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Report to Congressional Requesters

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ENVIRONMENTAL ENFORCEMENT

Penalties May Not Recover Economic Benefits Gained by Violators

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The Honorable John Glenn
Chairman, Committee on Governmental Affairs
United States Senate

The Honorable John Conyers, Jr.
Chairman, Committee on Government Operations
House of Representatives

In separate requests, dated May 10, 1990, and December 20, 1990, you requested that we examine the Environmental Protection Agency's (EPA) enforcement efforts to ensure that they are well managed and effectively carried out. In light of earlier GAO and EPA Inspector General reports, which highlighted EPA's low penalty assessments, you asked us to focus particularly on EPA's penalty policies and practices. To answer your concerns, we examined overall national trends in penalty assessment within EPA's four major enforcement programs—air, water, hazardous waste, and toxic substances—using an analysis of penalty data provided by EPA. We also spoke with EPA program officials and selected regional and state officials who shed light on some of the problems underlying penalty practices.

Results in Brief

Because penalties should serve as a deterrent to violators and should ensure that regulated entities are treated fairly and consistently, it has been EPA's policy since 1984 that penalties for significant violations of environmental regulations be at least as great as the amount by which a company would benefit by not being in compliance. However, in nearly two out of three penalty cases concluded in fiscal year 1990 in EPA's air, water, hazardous waste, and toxic substances programs, there was no evidence that this economic benefit had been calculated or assessed. Thus, although the agency's final penalty assessments in these cases amounted to about $28 million, the widespread absence of documentation makes it impossible to calculate the amount the agency actually should have collected at a minimum.

State and local enforcement authorities—who are responsible for more than 70 percent of all environmental enforcement actions—do not regularly recover economic benefit in penalties, according to previous GAO and EPA Inspector General reports. Moreover, in cases that we and others have reported on, repeated violations have occurred in the absence of penalties.

Many factors may deter regulatory officials from following EPA's penalty policy—such as a philosophy of enforcement based on working with violators to obtain compliance rather than imposing penalties and pressures to settle cases because of limited resources for litigation. The agency has recognized that corrective actions are needed, but we believe that without additional management controls penalty practices are not likely to improve. EPA headquarters does not have sufficient information to oversee its regional office practices, and the organizational responsibilities for enforcement are diffuse, with 15 offices responsible for either setting or carrying out enforcement policies. In addition, although it has the authority to require it, EPA has only encouraged the states to adopt an economic benefit penalty policy, in the belief that states must first meet more fundamental enforcement program requirements. However, in two EPA regions we reviewed, fewer than half of the authorized state programs have adopted such a penalty policy, and in the absence of a federal requirement, others are unlikely to do so.

Background

Under several federal environmental statutes, including the Clean Air and Water Acts, EPA is responsible for issuing regulations in support of statutory requirements and for inspecting polluting facilities to make sure they are following prescribed emission and effluent controls and levels. While EPA regional offices can act as the direct enforcement authority, most statutes provide for EPA to delegate enforcement authority to states and, in some cases, localities, as long as their programs meet federal criteria and are approved by EPA; one exception is the Toxic Substances Control Act, which allows states to regulate chemicals to some extent but does not provide for program delegation. EPA regions remain responsible for overseeing these authorized states and local governments and for taking direct enforcement action if state and local agencies fail to do so. EPA can also revoke a state's authority if its program fails to meet federal standards. Since assuming direct regulatory authority, states and localities are now responsible for more than 70 percent of all formal environmental enforcement actions taken in the United States.

When violations are detected, EPA policy requires enforcement agencies to follow a defined set of procedures and schedules. For minor violations, these agencies may issue warning letters. If these violations are not corrected or if they are serious, civil or criminal remedies and sanctions may be sought. Civil remedies and sanctions may be imposed either administratively, by the enforcing agency, or judicially, by the courts. According to EPA officials, EPA generally chooses to seek civil

judicial remedies in cases that set precedent or involve extensive environmental harm.

For many violations, federal and state laws authorize enforcement agencies or the courts to impose penalties. Federal laws generally specify a maximum amount and several factors that must be considered in assessing penalties, including the severity of the violation, good faith efforts to comply, and the economic benefit of noncompliance. EPA has the discretion to set any other penalty policy.

Penalties play a key role in environmental enforcement by acting as a deterrent to violators and by ensuring that regulated entities are treated fairly and consistently, with no one gaining a competitive advantage by violating environmental regulations. In certain programs, other types of sanctions are also available to enforcement agencies, such as permit revocation and shutdown of operations, denial of government contracts, and bans on use of public sewers. Authorities generally favor penalties, however, because, among other reasons, they provide the agencies with greater flexibility and can be made to fit the violation much more than, for example, shutting down a plant.

EPA's Uniform Civil Penalty Policy

In 1984, EPA established for all its regulatory programs a uniform penalty policy that requires regional enforcement officials to assess penalties that are at least as great as the amount by which a company would benefit by not complying with the law. According to this policy, which is still in effect, the final assessed penalty is supposed to include this minimum penalty—the economic benefit component—as well as a gravity component determined by the seriousness of the violation.

The policy allows enforcement officials to reduce the gravity component during settlement negotiations when the violator has made a good faith effort to come into compliance, when no history of violations has occurred, or for various other reasons. However, the policy requires full recovery of the economic benefit component except when (1) a facility can demonstrate that it is unable to pay, (2) significant public interest concerns such as plant closings are involved, or (3) EPA would probably not recover economic benefit in litigation—circumstances that EPA considers would occur only rarely. The policy also permits enforcement officials to omit economic benefit from the penalty assessment when the benefit is negligible. While each regulatory program also has its own civil penalty policy because of statutory differences, all programs establish economic benefit and gravity as the basis for penalties.

To determine economic benefit, EPA officials collect information on delayed capital investment; avoided operations and maintenance expenses; and one-time, nondepreciated expenditures. To assist in the calculation itself, EPA's Office of Enforcement developed a computer model, known as BEN. According to its developer, the program, which is available in all EPA regions, is easy and quick to use. The Office of Enforcement also provides training in its use.

Prior Reviews of Penalty Practices

In a series of 10 program reviews conducted between 1988 and 1990, GAO and EPA's Inspector General documented numerous cases in which EPA regional offices and states had not followed the agency's penalty policy and had assessed low penalties, or none at all, for significant violations. These reviews covered enforcement of EPA's hazardous waste program under the Resource Conservation and Recovery Act (RCRA); the national pollutant discharge permit program, the industrial pretreatment program, and the oil pollution prevention program under the Clean Water Act; and the stationary source air pollution program under the Clean Air Act—five programs altogether, covering 10 regions and 22 states. (A list of reports is provided in app. I.)

Following these and other internal reviews, EPA in 1989 identified enforcement as one of several areas within the agency particularly vulnerable to fraud, waste, and abuse because of the lack of management controls and the large dollar amounts involved. In its December 1990 report to the President under the Federal Managers' Financial Integrity Act, the agency said that while penalty practices had been one of three problem areas within the enforcement program, it believed that activities undertaken in fiscal year 1990, such as greater headquarters focus on penalties in annual reviews of regional enforcement programs, would correct these deficiencies.

Overall, enforcement has received renewed attention under the current administration. EPA Administrator, William Reilly, ranked enforcement among his top five priorities for the agency when he took office. In 1990 the Office of Enforcement published a 4-year strategic plan that emphasized strong enforcement practices and several new initiatives dealing with improved information systems and inspection schemes, among other things. According to officials we interviewed, EPA remains committed to a strong penalty policy and continues to believe that penalties should be high enough to serve as a deterrent to violations and should remove the economic benefit of noncompliance.

