



G A O

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United States Government Accountability Office
Washington, DC 20548

September 18, 2008

The Honorable John Dingell
Chairman
Committee on Energy and Commerce

The Honorable Bart Stupak
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
House of Representatives

Subject: *Environmental Enforcement: EPA Needs to Improve the Accuracy and Transparency of Measures Used to Report on Program Effectiveness*

As part of its mission to protect human health and the environment, the Environmental Protection Agency's (EPA) enforcement office maintains civil and criminal enforcement programs to help enforce the requirements of major federal environmental laws such as the Clean Air Act and the Clean Water Act. EPA's civil and criminal enforcement programs work with the Department of Justice (DOJ), and in some cases states, to take legal actions to bring polluters into compliance with federal laws. While civil enforcement actions require polluters to pay penalties and take other corrective actions, criminal enforcement actions also may include imprisonment. EPA's enforcement office sets national priorities to focus resources on significant environmental risks and non-compliance patterns; prepares nationally significant civil and criminal cases for legal action by DOJ; uses 10 regional offices to implement civil enforcement actions on a day-to-day basis; and pursues criminal violations of environmental laws through its criminal enforcement office. The agency exercises its authority to independently pursue some violators through administrative proceedings—civil administrative actions—and to refer significant matters to DOJ when it believes cases need to be filed in federal court as civil judicial actions.¹ DOJ is responsible for prosecuting and settling civil judicial and criminal enforcement cases.

¹EPA generally depends on DOJ to file a complaint in court when EPA seeks penalties greater or compliance periods longer than the administrative limits imposed by statutes. For example, under the Clean Air Act, the maximum amount that may be sought in a single administrative enforcement action is \$270,000, adjusted for inflation, although higher amounts may be pursued with joint approval of the EPA Administrator and the Attorney General. Also, under the Act, EPA may only issue an administrative compliance order requiring the violator to comply as expeditiously as practicable, but in no event longer than 1 year after the date of the order. In addition, states may also participate as plaintiffs in some federal lawsuits.

EPA relies on a variety of measures to assess and report on the effectiveness of its civil and criminal enforcement programs. For example, EPA relies on assessed penalties that result from enforcement efforts among its long-standing measurable accomplishments. The agency uses its discretion to estimate the appropriate penalty amount based on individual case circumstances. EPA has developed penalty policies as guidance for determining appropriate penalties in civil administrative cases and referring civil judicial cases. The policies are based on environmental statutes and have an important goal of deterring potential polluters from violating environmental laws and regulations. The purpose of EPA's penalties is to eliminate the economic benefit a violator gained from noncompliance and to reflect the gravity of the alleged harm to the environment or public health.²

Like other federal agencies, EPA has established results-oriented goals and performance measures. Two of the major performance measures for civil enforcement, according to EPA, are (1) the value of injunctive relief—the monetary value of future investments necessary for an alleged violator to come into compliance, and (2) pollution reduction—the pounds of pollution to be reduced, treated, or eliminated as a result of an enforcement action.³ EPA told us these two measures, as well as penalties, should be considered when assessing the overall impact of its enforcement actions. EPA relies on these measures, among others, in pursuing its national enforcement priorities and overall strategy of fewer, but higher impact, cases. Unless these measures are meaningful, Congress and the public will not be able to determine the effectiveness of the programs. Therefore, it is important to understand how they are determined and the extent to which they accurately reflect EPA's accomplishments.

In this context, we agreed to report on (1) amounts of civil and criminal penalties assessed in recent years and how EPA calculates and reports on these outcomes, (2) the value of injunctive relief and amounts of pollution reduction and how EPA calculates and reports on these outcomes, and (3) factors that influence EPA's process in achieving enforcement outcomes. This report recommends steps that EPA should take to improve the transparency and accuracy of its reports to Congress and the public when reporting on the effectiveness of its enforcement programs.

In conducting our work, we reviewed agency documents such as guidance and policy statements as well as reports to Congress and the public. In addition, we reviewed EPA information associated with the case that the agency identified as resulting in the largest value of injunctive relief in its history. We also met with EPA headquarters and regional officials, DOJ officials, and non-profit groups concerned with environmental enforcement. We reviewed EPA reports of monetary accomplishments presented in nominal dollars and adjusted these amounts for

²Violators frequently obtain an economic benefit by avoiding or delaying necessary compliance costs, by obtaining an illegal profit, by obtaining a competitive advantage, or by a combination of these factors. EPA has developed an economic model for assisting the agency in determining the portion of a penalty that should be attributable to a polluter's economic benefit from a violation.

