the “open fields” doctrine. There is no warrant requirement in these situations because there is no “search” within the meaning of the Fourth Amendment. *Miller v. Illinois Pollution Control Bd.*, 642 N.E.2d 475, 483 (Ill. App. Ct. 1994). No justifiable expectation of privacy is present when the incriminating evidence or activities are readily observable by persons on adjacent lands. *Id.* The importance of this doctrine to EPA’s right to conduct inspections is substantial given that regulated environmental activities commonly occur in readily observable places.

<sup>12</sup> Although seen less frequently, environmental statutes also grant EPA with power to issue administrative subpoenas. *See, e.g.*, Section 11(c) of TSCA 15 U.S.C. §2610(c) and Section 122(e)(3)(B) of CERCLA, 42 U.S.C. §9622(e)(3)(B).

<sup>13</sup> *See, e.g. Unites States v. Charles George Trucking Co.*, 823 F.2d 685, 691 (1st Cir. 1987).

<sup>14</sup> *See, e.g. United States v. Crown Roll Leaf, Inc.*, 29 Env’t L. Rep. Cas. (BNA) 2025, 20 ELR 20297, 20300 (D.N.J. 1989) and *Unites States v. Charles George Trucking Co.*, 823 F.2d 685 (1st Cir. 1987).

<sup>15</sup> In that case, *United States v. Gurley*, 235 F.Supp.2d 797, 806 (W.D. Tenn. 2002), *aff’d*, 384 F.3d 316 (6th Cir. 2004), the court considered the following factors in assessing whether the penalty was appropriate: (1) the good or bad faith of the defendant; (2) the injury to the public; (3) the defendant’s ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the agency in question.<sup>15</sup> On balance, the court reasoned that the assessment was appropriate based largely on the president’s bad faith refusal to respond at all to such requests even though the requests sought information that the EPA had already obtained from other sources. On balance, the court reasoned that the assessment was appropriate based largely on the president’s bad faith refusal to respond at all to such requests even though the requests sought information that the EPA had already obtained from other sources.

<sup>16</sup> Final Policy Statement, 65 Fed. Reg. 19618 (April 11, 2001).

<sup>17</sup> The major environmental statutes have employee protection provisions protecting whistleblowers from retaliation. *See, e.g.* Clean Air Act, Section 322, 42 U.S.C. § 7622 and TSCA, Section 23, 15 U.S.C. § 2622 .

<sup>18</sup> 40 CFR Part 22.

<sup>19</sup> 40 CFR §§22.13, 22.14.

<sup>20</sup> 40 CFR §22.15.

<sup>21</sup> 40 CFR §22.21.

<sup>22</sup> 40 CFR §22.18(d); Notice of final” EPA Policy on Alternate Dispute Resolution,” 65 Fed. Red. 81858 (Dec. 27, 2000).

<sup>23</sup> 40 CFR §22.19.

<sup>24</sup> *Id.*

<sup>25</sup> 40 CFR §22.19(e)(4).

<sup>26</sup> EPA Office of Administrative Law Judges “Practice Manual,” (updated July 2011).

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<sup>27</sup> 40 CFR §22.22.

<sup>28</sup> 40 CFR §22.27.

<sup>29</sup> Environmental Appeals Board “Practice Manual (Sept. 2010); [www.epa.gov/eab/](http://www.epa.gov/eab/).

<sup>30</sup> EPA General Enforcement Policy #GM-21 (Feb. 16, 1984).

<sup>31</sup> <http://cfpub.epa.gov/compliance/resources/policies/civil/penalty/>.

**Attachment 1**  
**Review of Selected Major Federal Environmental Statutes-**  
**Administrative Penalty Authorities**

**REVIEW OF SELECTED MAJOR FEDERAL ENVIRONMENTAL STATUTES  
ADMINISTRATIVE PENALTY AUTHORITIES**

- **The Clean Water Act**

- Two types of administrative penalties for violations of the National Pollutant Discharge Elimination System provisions (which include direct discharges, storm water, pre-treatment, and sewage sludge discharges), and for violations of the requirements for oil and hazardous substance discharges: “Class I” and “Class II.”
- Class I penalty assessed under Section 309(b)(2)(A) or Section 311(b)(6)(B)(i) may not exceed \$16,000 per violation, and the total maximum may not exceed \$37,500.
- Class II penalty assessed under Section 309(g)(2)(B) or Section 311(b)(6)(B)(ii) may not exceed \$16,000 per violation and the maximum may not exceed \$177,500.
- Collectable only after EPA gives the violator a notice of proposal to issue an order collecting a penalty, and an opportunity to request a hearing on the proposed order. Such order must go through public notice and comment, and is subject to judicial review. *See* Sections 309(g)(8) and 311(b)(6)(G) of the CWA.