Assessed Penalties Show Little Relationship to Economic Benefit

Although total penalties assessed by the agency increased in fiscal year 1990, the amounts, for the most part, still show little relationship to the economic benefit of the violations. This is true of the penalties assessed by EPA and, according to available data, of state penalties as well.

EPA Penalty Trends

According to EPA, total penalties assessed by the agency in all its programs amounted to $61 million in fiscal year 1990, increasing from $35 million in fiscal year 1989 and $37 million in fiscal year 1988. Most of this increase—$21 million of $26 million—came from the toxic substances program, which increased its administrative penalties by over $6 million, or 147 percent. In addition, $15 million was assessed in one civil judicial case involving a toxic substances violation. (See app. II, fig. II.1.)

Within the four programs we examined, EPA provided data to us covering 685 cases that were concluded in fiscal year 1990. For these cases, EPA had initially requested penalties of $66 million.[1] Following settlement negotiations or litigation, the penalty amounts were reduced to about $28 million. In most of these cases, however, EPA has no measure of how much it should have assessed, at a minimum, because the agency did not calculate—or at least document—the economic benefit to the violator, which, in theory, should have been the minimum amount of the penalty.

Of the 685 cases concluded in fiscal year 1990, EPA was not able to report the economic benefit of the violation in 442 cases, or 65 percent of the total. (See app. II, fig. II.2.) Within these undocumented cases, 163 also had no record of the initial penalty requested. In the remaining 279 cases, the initial penalties totaled almost $20 million, which was reduced by 61 percent to less than $8 million. While these reductions may have been allowable under the penalty policy, without documentation to support the initial penalties, the government has no way of knowing the minimum amount that it should have collected in these cases.

[1]Based on 522 of the 685 cases that included both initial and final penalties. Because initial penalties may be revised during the discovery process, that is, the period in which additional information on the case is exchanged, we used the latest values computed in hazardous waste, water, and air cases. For the toxic substances program, officials said that initial penalties often represent the maximum amount the law allows, rather than economic benefit and gravity, which are generally lower.

Among civil judicial cases,[2] which generally represent the more serious violations, the incidence of documentation was relatively high, covering 89 percent of those cases. However, among administrative penalty cases, which comprise 90 percent of all enforcement cases, only about one in four cases had information on economic benefit in its files. (See app. II, fig. II.3.) In 85 percent of the cases in which economic benefit calculations were documented, the final assessed penalties were at least as great as the economic benefit. In the cases in which final penalties were below the economic benefit, the benefits not recovered totaled over $8 million. However, we did not conduct file reviews to determine whether these reductions were permissible exceptions to the penalty policy.

Among EPA programs, the toxic substances program, which was unable to furnish us with data on economic benefit in any of these cases, had the greatest absence of documentation. Officials in the toxic substances program attributed the lack of documentation to what they said was the negligible economic benefit involved in many toxic substances cases, which are often record keeping violations. The hazardous waste program also had a large proportion of cases (88 percent), most of them administrative, for which no economic benefit value was documented. By contrast, all air program cases—all of them civil judicial cases[3] — contained documentation of economic benefit, as did 71 percent of water program violations. (See app. II, fig. II.4.)

State Penalties

According to GAO and EPA Inspector General reports, economic benefit is not routinely recovered in state and local penalties. In our 1990 review of enforcement in the stationary source air pollution program,[4] we found that over half of the more than 1,100 significant violators that states and localities had identified in fiscal years 1988 and 1989 had paid no cash penalties at all. In another case, a facility that had failed to install required control equipment and had emitted excess air pollutants for more than 6 years was ultimately assessed a penalty of $15,000. At our request, EPA's Enforcement Office calculated the economic benefit of the

[2]Although all penalty cases examined here are civil cases, the term "civil judicial" is commonly used in order to distinguish these cases from criminal cases. Because administrative cases by nature fall under civil law, the term "civil" is commonly left off.

[3]EPA did not obtain comprehensive administrative penalty authority under the Clean Air Act until the statute was amended in 1990.

[4]Air Pollution: Improvements Needed in Detecting and Preventing Violations (GAO/RCED-90-155, Sept. 27, 1990).

violation and found that it was, in fact, more than $231,000—about 15 times more than the penalty imposed. The local air agency official explained that the assessed penalty was in keeping with the customary penalty for such violations.

In cases that we and others have reported on, repeated violations have occurred in the absence of penalties. In the above-mentioned air pollution violation case, 2 months after paying the $15,000 penalty, the facility was found conducting unpermitted operations. In other cases, facilities that received no penalties not only continued to pollute but also eventually caused serious and expensive contamination problems, as illustrated by the following examples.

- A wood preserving facility on the Chesapeake Bay repeatedly violated its wastewater discharge permit for 13 years with no penalty. The facility caused numerous environmental problems, including contamination of surface and groundwater, before being placed on the Superfund National Priorities List for cleanup, estimated to cost $23 million. Despite the magnitude of the problems, the facility retained its permit for over 2 years after being declared a Superfund site.
- Avtex Fibers in Virginia violated its wastewater discharge permit at least 1,600 times over a 9-year period. EPA and the state of Virginia also cited the company for contaminating groundwater and emitting into the air 770 times the allowed levels per hour of carbon disulfide. Yet, according to the Virginia Assistant Attorney General and information in EPA files, Avtex never paid a fine. The plant remained open until November 1989 when the state of Virginia revoked Avtex's discharge permit because it was discharging PCBs (a toxic substance) into the Shenandoah River. Because of groundwater contamination, the plant was placed on the Superfund National Priorities List for cleanup, after which the plant owners filed for bankruptcy protection. While the full amount cannot yet be reliably estimated, taxpayers may ultimately have to bear the brunt of cleanup costs, which EPA's project officer for the site believes will be among the highest to date for Superfund sites.

In the Avtex case, competitors also charge they have been adversely affected by the absence of penalties. One of Avtex's competitors, a company in Tennessee, said that it had to make pollution control investments totaling more than $30 million and that Avtex, which was not required to make such investments, was often able to underprice it in the rayon market.

Pressures to Reduce Penalties

According to both EPA headquarters and regional office officials, various pressures and differing views prevail within EPA regions that deter them from following the agency's penalty policy and recovering economic benefit. Some regional and program officials strongly endorse EPA's penalty policy and aim to carry it out. Others, however, choose to deemphasize penalties in favor of working with a violator to obtain compliance because of a belief that this approach will bring a larger number of facilities back into compliance.

In addition, pressures to meet program targets for settled cases and limited budgetary resources encourage regional officials to settle cases quickly rather than continue to negotiate or pursue a case through a hearing or trial in order to obtain an appropriate penalty. According to some Office of Enforcement officials, officials may feel pressure to settle cases quickly just before the end of a fiscal quarter in order to boost statistics that are maintained on numbers of settled cases. Also, officials may feel constrained by limited resources from pursuing a case through a hearing or trial and may therefore choose to settle with violators for a lesser penalty amount. A continued reluctance to pursue high penalties can have a negative effect, however, as headquarters officials acknowledge: Once violators recognize that EPA is unlikely to take them to court, they are less likely to settle on terms favorable to the government. And, in the long run, this can undermine the goal of having penalties serve as a deterrent to violations.