³The Government Performance and Results Act of 1993 (GPRA) requires that each agency report annually to Congress on the results of its activities in each fiscal year. Program managers use these measures as short-term indicators of program performance and in longer-term trend analyses.

inflation when determining the extent of trends in the data through statistical analysis. We primarily focused our penalty analysis on fiscal years 1998 through 2007 since EPA officials said they were confident in the data within most of the period and in our judgment the most recent 10-year period appeared to be a reasonable time frame. Further, we were able to perform some analysis of the data reliability for most of those years by comparing amounts in EPA's database available only to government officials and amounts reported to the public. We conducted this performance audit in accordance with generally accepted government auditing standards from January 2008 through September 2008. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Results in Brief

Total penalties assessed by EPA, when adjusted for inflation, declined from \$240.6 million to \$137.7 million between fiscal years 1998 and 2007. We identified three shortcomings in how EPA calculates and reports penalty information to Congress and the public. Specifically, EPA is:

- Overstating the impact of the enforcement programs by reporting penalties assessed against violators rather than actual penalties received by the U.S. Treasury.
- Reducing the precision of trend analyses by reporting nominal rather than inflation-adjusted penalties, thereby understating past accomplishments.
- Understating the influence of its enforcement programs by excluding the portion of penalties awarded to states in federal cases.

In contrast to penalties, we found that both the value of estimated injunctive relief and the amount of pollution reduction reported by EPA generally increased. The estimated value of injunctive relief increased from \$4.4 billion in fiscal year 1999 to \$10.9 billion in fiscal year 2007, in 2008 dollars. In addition, estimated pollution reduction commitments amounted to 714 million pounds in fiscal year 2000 and increased to 890 million pounds in fiscal year 2007. However, we identified several shortcomings in how EPA calculates and reports this information. We found that generally EPA's reports do not clearly disclose the following:

- Annual amounts of injunctive relief and pollution reduction have not yet been achieved. They are based on estimates of relief and reductions to be realized when violators come into compliance.
- Estimates of the value of injunctive relief are based on case-by-case analyses by EPA's technical experts, and in some cases the estimates include information provided by the alleged violator.

- Pollution reduction estimates are understated because the agency calculates pollution reduction for only 1 year at the anticipated time of full compliance, though reductions may occur for many years into the future.

Finally, we identified factors that affect EPA’s process in achieving penalties, injunctive relief, and pollution reduction. For example, DOJ, not EPA, is primarily responsible for prosecuting and settling civil judicial and criminal enforcement cases. Therefore, EPA does not have ultimate control of enforcement outcomes.

We are recommending that the EPA Administrator take a number of actions to disclose more information when reporting penalties and estimates of the value of injunctive relief and pollution reduction.

While Assessed Penalties Declined between Fiscal Years 1998 and 2007, There Are Three Shortcomings in How EPA Calculates and Reports Penalties

From fiscal years 1998 to 2007 total inflation-adjusted penalties declined when excluding major default judgments,⁴ and we identified three shortcomings in how EPA calculates and reports on these outcomes. Total penalties reported by EPA are the sum of assessed penalties resulting from EPA’s civil administrative, civil judicial, and criminal enforcement actions. When adjusted for inflation, total assessed penalties were approximately \$240.6 million in fiscal year 1998 and \$137.7 million in 2007. Civil judicial penalties are the largest source of assessed penalties, accounting for about 45 percent of the total (see table 1).

Table 1: Assessed Penalties Reported by EPA, Adjusted for Inflation

Constant 2008 dollars in millions

Fiscal Year	Civil Judicial	Administrative	Criminal	Total
1998	\$82.9	\$36.6	\$121.1	\$240.6
1999	180.8	32.7	78.8	292.3
2000	68.1	36.3	151.3	255.7
2001	122.2	28.6	113.9	264.7
2002	75.6	30.6	73.7	180.0
2003	83.6	28.2	82.2	194.0
2004	137.1	31.3	53.1	221.5
2005	139.3	29.3	109.5	278.1
2006	86.4	44.4	45.4	176.2
2007	41.0	31.7	65.0	137.7
Total	\$1,017.0	\$329.6	\$894.1	\$2,240.7
<i>Percent of total</i>	<i>45.4%</i>	<i>14.7%</i>	<i>39.9%</i>	<i>100.0%</i>