- **The Clean Air Act**

- Section 113(d) administrative penalties for most violations up to \$37,500 per day of violation but limited to matters where the total penalty sought does not exceed \$295,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action.
- Section 113(d)(3) authorizes field citations not to exceed \$7,500 per day of violation. A penalty assessed by a field citation is subject to judicial review.
- Separate penalty provisions for Motor Vehicle Emissions and Fuels Standards. For the requirements relating to regulation of fuels, EPA can assess penalties up to \$37,500 and economic benefit, but not to exceed \$295,000.
- The penalty caps can be waived if the EPA Administrator and the U.S. Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is “appropriate for administrative penalty action.” Such a determination is not subject to judicial review.
- Under the fuels regulations in 40 CFR part 80, violations of requirements establishing a regulatory standard based upon a multi-day averaging period constitute a separate day of violation for each and every day in the averaging period.
- All of the above penalties are assessed by issuance of an order, after written notice and an opportunity to request a hearing, and are subject to judicial review.

- **The Resource Conservation and Recovery Act**
  - EPA can issue compliance orders under Sections 3008(a)(3), (c)(g), and (h)(2) to assess penalties, not to exceed \$37,500 per violation, per day, for violations of the hazardous waste management program requirements, including failure to take corrective action under a compliance order.
  - There is no penalty cap under RCRA.
  - For violations of the petroleum underground storage tank program, such as release detection, prevention and correction requirements, Section 9006(d) allows a penalty not to exceed \$16,000 per tank per day of violation. For failure to comply with an order relating to underground storage tanks, Section 9006(a)(3) allows a penalty of not more than \$37,500 for each day of noncompliance.
  
- **The Emergency Planning and Community Right-to-Know Act**
  - Two types of administrative penalties for failure to comply with Section 304 emergency notification requirements: “Class I” and “Class II.”
  - Section 325(b)(1) allows a “Class I” administrative penalty that may not exceed \$37,500 **per violation**.
  - If a violation continues, or there is more than one violation continues, under Section 325(b)(2) EPA may seek a “Class II” penalty that does not exceed \$37,500 **per day** of the total amount assessed cannot exceed more than \$107,500 **per day**.
  - For failure to comply with Section 312 hazardous chemical inventory requirements or Section 313 toxic release inventory requirements, Section 325(c)(1) allows a penalty not to exceed \$37,500 per violation per day. 40 CFR §372.18 implements the TRI penalty.
  - For failure to comply with EPCRA’s Section 311 material safety data sheet requirements, Section 323(b) medical emergency requirement, or Section 322(a)(2) information submittal requirement, Section 325(c)(2) allows a penalty not to exceed \$16,000 per violation per day.
  - If a trade secret claimant presents insufficient support, and the trade secret claim is frivolous, Section 325(d)(1) allows a penalty of \$37,500 per claim.
  
- **Comprehensive Environmental Response, Compensation, and Liability Act**
  - Although CERCLA primarily is a remedial statute, it does contain some affirmative requirements and penalties for violations of those requirements.
  - Section 109 (a) and (b) allow assessment of either a “Class I” or a “Class II” administrative penalty where there is a violation of the immediate release reporting requirement or the recordkeeping requirements under Section 103, financial assurance requirements under Section 108, or orders, consent decrees or agreements under Sections 122 and 120. 40 CFR §302.7(a) implements release reporting penalties.
  - Class I penalty cannot exceed \$37,500 **per violation**.

- If a violation continues, or there is more than one violation continues, a Class II penalty may be assessed but it cannot exceed \$37,500 **per day** of the total amount assessed cannot exceed more than \$107,500 **per day**.
- Penalties assessed by an order after notice and an opportunity for a hearing. Judicial review of an order assessing the penalty is allowed.

- **The Toxic Substances Control Act**

- Section 16 allows a penalty not to exceed \$37,500 per day per violation for most violations, including use of a chemical substance manufactured, processed or distributed in commerce in violation of the statute.
- Section 207 allows a penalty of \$7,500 per day. for violations of the Asbestos Hazard Emergency Response Act provisions of the statute.
- Penalties are assessed through issuance of an order.