State and local enforcement agencies are likewise subject to pressures that make them reluctant to follow a penalty policy based on recovering economic benefit. Local officials we have talked to were concerned that high penalties might jeopardize local business, result in unemployment, and dissuade businesses from locating in the state. For example, in our 1990 air program enforcement review, a local government official in North Carolina told us that he believed that placing economic benefit penalties on violators might place facilities in his state at a competitive disadvantage vis-a-vis businesses in areas that did not have a similar penalty policy. In a municipality we visited during our review of enforcement under the industrial wastewater pretreatment program,[5] we found that no industrial users had been fined, taken to court, or subjected to any formal enforcement action. The town administrator believed it was more prudent to obtain the cooperation of the town's industry than to alienate it by escalating enforcement action—even

[5]Water Pollution: Improved Monitoring and Enforcement Needed for Toxic Pollutants Entering Sewers (GAO/RCED-89-101, Apr. 25, 1989).

though the town's major industry was repeatedly violating its effluent discharge limits.

Finally, some states have legal limits on the dollar amounts they can assess for penalties. Iowa state law, for example, prohibits administrative penalties of more than $1,000 per day, as compared with caps of up to $25,000 under federal statutes. According to EPA officials, state legislatures would be more likely to change such limits if EPA were to impose program requirements that necessitate removing the caps. The hazardous waste program, for example, plans to propose a rule to require states to raise caps to the $25,000 level allowed under RCRA.

Oversight of Regional and State Penalty Practices Is Insufficient

Because of the pressures that work against its penalty policy at the regional and state levels, EPA's oversight of penalty practices is critical, particularly given the importance that the agency's top management places on the policy.

Headquarters Does Not Have Sufficient Information to Oversee Regional Penalty Practices

EPA headquarters reviews civil judicial cases more closely than it does administrative cases, but it does not have complete information on economic benefits for either type of case. Civil judicial cases, which make up about 10 percent of the caseload, are individually reviewed at headquarters by EPA's Office of Enforcement, and we found that the penalty assessments in the civil judicial cases we reviewed were well documented. However, individual review is time-consuming and labor-intensive, according to EPA. While it may be worthwhile and even necessary, for other reasons, to undertake individual reviews for the relatively small number of civil judicial cases, such a review might be difficult to justify simply to check if economic benefit is calculated and assessed. Further, because the review is so detailed, reviewers may not be able to discern any overall patterns or trends among programs and regions. Finally, because reviewers are assigned to specific programs, no one in the Enforcement Office reviews information across all programs for general trends or inconsistencies.

The Enforcement Office has a central reporting system for its docket of civil judicial cases that permits a review of trends in penalty practices among programs and regions, but it records only the initial and final penalty assessments. No information on the minimum penalty to be collected—the economic benefit component—is included, nor is the size of

the gravity component, nor the reasons why initial penalties were reduced. Although the system was originally designed to include information on economic benefit and gravity components, these fields were removed from the system a number of years ago because regional officials often did not enter the data. According to the EPA official currently responsible for the system, not all regional and program enforcement officials were convinced of the need to collect and analyze the data, and the Office of Enforcement officials at that time did not press the officials to do so.

Each of the regulatory program offices also maintains an automated data management system with information on administrative penalties, but these data bases do not track economic benefit. The program offices, joined since last year by the Office of Enforcement, review administrative penalty information during annual audits. However, these audits deal with many other aspects of enforcement besides penalties and, because of time and resource constraints, only a small percentage of cases are reviewed. Recently, however, the hazardous waste program has gone beyond these actions and directed regional offices to forward final penalty calculations and justifications for all administrative cases to headquarters for periodic review.

EPA Organizational Responsibilities for Enforcement Are Diffuse

Oversight is also made more difficult by the fact that the organizational responsibilities for enforcement within EPA are diffuse: 15 offices are responsible for either setting or carrying out enforcement policies. During the 1970s, enforcement for all regulatory programs was centralized within headquarters in the Office of Enforcement, headed by an assistant administrator, who was responsible for developing and overseeing enforcement policies and programs. At the regional level, a single division director, who reported to the regional administrator, was responsible for enforcement in all regulatory programs. The rationale for this structure was that enforcement cut across all programs and that a consolidated enforcement office gave the function more focus.

In two reorganizations in the early 1980s, however, the agency moved responsibility for enforcement to the individual program offices. Thus, for example, the Office of Water became responsible for not only writing regulations but also for enforcing them. These reorganizations left the Office of Enforcement with a core of legal staff but with little line authority over any of the program offices. Although critics assert that the reorganizations' goal was to weaken enforcement at a time when the agency was emphasizing voluntary compliance, the stated purpose was

to incorporate an enforcement presence in the program offices and give them responsibility for all elements of their programs. In addition, as part of an agencywide initiative to delegate responsibility to those nearest the source of pollution, each regional administrator was given responsibility for enforcement in his or her region. (See app. III for the current and former organizational structures for enforcement.)

As a result, today no one office is clearly accountable for penalty practices. The assistant administrator for enforcement remains responsible for setting agencywide enforcement policies but has no authority to compel the programs and regions to carry out these policies. The program assistant administrators are also responsible for setting enforcement policies, but these are only for their individual programs. For the most part, the policies are implemented by regional program officials who report directly to the regional administrators and receive guidance and oversight from the program assistant administrators but have no formal connection to the Office of Enforcement.

Until recently, the regional counsels provided legal enforcement support to regional program officials but had no formal connection to the Office of Enforcement. However, in 1989, the assistant administrator for enforcement was given the responsibility for annually rating the performance of the regional counsels on enforcement matters and for providing input to the deputy regional administrator's rating. In 1990, the assistant administrator for enforcement also proposed to return to a centralized enforcement structure in order to increase accountability, but the EPA Administrator declined to act on the proposal. The Administrator said that although the proposal had merit and might be reconsidered, enforcement in the agency was working well despite problems in some areas and that a reorganization might be too disruptive.

EPA has acknowledged that oversight of regional penalty practices has been a problem, and in its December 1990 report to the President describing efforts to correct material weaknesses, it outlined a series of completed corrective actions. The Office of Enforcement issued a memorandum to the regions in December 1989 re-emphasizing the need to adhere to its uniform civil penalty policy and to document the reasons for any reductions to initial penalties. The Office of Enforcement and program offices were also directed to pay more attention to penalty calculation and documentation in their reviews. Finally, attorneys were required to be trained in negotiation skills before leading settlement

negotiations. However, while these actions may emphasize the importance of the agency's penalty policy, they do not provide for comprehensive reviews or for a mechanism to follow through and ensure that regions are acting on this guidance.

EPA's Oversight of States Is Limited

EPA's oversight of state penalty practices is even more limited, largely because the agency has not required the states to adopt its own civil penalty policy. According to agency officials, it has been necessary to concentrate first on ensuring that states can meet more basic requirements, such as taking timely and appropriate enforcement actions, before requiring them to adopt EPA's economic benefit penalty policy. Instead, the agency's 1986 Policy Framework for State/EPA Enforcement Agreements simply recommends that state penalty policies include an economic benefit component. EPA argues that such policies provide greater consistency for similar violations, and, in general, a more equitable and legally defensible basis for determining penalty amounts. In addition, one state official we talked to noted that an economic benefit policy provides for a more equitable treatment of the regulated community within a state. However, in the 2 EPA regions we visited, only 13 of the 29 air, water, and hazardous waste authorized state programs have penalty policies that consider economic benefit, according to EPA officials.