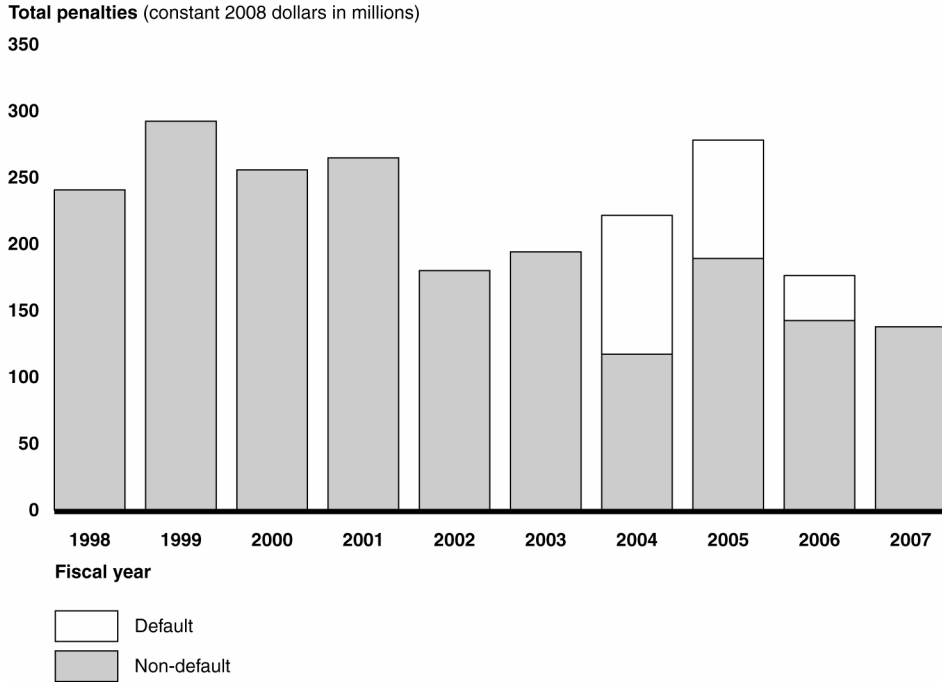
Source: GAO analysis based on EPA data.

Note: Numbers may not add due to rounding.

⁴A default judgment is a binding judgment in favor of the plaintiff when the defendant has not responded to a civil complaint.

While these total inflation-adjusted penalties tended to decline during this period, the trend exhibits only marginal statistical significance.⁵ The data, according to EPA, include penalties for three major cases totaling \$227.2 million in 2008 dollars that EPA does not expect the federal government to collect due to default judgments, which represent uncontested cases where courts awarded the statutory maximum penalty requested by EPA and DOJ. Figure 1 highlights the three penalties in fiscal years 2004 through 2006, ranging from \$33.8 million to \$104.4 million in 2008 dollars, and illustrates the trend for this period.

Figure 1: Total Inflation-Adjusted Assessed Penalties, Fiscal Years 1998 through 2007, Default Cases Identified



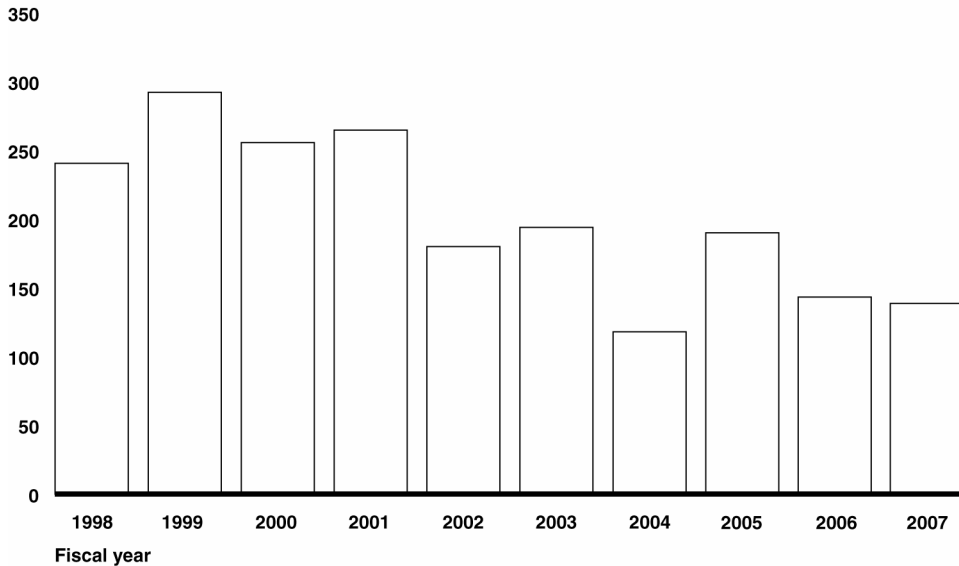
Source: GAO analysis based on EPA data.

When excluding these default judgments, total inflation-adjusted penalties exhibit a statistically significant downward trend between fiscal years 1998 and 2007 (see fig. 2).