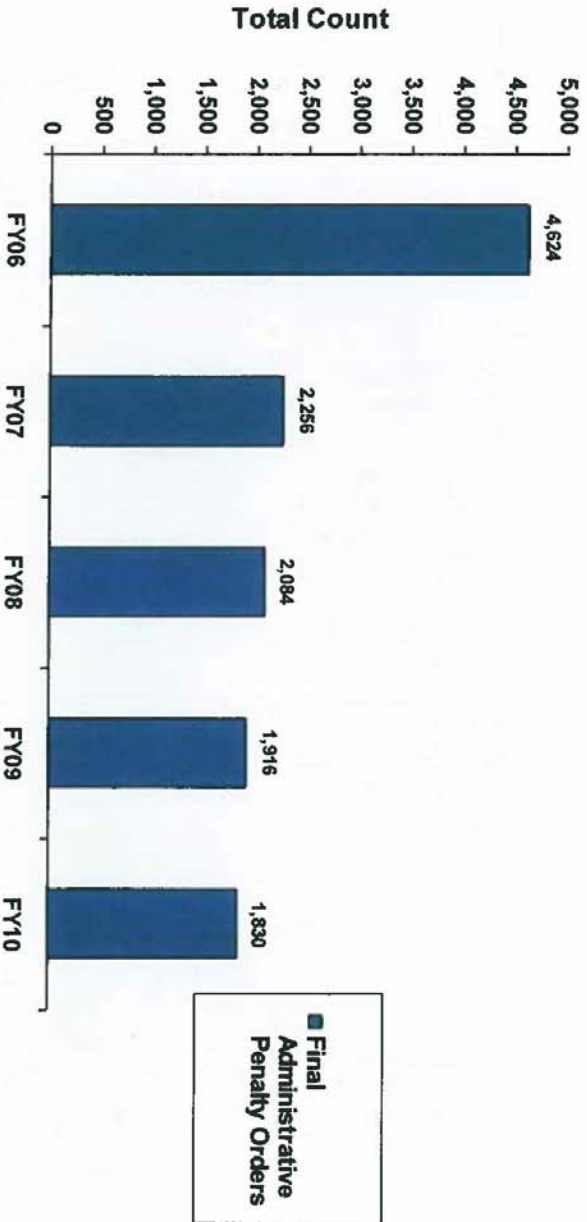
**Attachment 2**  
**Excerpt from “Fiscal Year 2010/EPA Enforcement & Compliance**  
**Annual Results”**



# FY2010 Enforcement & Compliance Annual Results

## Concluded EPA Enforcement Actions

### EPA Final Administrative Penalty Orders Issued



FY2010 Data Source: Integrated Compliance Information System (ICIS); data source for previous fiscal years: ICIS.

Note: The large final administrative penalty order (FAPo) number in FY 2006 is the result of a one-time enforcement initiative involving animal feeding operations (AFOs) that resulted in over 2,568 multi-program administrative consent agreements and final orders (referred to as the AFO Air Compliance Agreements). Almost all of these cases were both initiated and resolved in FY 2006. Approximately 55% of the FY 2006 FAPOs and nearly 100% of the MIP FAPOs (2,576) were a result of this initiative.



**Attachment 3**  
**Selected EPA and State Enforcement Inspection Protocols**

## **SELECTED EPA AND STATE ENVIRONMENTAL INSPECTION PROTOCOLS<sup>®</sup>**

- 1) Inspection Phase
  - a) Admission to Plant Premises
    - i) Notify the environmental inspection coordinator (EIC) or other management representative and legal counsel. Where possible, inspections should be coordinated with the EIC or other management representative so that they can be present and accompany the inspector during the inspection.
    - ii) Obtain and record the identity of the inspectors
      - (1) full name;
      - (2) titles;
      - (3) agency represented; and
      - d. agency division, office address, and phone/e-mail contacts.
    - iii) Inquire whether inspection is part of a routine program or in response to a specific event, condition, or complaint.
    - iv) Ask the inspector to agree to provide the company with a copy of all records made during the inspection.
    - v) Where necessary, request that all confidential or proprietary business information acquired in the course of the inspection and all related reports, files, data and physical evidence prepared or obtained as a result of the inspection be deemed and labeled "confidential business information."
    - vi) Request all facility safety precautions be observed. Consult with legal counsel if the inspector refuses to abide by company rules concerning safety glasses, hard hats, safety shoes, other personal protective equipment, etc.
    - vii) To the extent possible, determine what the inspector wants to see (including records) and prepare an itemized list.