EPA is responsible for overseeing state penalty practices and has the authority to pursue its own enforcement action when authorized states are unable or unwilling to assess adequate penalties on their own. In an action called "overfiling," EPA can impose its own penalty for a violation in which a state assessed no penalty when one was required, or in which the penalty was "grossly deficient," considering all the circumstances of the case and the national interest. However, the criteria for "grossly deficient" are not clear and provide no concrete standards. EPA's state/federal enforcement policy framework states only that determining whether a penalty is grossly deficient is "a judgement call made on a state-by-state basis." As a result, regional officials told us they are often uncertain as to when overfiling is called for and ultimately use what is called the "laugh test"; that is, if a state penalty is so low as to lack credibility, it is considered grossly deficient. Other officials in one EPA region told us that they do not even review penalties for potential overfiling because of the absence of standards.

Although it has only recommended an economic benefit penalty policy to the states, EPA could require that states adopt such a policy as a condition of its approval of a state program. Under both the Clean Water Act and RCRA, EPA must determine that a state program provides for adequate enforcement before it will approve the program. EPA regulations currently define an adequate enforcement program as one that includes penalty authority, but EPA could change its regulations to require that an economic benefit policy be part of a state's enforcement program. EPA has similar review and approval authority over state implementation plans under the Clean Air Act, and we believe it can use this authority to require economic benefit penalty policies in state air programs.

We have, in fact, recommended that EPA impose such a requirement in both the air and hazardous waste programs. In our 1990 report on EPA's enforcement of the stationary air pollution control program, we called for EPA to require states to include an economic benefit penalty policy in the new implementation plans that would be required under the 1990 Clean Air Act Amendments. The agency has reacted favorably to our recommendation and is awaiting an opinion from its Office of General Counsel as to the agency's authority.

We made a similar recommendation in a 1988 report on enforcement of the hazardous waste program.[6] However, according to a program official, the agency chose not to require states to adopt an economic benefit penalty policy because it was concerned about the effect of adding this requirement to others it is proposing to place on state enforcement programs. In addition, the agency was concerned that states would choose not to change their legislation to meet such a requirement and would therefore lose their RCRA authorization. If this occurred, EPA would then have to administer the hazardous waste programs in these states, which it said it was reluctant to do.

Another way in which EPA can attempt to change state penalty practices is through its state program grants. RCRA, the Clean Water Act, the Clean Air Act, and other statutes that provide for state delegation authorize EPA to provide grants to the states to run their programs. In theory, EPA can use a grant to bring about a change in a state program by attaching conditions to it. In those states that are willing to accept such a condition, requirements for an economic benefit penalty policy may be imposed relatively quickly—as part of an annual grant negotiation. By

[6]Hazardous Waste: Many Enforcement Actions Do Not Meet EPA Standards (GAO/RCED-88-140, June 8, 1988).

contrast, bringing about changes in state programs through regulatory requirements can take from 3 to 5 years or, in the case of state implementation plans, from 5 to 10 years, according to EPA officials.

As for states' adherence to economic benefit penalty policies, EPA now requires states to report quarterly on enforcement actions taken, and the agency reviews state enforcement actions to ensure that the states are meeting criteria for timeliness and appropriateness. EPA could therefore monitor the states' implementation of its penalty policy by having them provide information on penalty assessments, including economic benefits, along with other enforcement data.

While EPA would like to see states adopt an economic benefit policy and have argued strongly in favor of such a move, officials in the Office of Enforcement and in the water and hazardous waste programs are concerned about actually compelling states to do so. Their principal concern is that states will relinquish authority for their programs to EPA, a burden that these officials believe would be too difficult to assume.

Conclusions

EPA's civil penalty policy, in our view, is a reasonable one. The policy is simple to understand, treats all regulated entities fairly and comparably, can be applied in any state or region, and allows for exceptions when circumstances call for them. Moreover, having a standard on which to base penalties permits management oversight of numerous decisions with important monetary consequences. Although other forms of sanctions may also be effective, such as permit revocation, there will always be a role for penalties to play. And, as long as penalties are used, we believe that there ought to be some reasonable and consistent criteria for determining their size.

EPA's top management remains committed to the civil penalty policy. It has taken the first step in ensuring adherence to this policy by emphasizing its importance to its regional offices and, in particular, by emphasizing the importance of including documentation of penalty assessments in case files. We are skeptical, however, that these actions will be enough. Without evidence of the sustained interest of headquarters, EPA regional offices and states have little reason to make changes in their customary practices and beliefs. In order for its penalty policy to be successfully implemented over the long run, EPA needs to hold states and regions accountable for carrying out the policy by monitoring their performance. While the hazardous waste program has initiated such an

effort on its own, monitoring needs to transcend individual program efforts to cover agency activities overall.

EPA already has the basis for such a monitoring system in its central penalty reporting system. The system, in fact, was originally designed to contain information on economic benefit and gravity components. While this system will not eliminate the need for individual file reviews for civil judicial cases, it would make oversight of administrative cases much easier. Moreover, it would allow the identification of any trends in regional or program penalty practices in civil judicial cases. When there are legitimate reasons for not including an economic benefit component as part of a penalty calculation, such as when the benefit is negligible, these can be indicated in the system. In this way, a monitoring system would provide the necessary internal controls for management to monitor agency performance and make any necessary improvements. Given the large dollar amounts involved in penalty collections, strengthening internal controls is crucial to avoid fraud, waste, and abuse.

In addition to needing better information, EPA needs to have clearer lines of responsibility for taking any corrective action indicated by the information. We would not necessarily advocate a reorganization to remedy this situation, however. While consolidation of enforcement responsibilities may be needed to remedy the diffuse responsibility for enforcement within the agency, the need for and desirability of such a move should be decided on the basis of more than just implementation of penalty policy.

As for state penalty practices, we believe that EPA has not only the authority but also sound reasons for requiring states to have a penalty policy that requires recovery of economic benefit. With states responsible for the large majority of enforcement actions, any policies that are set for federal practices alone will ultimately have little effect. As a basis for assessing penalties, economic benefit ensures that regulated facilities are penalized in the same way regardless of which state they are in or whether they are regulated by a state or federal agency. An economic benefit policy for states would also provide EPA regions with a standard by which to judge whether a state penalty is adequate and whether overfiling is warranted. We recognize that some states now face legal constraints that may keep them from adopting such a policy, but it seems unlikely that changes will occur in those states unless there is some outside requirement for it. Using state grants as a vehicle for change may be effective as an interim step where states are inclined to

change their policies. However, EPA can only compel adherence by changing state program requirements.

As stated in previous reports, we appreciate EPA's concerns about the sensitivity of its relationships to the states. We recognize that states could choose to return responsibility for regulatory programs to the federal government and that such a move could impose a considerable burden on EPA. However, if EPA's oversight role is to be taken seriously, the agency has to be prepared to assume this burden when there is good reason.

Once EPA requires such a penalty policy, it will have to monitor state penalty assessments to ensure that the policy is carried out. This information can be incorporated into existing state enforcement reporting system requirements and would allow both EPA and the states to be aware of how the states were doing.