⁵The tests of statistical significance cited in this paragraph are based on simple linear regression analyses of penalty amounts as a function of year. When analyzing total inflation-adjusted penalties for fiscal years 1998 through 2007, the trend is marginally significant. When default cases are removed for 1998 through 2007, and when total inflation-adjusted penalties are analyzed from 1974 through 2007, the trends are statistically significant at the less than 0.05 level.

Figure 2: Total Inflation-Adjusted Assessed Penalties, Fiscal Years 1998 through 2007, Less Default Cases

Total penalties (constant 2008 dollars in millions)



Source: GAO analysis based on EPA data.

Excluding certain years or choosing different timeframes for analysis could remove the appearance of a downward trend. While our analysis focused on fiscal years 1998 to 2007, when reviewing EPA's reported data since 1974, we recognized that total penalties increased until the late 1990s and stopped rising thereafter (see enclosure I).

We identified three problems in how EPA calculates and reports penalties that may inhibit the accuracy and transparency of EPA's reporting:

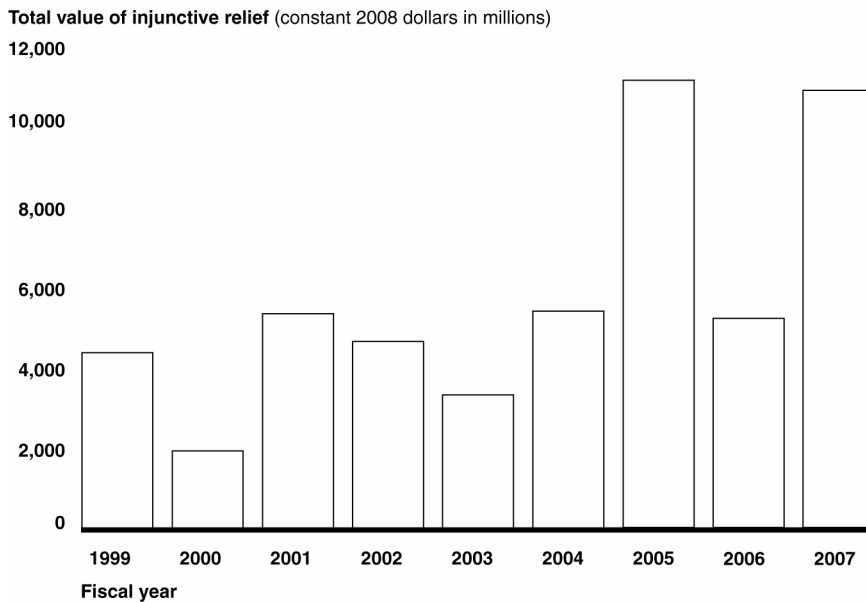
- EPA does not report the actual amounts of penalties received by the U.S. Treasury. This may overstate the impact of the enforcement programs by reflecting penalties that have not, or will not, be collected. For example, EPA identified three major civil judicial cases in recent years that generated significant amounts of assessed penalties through default judgments. These penalties are unlikely to ever be collected, and the removal of these penalties results in a significant reduction in the overall level of penalties reported by EPA.
- When reporting penalties over time, EPA presents nominal amounts that are not adjusted for inflation and, therefore, understate past accomplishments. According to OMB, economic analyses are often most readily accomplished using real or constant-dollar values to measure benefits and costs in units of stable purchasing power. Therefore, to evaluate real trends in penalties, it is necessary to remove the effect of price changes in the reported nominal penalties by adjusting for inflation.
- The penalty amounts EPA reports do not include portions of penalties awarded to states in federal cases in which states also participated. EPA

indicated that states also participate in many federally-led enforcement cases that result in penalties paid to both EPA and the states. However, EPA reports only the amount of penalties assessed for payment to the federal government, thereby understating the effects of its enforcement efforts on defendants. For example, in 1999 EPA and the State of California jointly settled an enforcement case with a major commercial diesel engine manufacturer for alleged violations of the Clean Air Act. The company agreed to pay a total of \$25 million in penalties, of which \$18,750,000 was paid to the federal government and \$6,250,000 was paid to the State of California. However, only EPA's share of \$18,750,000 was included in its reporting of penalties.

Shortcomings in How EPA Reports Measures of Injunctive Relief and Pollution Reduction May Inhibit Accuracy and Transparency of Reporting

The value of estimated injunctive relief, when adjusted for inflation, has increased from \$4.4 billion in fiscal year 1999—the earliest period for which EPA has reported the measure—to \$10.9 billion in fiscal year 2007 (see fig. 3).