- viii) To the extent possible and appropriate, focus inspection on regulated areas or units, *e.g.*:
  - (1) Wastewater discharge points--wastewater treatment facilities and outfall monitoring equipment;
  - (2) Air emission sources—sources and abatement equipment specified in a permit; and
  - (3) Waste generation, storage, accumulation, treatment or disposal facilities.
- ix) **Note on Search Warrants:** If the inspector has obtained a search warrant, a copy of the warrant and, if possible, supporting application should be obtained. *Contact legal counsel immediately for guidance.* The scope of the inspection should be limited to those areas specified in the warrant. If the warrant is vague or ambiguous, seek clarification on scope of search with help of legal counsel.

b) Environmental Samples

- i) Keep records of sampling locations and descriptions of sampling activity.
- 2. Ask inspector what is being sampled and analyzed and the corresponding sampling and analytical methods.
- 3. Environmental samples should be split with the inspector to provide the company the opportunity to conduct its own tests. (Alert preferred technical consultant/laboratory to dispatch appropriate personnel and equipment to properly obtain and preserve split samples.)

c) Inspection of Records

- i) Find a private room where records can be viewed without disruption to inspector or normal plant activities.
- 2. Copies of public records required to be maintained by regulation (*e.g.* permits, manifests, discharge monitoring reports) may be turned over to the inspector. Prior consultation with legal counsel is desirable, however.
- 3. Upon a request for access to records other than public records discussed above, the EIC or other management representative can request the inspector to afford some time for the company to discuss confidentiality and privilege issues with legal counsel. Seek agreement with inspector to allow submission of such records after inspector departs premises

4. Copies of all materials delivered to inspectors should be maintained in a facility inspection file.
5. Originals of records should not be removed in the absence of valid compulsory authorization (e.g. search warrant). Every effort should be made to notify legal counsel prior to any such removal.

d) Photographs

1. Consider safety concerns relative to photography or videotaping.
2. Photographs or videotapes should be taken of every scene photographed by the inspector.
3. Use of cameras and other video and recording equipment should be consistent with company safety concerns.

e) Walking Tours

- i) Request that the inspector to wear all required safety apparel.
- ii) Ascertain precisely what inspector wants to see and guide inspector directly to that area or those areas.
- iii) Where necessary or appropriate, the EIC should avoid speculation or guessing in connection with the inspector's questions and advise the inspector:
  - (1) to put questions in writing; and,
  - (2) that the company will look into the matter and provide a reply.
- iv) Efforts should be made to take notes regarding all areas the inspector examines, all comments the inspector makes, and questions asked.
- v) Inspector requests to interview employees should be discussed with legal counsel.

2) Post-Inspection

a) Debriefing the Inspector

- i) At the conclusion of the inspection, a conference with the inspector should be requested. This conference should be utilized solely for the purpose of

- (i) ensuring that the inspector has relevant facts correct, and (ii) gathering information from the inspector relative to probable findings and apparent violations observed, if any.
  - ii) During the conference, an oral request for a copy of the inspector's findings should again be made.
- 3. Re-assert any business confidentiality claims.
- 4. Avoid emotional reactions and heated arguments with inspectors where violations are alleged, inform inspector that the company reserves all applicable legal defenses.
- 5. Anticipate possibility of post-inspection follow-up information request.
- b) Inspection Summary
  - i) Immediately upon the departure of the inspector, prepare a detailed factual summary of the inspection utilizing the notes compiled during the inspection and transmit notes and summary to legal counsel.
  - ii) Include statements and questions made by and to the inspector.
- c) Testing
  - i) Consult with technical consultant/laboratory to ensure the samples are properly preserved if they are not immediately tested.
  - ii) Document the chain of custody for the handling of the samples.
- d) Follow-through
  - i) Consider need for immediate corrective action for any problematic conditions noted in the inspection.
  - ii) After consultation with counsel, photocopy and submit documents the company consents to provide to agency, keeping one copy for the inspection file.
  - iii) File a formal written request renewing the oral request for the inspector's findings, including any analytical results and video/photographic records.
  - iv) Request follow-up meeting with agency prior to institution of any anticipated formal enforcement action, and keep request on company "radar."

Note: When delaying commencement of an inspection, or any phase of an inspection, to follow relevant protocols, care should be taken to avoid making any delay substantial enough to amount to a refusal of access, unless authorized personnel have determined that such delay is warranted under the circumstances.

*Disclaimer: The information provided in this presentation is intended solely as an educational resource, does not constitute legal advice, and should not be used as a substitute for careful review of site-specific circumstances and specific inspection scenarios in consultation with competent legal and technical professionals. The views expressed in this paper are solely those of the authors and should not be construed as representative of the views of any other person or entity.*

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