Recommendations to the Administrator, EPA

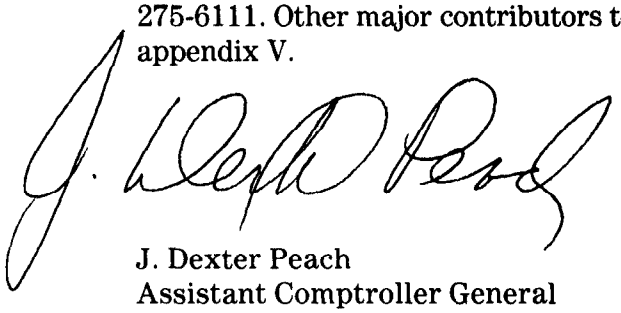
To institute the internal controls necessary to ensure that the agency's uniform civil penalty policy is followed, we recommend that the EPA Administrator

- require that EPA's regional offices provide information on administrative penalties for the Office of Enforcement's penalty reporting system and that they include, for civil judicial and administrative cases, initial calculations of economic benefit and gravity, subsequent revisions to these calculations, reasons for penalty reductions, and final penalty amounts;
- identify (once the reporting system has been modified) the individuals or offices within the agency that will be responsible for monitoring penalty practices and for taking any corrective actions indicated;
- require states, in their federally delegated air, hazardous waste, and water programs, to adopt economic benefit policies that are based on EPA's uniform civil penalty policy; and, in the interim, require economic benefit policies as conditions of annual program grants; and
- require states, once they have adopted economic benefit policies, to report final calculations of economic benefit and gravity, subsequent revisions to these calculations, reasons for penalty reductions and final penalty amounts, as part of the enforcement information they now provide.

Our work was conducted from August 1990 through May 1991 in accordance with generally accepted government auditing standards.

Appendix IV describes our methodology in detail. As requested, we did not obtain official agency comments on a draft of this report. However, we discussed the information in this report with EPA officials, who generally agreed with the factual information, and we made changes where appropriate. Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will make copies available to the Administrator, Environmental Protection Agency; the Director, Office of Management and Budget; and other interested parties.

This work was prepared under the direction of Richard L. Hembra, Director, Environmental Protection Issues, who can be reached at (202) 275-6111. Other major contributors to this report are listed in appendix V.



J. Dexter Peach
Assistant Comptroller General

Contents

Abbreviations

EPA	Environmental Protection Agency
IG	Inspector General
GAO	General Accounting Office
NPDES	National Pollutant Discharge Elimination System
PCBs	polychlorinated biphenyls
POTW	publicly owned treatment works
RCED	Resources, Community, and Economic Development Division
RCRA	Resource Conservation and Recovery Act

Prior Reports on EPA Penalties

Listed below are reports issued by GAO and EPA's Inspector General (IG) between 1988 and 1990 covering penalty policies and practices. Although most of these reports addressed other enforcement issues as well, the summaries below cover only penalty issues.

General (Across EPA Programs)

Capping Report on the Computation, Negotiation, Mitigation, and Assessment of Penalties Under EPA Programs (EPA-IG E1G8E9-05-0087-9100485, Sept. 27, 1989)

This report summarized previous audits of penalties under the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act. The IG concluded that many EPA regions and states inadequately calculated penalties, reduced the proposed penalties excessively with little or no documentation, and, in many cases, neglected to recover the violators' economic benefits of noncompliance. In some cases penalties were reduced in excess of 90 percent with little or no documentation to support the reductions. Although EPA does not require states to adhere to EPA's penalty policy, the IG report noted that, in the cases it reviewed, states did not properly administer EPA's or their own penalty policies. The IG also reported that EPA did not have aggregate administrative and judicial penalty information and therefore could not adequately judge the success of its enforcement program.

Air Quality

Air Pollution: Improvements Needed in Detecting and Preventing Violations (GAO/RCED-90-155, Sept. 27, 1990)

GAO examined EPA's efforts to control air pollution from stationary sources, focusing on Regions 3, 4, and 9, and eight authorized state and local programs within these regions. GAO found that state and local programs had assessed penalties in fewer than half the cases of significant violations in fiscal years 1988 and 1989. Of the eight programs reviewed, none regularly sought to recover economic benefit penalties. Some states continue to emphasize compliance and technical assistance in their enforcement efforts, rather than penalties. EPA rarely takes its own direct enforcement action when a state fails to do so because of, among other reasons, the high cost and political difficulty in using this federal authority.

Review of Region 5's Stationary Source of Air Pollution Compliance and Enforcement Program (EPA-IG E1K67-05-0449-80743, Mar. 11, 1988)

The EPA Inspector General reviewed 29 case files of stationary sources in Region 5 and found that 12 of the 18 significant cases were settled with penalties. Only 4 of these 12 cases correctly calculated and documented the penalty amount. The collected penalty exceeded the violator's economic benefit in only two of the nine applicable cases. The other seven violators gained an economic benefit from noncompliance.

Consolidated Report on EPA's Administration of the Asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP) (EPA-IG E1GM7-05-0571-80821, Mar. 24, 1988)

EPA's Inspector General reviewed inspection and enforcement actions of Regions 4, 5, and 9 and the delegated state and local agencies within those regions. The IG found that EPA regions and state and local agencies were generally not issuing violations or resolving violations with penalties. When penalties were recommended, amounts were generally not sufficient to deter violations or remove the economic benefit of noncompliance.

Water Quality

Inland Oil Spills: Stronger Regulation and Enforcement Needed to Avoid Future Incidents (GAO/RCED-89-65, Feb. 22, 1989)

Following the large 1988 oil spills by the Ashland Oil Co., near Pittsburgh and the Shell Oil Company near the San Francisco Bay, GAO reviewed efforts underway in EPA Regions 3, 5, 6, and 9, to determine how EPA was enforcing federal regulations intended to prevent oil spills under the Clean Water Act. GAO found that EPA does not have national guidance on imposing fines for violations of EPA's Oil Pollution Prevention regulations. Although EPA's data indicate that the rate of noncompliance may be high, the regions rarely impose fines. Seven of the 10 EPA regions have never levied penalties against violators of the Oil Pollution Prevention regulations.

Water Pollution: Improved Monitoring and Enforcement Needed for Toxic Pollutants Entering Sewers (GAO/RCED-89-101, Apr. 25, 1989)

EPA's National Pretreatment Program requires industries to treat their wastewater before discharging it into publicly owned treatment works (POTW). From a survey sent to a stratified random sample of 502 of the approximately 1,500 POTWs participating in the national pretreatment program, GAO found that until 1988, EPA emphasized implementation rather than enforcement in its pretreatment program. About 60 percent

of the POTWs GAO surveyed issued notices of violations, but only about 5 percent imposed administrative penalties. POTWs find it politically difficult to impose sanctions on facilities that employ local workers and pay local taxes. Both EPA and regional officials acknowledged that they have had limited oversight and enforcement of POTWs who do not comply with their own enforcement responsibilities.

Report of Audit on the Management of the Chesapeake Bay Program Point Source Pollution Program (EPA-IG E1H98-03-0208-9100467, Sept. 11, 1989)

The Chesapeake Bay Agreement between EPA and the states surrounding the Bay is intended to reduce toxic pollutants entering the Bay. EPA's Inspector General audited the Chesapeake Bay program and found that EPA Region 3 and Maryland, Pennsylvania, and Virginia have not effectively enforced the Clean Water Act against polluters of the Chesapeake Bay. The states assessed insignificant penalties or no penalties against major long-standing violations, but EPA did not fulfill its enforcement oversight responsibility and take its own enforcement action to obtain a larger penalty.

Consolidated Report on Audit of the National Pollutant Discharge Elimination System Permit Enforcement Program (EPA-IG E1H28-01-0200-010015422, Jan. 4, 1990)

EPA's National Pollutant Discharge Elimination System (NPDES) requires wastewater dischargers to have permits and EPA and states to effectively monitor compliance and enforce permit requirements. This consolidated report summarizes the results of audits of EPA Regions 1, 2, 4, 5, including 11 states, and selected cases from each state. The IG found that the EPA regions and the delegated states had not assessed penalties in accordance with EPA's civil penalty policy and had not adequately documented penalty adjustments. In 46 of the 69 civil cases reviewed, the penalty assessments did not recover the economic benefit of noncompliance. In Regions 2 and 5, the IG found inconsistencies between penalties assessed against municipal and industrial facilities for similar violations.