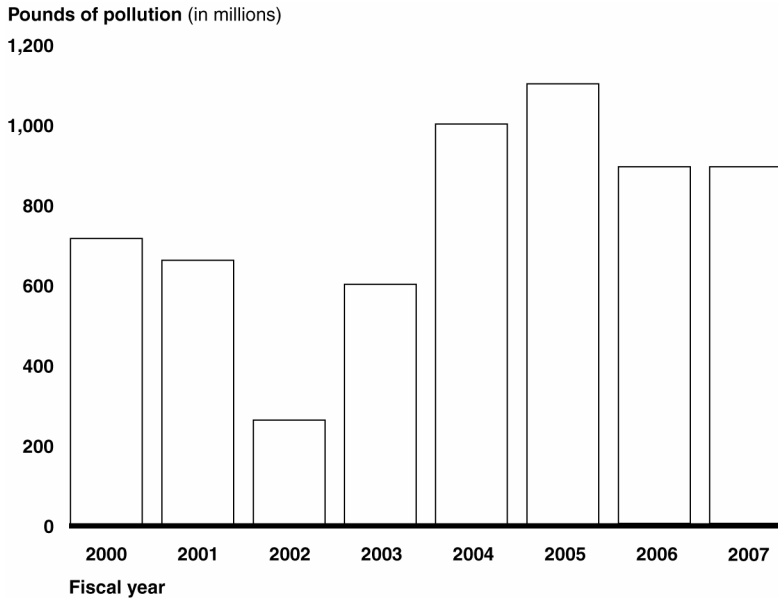
Figure 3: Total Inflation-Adjusted Value of Estimated Injunctive Relief, Fiscal Years 1999 through 2007



Source: GAO analysis based on EPA data.

Estimated pollutant reduction commitments amounted to 714 million pounds in fiscal year 2000, peaked at 1.1 billion pounds in fiscal year 2005 and decreased to 890 million pounds in fiscal years 2006 and 2007 (see fig. 4).

Figure 4: Total Estimated Pounds of Pollution To Be Reduced or Treated, Fiscal Years 2000 through 2007



Source: EPA.

Note: The data from fiscal years 2000 to 2002 are based on EPA's *Performance and Accountability Report for Fiscal Year 2007*, however EPA's enforcement office reports the data from fiscal years 2003 to 2007, citing improved data quality assurance starting in fiscal year 2003. We cannot be certain of the extent that the revised methodology affected the reported levels of pollution reduction after 2003 compared to prior years.

In reviewing the value of injunctive relief and pollution reduction amounts reported by EPA, we identified several shortcomings in how EPA calculates and reports these outcomes that may inhibit the accuracy and transparency of EPA's reporting. The following shortcomings are manifested in EPA reports to Congress and the public, such as (1) annual accomplishments reports on enforcement performance and accountability, and (2) reports comparing EPA's goals and accomplishments under the Government Performance and Results Act:⁶

- EPA calculates estimated rather than actual amounts of pollution reduction based on a 1-year period in the future at the anticipated time of full compliance, and the value of injunctive relief based on the monetary value of an alleged violator's estimated future investments to come into compliance. However, the agency's reports do not always make it clear that these amounts have not been achieved. For example, EPA's fiscal year 2007 accomplishment report on enforcement referred to the largest civil enforcement actions for just three priority areas alone that "...achieved more than 400 million pounds of pollutant reductions and more than \$7 billion in injunctive relief and

⁶EPA, *FY 2007 Office of Enforcement and Compliance Assistance Accomplishments Report and Performance and Accountability Report for Fiscal Year 2007*.

supplemental environmental projects.”⁷ However, for the most part, those amounts were estimates of future anticipated results, such as an estimated defendant’s future costs over several years, and do not represent actual accomplishments. Similarly, EPA’s annual performance and accountability report, referring to total pollution reduction, states “EPA has reduced, treated or eliminated 890 million pounds of pollution through enforcement actions in fiscal year 2007.” However, not all of those pollution reductions actually occurred in 2007.

- EPA does not disclose in its estimates of the value of injunctive relief how the estimates are derived. In estimating the value of injunctive relief, EPA technical staff rely on their professional judgment without any agency guidance or systematic processes, and in cases where they are available they rely on estimates of alleged violators. For example, in one major settlement EPA estimated that the value of injunctive relief would total \$4.6 billion, the largest injunctive relief amount in the agency’s history. The purpose of the injunctive relief in this case is to reduce future air pollutants from several coal-fired generating plants of a power company.⁸ EPA officials told us they based the estimated value on advice from their technical experts and examination primarily of a 3-page document⁹ the company provided through discovery.¹⁰ Furthermore, EPA officials said defendants are not always compelled to provide information that the agency could use to estimate future costs of compliance.
- EPA’s estimates of pollution reduction may be understated because EPA reports only 1- year of estimated pollution reduction at the anticipated time of full compliance for a given case, although reductions may occur for many years into the future. In addition, EPA’s estimates do not account for incremental reductions in the years leading up to full compliance.
- The estimated pounds of pollution reduced, treated, or eliminated does not reflect the varying toxicity of the types of pollution represented by the

⁷As part of a settlement, an alleged violator may agree to undertake an environmentally beneficial project related to the violation in exchange for mitigation of the penalty to be paid. A Supplemental Environmental Project (SEP) furthers EPA’s goal of protecting and enhancing public health and the environment. It does not include the activities a violator must take to return to compliance with the law.

⁸An enforcement action against American Electric Power resulted in a settlement between the federal government and the Ohio-based utility in October 2007. EPA officials said this particular estimate was conservative because it excluded, for example, the increased operations and maintenance costs of the plants and consideration of additional plants covered in the consent decree that would require retrofitting with pollution controls, conversion to different power sources, or retirement, which could cost more than \$1 billion.

⁹In commenting on our draft report, EPA said that their decision was further informed by pollution control planning documents obtained through discovery, representations made in the litigation, and transcribed statements made to the federal court judge supervising confidential settlement negotiations.

¹⁰Discovery is the process where civil litigants seek and obtain information both from other parties to the litigation and others through, for example, interrogatories and document requests.

measure. For example, EPA officials said that the amount of mercury to be reduced in the atmosphere as a result of enforcement efforts may be a small number of pounds when compared to other pollutants, but mercury is a more toxic substance than many other pollutants that are included in the measure. EPA officials said they recognize this issue and they are working to address it.

Other Factors Influence EPA's Process for Achieving Enforcement Outcomes

EPA's process for achieving annual results in terms of penalties, estimated value of injunctive relief, and amounts of pollution reduction is influenced by many other factors. While the following list is not comprehensive, it describes some of the significant aspects of the legal and policy environment that could affect the outcomes:

- The Department of Justice (DOJ), not EPA, is primarily responsible for prosecuting and settling civil judicial and criminal enforcement cases. The Attorney General is charged by statute with conducting and supervising litigation to which the United States, or its departments or agencies, is a party, including cases referred by EPA.¹¹ Once cases are referred, EPA officials stated that they continue to participate in all civil and many criminal cases. For each case, DOJ must weigh the litigation risks that affect the likely outcome at trial in making its decisions on whether or how to settle. Consequently, DOJ officials said EPA's proposed penalty estimates do not govern DOJ's decisions. DOJ, like EPA, considers applying penalties as described in the relevant environmental statutes. EPA and DOJ officials say they cooperate and reach mutually agreeable decisions on civil judicial cases. For example, DOJ officials said both agencies sign the settlement agreements. However, EPA does not have ultimate control over the enforcement outcomes.
- Executive Order 12988 directs DOJ, whenever feasible, to seek settlements before pursuing civil judicial actions against alleged violators. According to DOJ officials, the Executive Order encourages negotiations prior to the onset of litigation and, thereby, improves the ability of the United States to achieve favorable enforcement outcomes.
- Unclear legal standards, as illustrated in the following examples, have hindered EPA's enforcement efforts. Agency officials told us a 2006 Supreme Court decision, *Rapanos v. United States*, generally made it more difficult for EPA to take enforcement actions because the legal standards for determining what is a "water of the United States" were not clear. This uncertainty required EPA to gather significantly more evidence to establish Clean Water Act jurisdiction in those cases where alleged violators discharged to waters of the United States. In a March 2008 memorandum, EPA's Assistant Administrator for Enforcement and Compliance Assurance said the Court decision and EPA's resulting guidance "negatively affected approximately 500 enforcement cases." For example, the official said EPA's regions decided not to pursue formal enforcement in about 300 instances where there were potential violations because of jurisdictional uncertainty.

¹¹28 U.S.C. §§ 515-519.