Hazardous Waste

Hazardous Waste: Many Enforcement Actions Do Not Meet EPA Standards (GAO/RCED-88-140, June 8, 1988)

GAO reviewed EPA and state RCRA cases in Regions 2, 5, and 6, and two states within each of these regions. GAO found that penalties assessed by

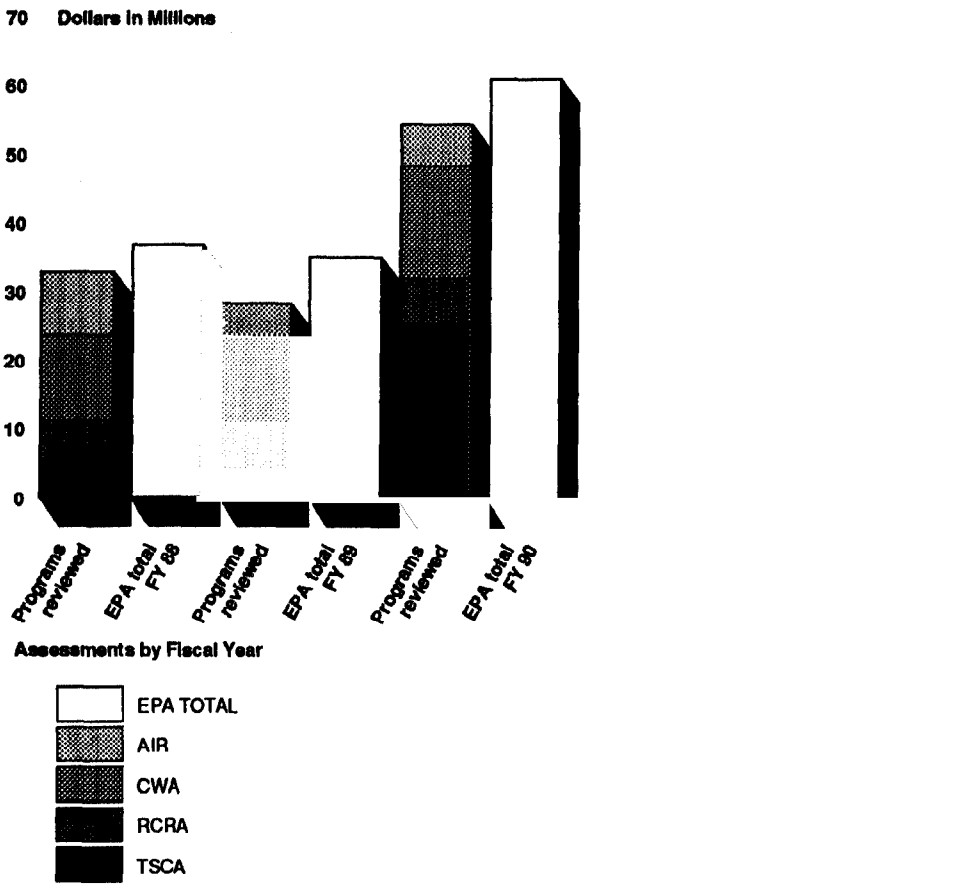
EPA and five states may not be large enough to offset the economic benefits of noncompliance and are not documented consistently. In the three EPA regions reviewed, GAO examined 31 of the 40 high-priority enforcement cases. The lack of documentation in 29 of these cases prevented GAO from determining whether the regions followed the RCRA penalty policy and adequately considered the economic benefit of noncompliance. GAO also reviewed 35 of the 40 high-priority enforcement cases in 4 states. In three of the states, we found no evidence to suggest that the economic benefit of noncompliance was adequately considered in the proposed penalty. Texas was the only state that consistently documented penalty calculations and considered economic benefit in all 14 of its high-priority cases. However, the maximum penalty amount allowed by the Texas penalty policy may not produce penalties large enough to offset the economic benefit of noncompliance.

Consolidated Report on Review of EPA's Controls Over Administrative Penalties Under the RCRA Enforcement Program (EPA-IG E1G6*8-09-0188-9100479, Sept. 18, 1989)

This report summarizes audits of penalty assessments and negotiations in Regions 1, 4, 6, 8, and 9. The IG found that these EPA regional offices did not consistently adhere to national penalty policies and procedures for RCRA violations. The IG's Office sampled 20 administrative RCRA cases, examining 4 in each of the regions reviewed. The IG found that in the majority of cases the EPA regions did not adequately compute and assess penalties against RCRA violators to reflect either the seriousness of the violation, the duration of noncompliance, or the economic benefits of noncompliance. Proposed penalties were insufficiently documented and excessively mitigated.

Data on EPA Penalties

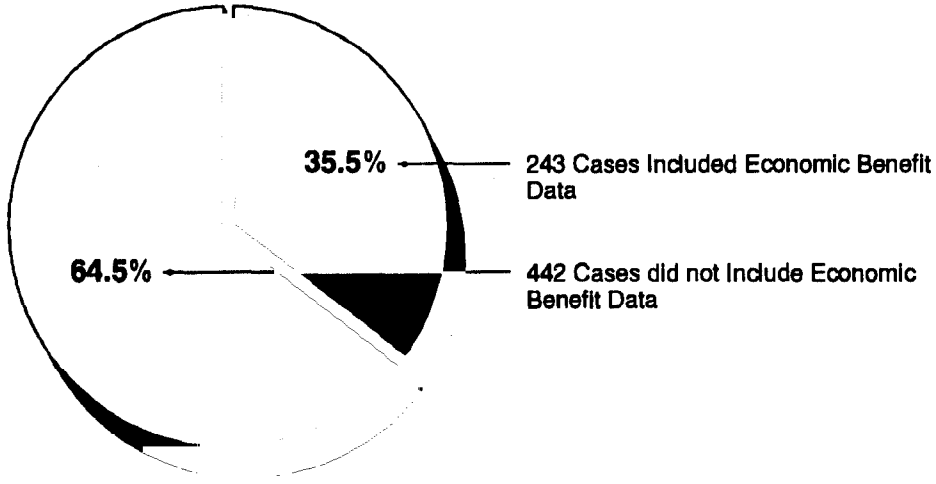
Figure II.1: EPA Penalty Assessments in Fiscal Years 1988-90, by Program and Agencywide



Note: Programs reviewed: stationary source program under the Clean Air Act; national permit discharge elimination system and pretreatment programs under the Clean Water Act; hazardous waste treatment, storage, and disposal under the Resource Conservation and Recovery Act, and toxic substances control program under the Toxic Substances Control Act.