- A rule change can affect the process for achieving enforcement outcomes. For example, according to an EPA Office of the Inspector General (OIG) report in 2004, a New Source Review rule change finalized in October 2003 “seriously hampered (EPA) settlement activities, existing enforcement cases, and the development of future cases” due largely to EPA’s revised definition of routine maintenance.¹² Under the revised rule the definition of routine maintenance allowed utilities to undertake projects representing a greater percentage of the cost of replacing a power unit—up to 20 percent—without being subject to the New Source Review requirements. According to the OIG, while EPA officials said the rule change was not retroactive, the change was so dramatic, that even though a court in December 2003 issued a stay delaying implementation of the rule, EPA’s underlying legal arguments may have been weakened.¹³ For example, three utilities said enforcement under a court-imposed remedy should be heavily reduced because their actions would not be a violation under the new rule. Furthermore, at the time the IG report was issued in September 2004, no new enforcement actions had been taken against coal-fired utilities alleged to have violated the old rule because of the new rule’s impact on EPA’s leverage in settlements or court remedies, according to the OIG. The decline in cases between 2002 through 2003 is also, according to EPA, due to the agency not initiating coal-fired power plant cases during the proposal and promulgation of the new rule. EPA officials said they initiated or concluded eight cases under the old rule since 2003.

Conclusions

Pursuing administrative, civil, or criminal action against a suspected polluter is a complex undertaking that often lasts years. While EPA’s reported outcomes of enforcement efforts help inform Congress, the public, and EPA management about EPA’s progress in prosecuting those who violate federal environmental laws, certain aspects of how EPA reports the data may undermine the transparency and accuracy of its reported outcomes and cause EPA to both over and under-report its enforcement achievements. Taken as a whole, these various shortcomings hamper the transparency and accuracy of EPA’s reporting and create the potential for Congress and the public to misunderstand the agency’s enforcement outcomes.

¹²EPA, Office of the Inspector General, *New Source Review Rule Change Harms EPA’s Ability to Enforce Against Coal-fired Electric Utilities*, 2004-P-0034 (Washington, D.C.: Sept. 30, 2004).

¹³After EPA issued the final New Source Review Equipment Replacement rule, 14 states, plus other governmental entities, and several public health/environmental organizations filed suits in the Court of Appeals for the District of Columbia Circuit challenging the rule. Some of these groups asked the Court to prevent the rule from taking effect or “stay the rule” until the challenges they raised in their lawsuits were resolved by the Court. On December 24, 2003, the Court stayed the effective date of the October 2003 Equipment Replacement New Source Review rule until the case could be fully adjudicated. As a result, the rule would not become effective on December 26, 2003. In March 2006, the U.S. Court of Appeals for the District of Columbia vacated the revised rule.

Recommendations for Executive Action

To improve the transparency and accuracy of its reports to Congress and the public when reporting on the effectiveness of the enforcement programs, we recommend that the EPA Administrator take the following six actions:

- When reporting the amount and nature of penalties stemming from enforcement actions, disclose (1) penalties in a manner that clearly indicates that they are assessed rather than collected penalties, (2) penalties collected as well as assessed by the federal government, (3) time series data that are adjusted for inflation, and (4) states' share of penalties in federal cases.
- When reporting other major outcome measures of civil enforcement efforts, clearly disclose (1) that the monetary value of injunctive relief is based on estimates of future amounts that defendants expect to spend to achieve outcomes, as agreed in consent decrees, and (2) that the pounds of pollution reduced represent the anticipated reduction for a 1-year period at the anticipated time of compliance.

Agency Comments

We provided a draft of this report to the EPA Administrator and the Attorney General of the United States for review and comment. EPA and DOJ generally agreed with the findings, conclusions, and recommendations in the report and provided technical comments that were incorporated, as appropriate. Specifically, EPA agreed with five of the six recommendations and stated it would consider the recommendation to report collected penalties. EPA's comments are reproduced in enclosure II.

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As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution for 30 days from the report date. At that time, we will send copies of this report to interested congressional committees, the EPA Administrator, the Attorney General of the United States, and other interested parties. We will also make copies available to others upon request. In addition, the report will be available at no charge on GAO's Web site at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact David C. Maurer at 202-512-3841 or maurerd@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this

report. In addition to the individuals named above, Assistant Director Diane Raynes, Kevin Bray, Mark Braza, Alison O'Neill, Mick Ray, and Daniel Semick made key contributions to this report. Other contributors include Mehrzad Nadji and Dae Park.