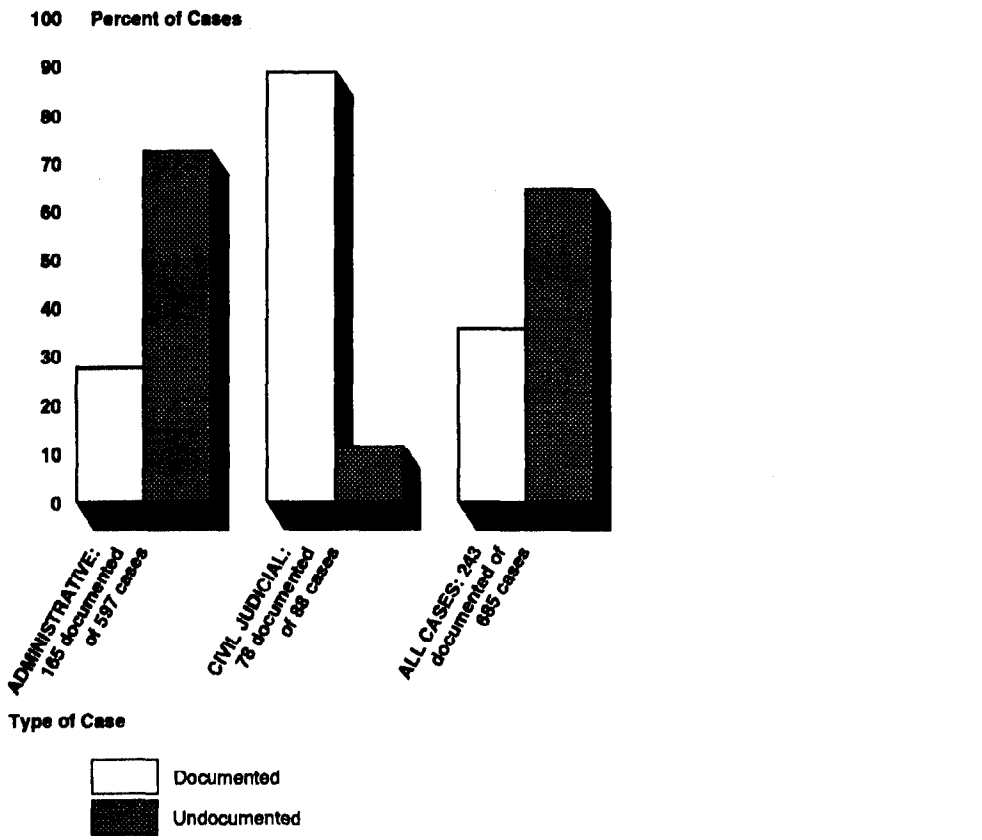
Source: EPA data.

Figure II.2: Documentation of Economic Benefits in Cases Reviewed



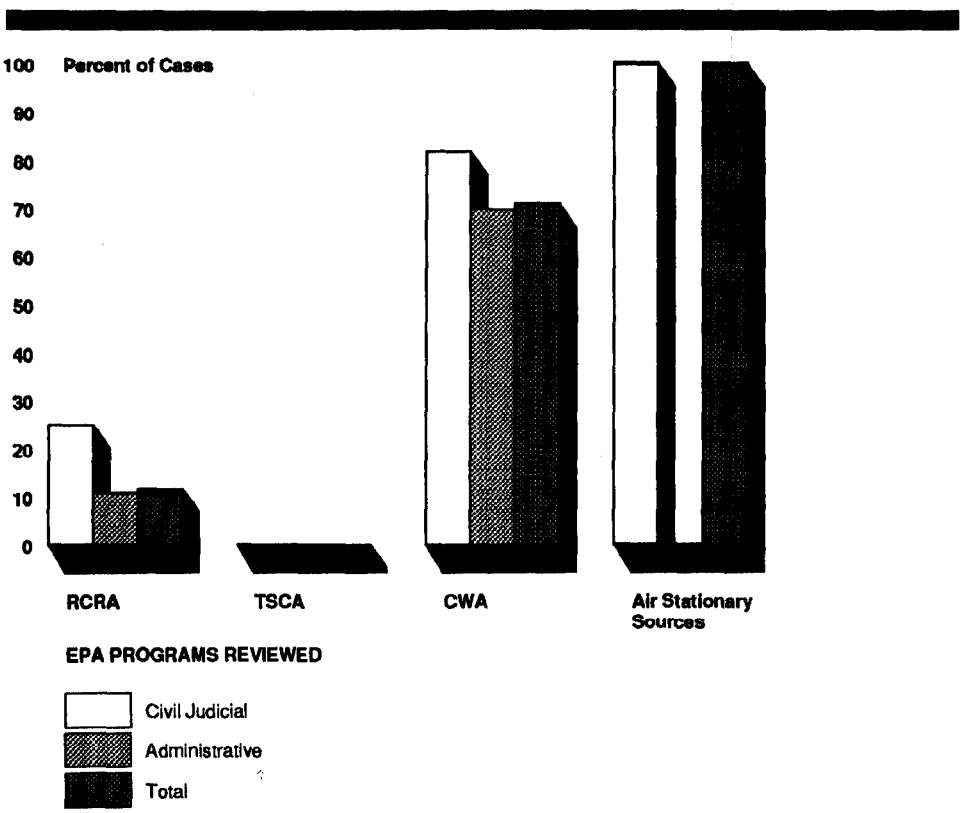
Source: EPA data on 685 cases concluded in fiscal year 1990 under four programs reviewed.

Figure II.3: Percentage of Cases in Which Economic Benefits of Noncompliance Were Documented, by Type of Case



Source: EPA data on 685 cases concluded in fiscal year 1990 under four programs reviewed.

Figure II.4: Percentage of Cases in Which Economic Benefits of Noncompliance Were Documented, by Program

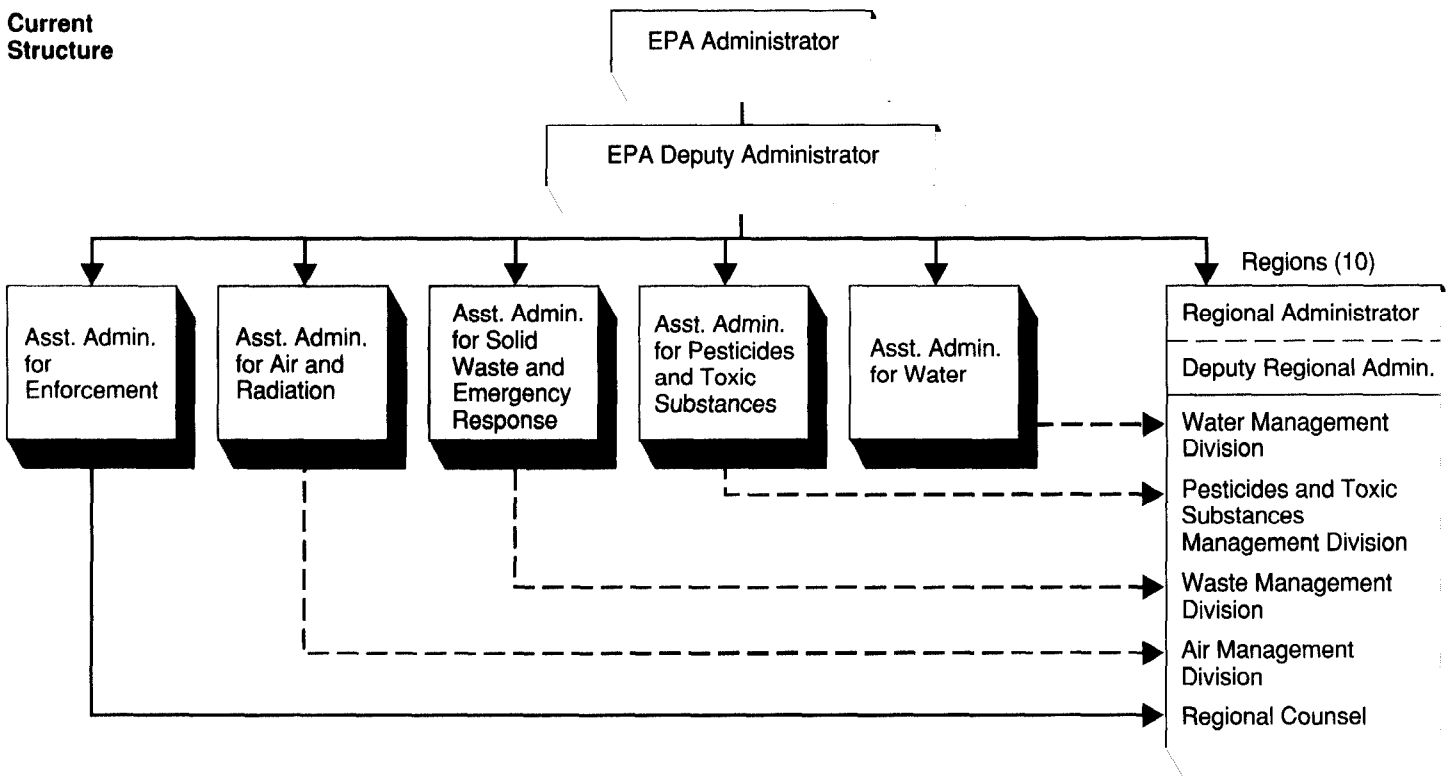


Note: The air program did not conclude any administrative cases in fiscal year 1990. The toxic substances program did not supply information on economic benefit for any cases.

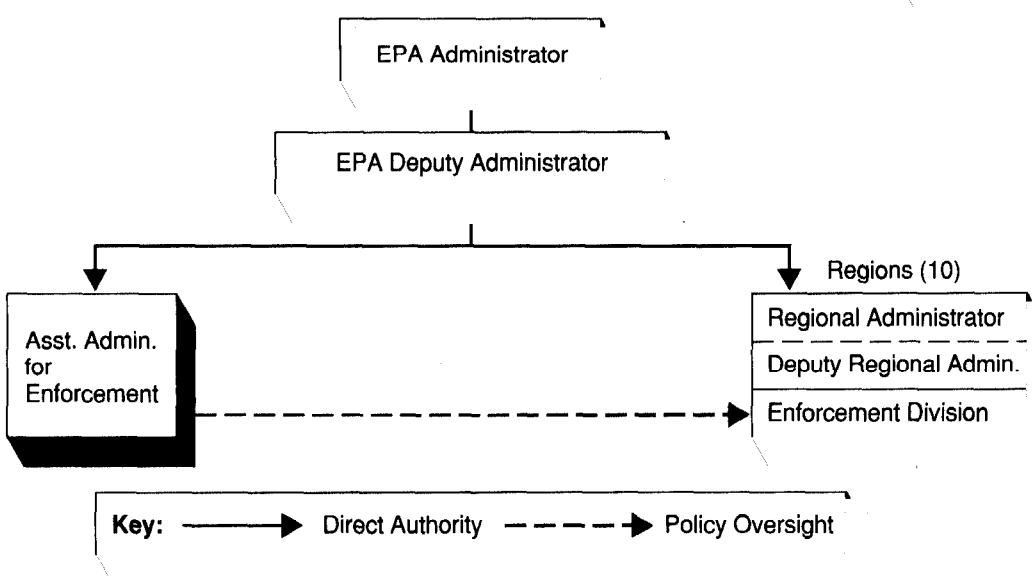
Source: EPA data on 88 civil judicial and 597 administrative cases concluded in fiscal year 1990.

Current and Former Organizations With Responsibility for Enforcement

Current Structure



Former Structure



Scope and Methodology

We focused our review on penalty practices carried out under the Clean Air Act Stationary Source Program, the Clean Water Act National Pollutant Discharge Elimination System and National Pretreatment Program, the Resource Conservation and Recovery Act (RCRA) Hazardous Waste Treatment, Storage, and Disposal Program, and programs under Title I of the Toxic Substances Control Act. We chose these programs because together they accounted for over 80 percent of all penalties EPA collected during fiscal years 1988 through 1991. In addition, prior GAO and EPA Inspector General reports focused on weaknesses in these programs. The programs we reviewed are described below.

- Stationary Source Air Pollution Program: EPA and states monitor emissions at over 30,000 stationary air pollution sources including electric utilities, factories, and refineries. States issue construction permits designed to restrict emissions. Major stationary sources are responsible for 44 percent of all air pollution emissions.
- The Clean Water Act National Pollutant Discharge Elimination System: EPA or authorized states issue permits to restrict the amount of pollutants that a municipal or industrial facility can discharge into U.S. waters. About 48,400 industrial and 15,300 municipal dischargers are regulated under this program.
- The Clean Water Act National Pretreatment Program requires industries that discharge wastes into the nation's municipal sewage treatment facilities to "pretreat" their wastes prior to discharge. Approximately 1,500 local treatment plants are required to establish and enforce pretreatment programs for industrial users in order to remove pollutants from industrial waste that may interfere with the treatment process, damage the facilities, or pass through the facility into receiving waters.
- RCRA Hazardous Waste Treatment, Storage, and Disposal Program: EPA or authorized states issue permits to any person or company owning or operating a facility that treats, stores, incinerates, or disposes of hazardous waste. About 3,000 regulated facilities manage 275 million metric tons of hazardous waste annually.
- The Toxic Substances Control Act of 1976, Title I, authorizes EPA to control the risks associated with more than 65,000 commercial chemical substances and mixtures in the United States. Under the act, EPA requires companies to test selected existing chemicals for toxic effects and requires the agency to review most new chemicals before they are manufactured. To prevent unreasonable risk, EPA may require companies to use several precautions, such as hazard-warning labels or outright bans on the manufacture or use of especially hazardous chemicals.

To determine the current status of EPA's penalty practices across programs and regions, we obtained data on penalties from each of the EPA offices in charge of these programs and from the Office of Enforcement. From each program office, we requested the initial calculations of gravity (the level of environmental harm) and economic benefit, subsequent recalculations, and the final assessed penalties for all administrative and civil judicial cases with a proposed monetary penalty concluded during fiscal year 1990. EPA officials obtained these data from individual case files maintained in the regions because program data bases did not contain all the needed information. However, officials did not provide information on all fiscal year 1990 cases because other EPA regions and offices were using some case files; therefore, they were not readily available at the time of our request. We did not verify any of the information provided.

We were not able to obtain data on penalty trends in the states because EPA does not collect data on state penalties, and the information was not easily accessible from the states. We therefore relied on information on specific cases reviewed in earlier GAO and EPA IG reports.

To understand the reasons underlying observed penalty trends, we interviewed Office of Enforcement and program enforcement officials at EPA headquarters and reviewed applicable penalty policies, reports, and other documentation. We also used EPA penalty data to choose two regions that seemed to represent widely differing penalty practices. In these regions, 5 and 7, we interviewed program enforcement officials and regional counsel representatives and reviewed pertinent documentation. We conducted telephone interviews with selected state officials on the Steering Committee on the State/Federal Enforcement Relationship and interviewed officials at the Department of Justice. We also analyzed 10 prior GAO and EPA Inspector General reports issued between 1988 and 1990 that focused on penalties. (See app. I for a listing of these reports.)

Our work was conducted primarily from August 1990 through May 1991 in accordance with generally accepted government auditing standards. We discussed the information contained in the report with EPA officials, who generally agreed with the factual information in this report, and included their comments where appropriate. However, as requested by the Committee staff, we did not obtain official EPA comments on a draft of this report.

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