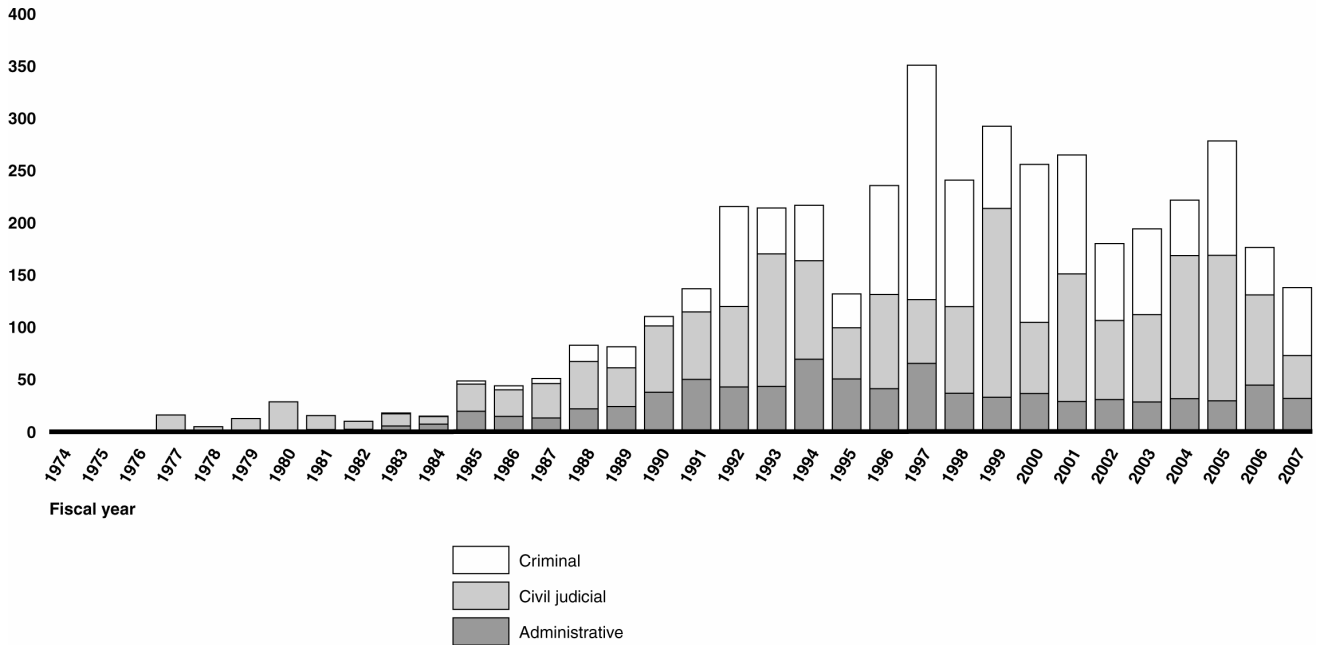
A handwritten signature in black ink that reads "David C. Maurer". The signature is written in a cursive style with a long, sweeping tail on the final letter.

David C. Maurer
Acting Director, Natural
Resources and Environment

Enclosures - 2

Figure 5: Total Inflation-Adjusted Assessed Penalties, Fiscal Years 1974 through 2007, by Type

Total penalties (constant 2008 dollars in millions)



Source: GAO analysis based on EPA data.

Comments from the Environmental Protection Agency



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

SEP 11 2008

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

Mr. David C. Maurer
Acting Director, Natural Resources and Environment
U. S. Government Accountability Office
Washington, DC 20548

Dear Mr. Maurer:

Thank you for the opportunity to comment on "Environmental Enforcement: EPA Needs to Improve the Accuracy and Transparency of Measures Used to Report on Program Effectiveness," Project Number GAO-08-1111R. The Office of Enforcement and Compliance Assurance (OECA) appreciates the work of GAO in preparing this report and generally accepts the recommendations provided. OECA is proud of its accomplishments in protecting public health and the environment, and agrees that clarity and transparency in the reporting of our results is important. We appreciate GAO's suggestions for improving clarity and transparency.

In our response below we address the specific recommendations and provide some additional substantive comments.

This draft report evaluates the accuracy and transparency of the performance measures OECA uses to report on program effectiveness. The performance measures examined include penalties, value of injunctive relief, and pounds of pollution estimated to be reduced, treated or eliminated. Below is OECA's response to recommendations and suggested corrections to technical inaccuracies.

I. OECA Response to Draft Recommendations

Recommendation 1: Clearly indicate in public reports and press releases that penalties reported are assessed.

GAO is correct that EPA reports penalties assessed rather than penalties collected. The purpose of reporting penalties assessed is to communicate to the public the consequences of noncompliance and to create a general deterrent effect that helps us achieve our mission.

Response: OECA will monitor its press releases, Annual Results reports and other public documents to ensure that it is clear that penalties reported for a particular case or year are penalties assessed.

Recommendation 2: Report penalties collected as well as assessed.

OECA continues to believe that reporting penalties assessed is the key measure for reporting to the public. While we agree that penalties collected is a useful internal management measure, we do not believe that penalties collected should be publicly reported when EPA announces individual case settlements or in its Annual Results. As a practical matter, amounts collected are not actually known for some time after the settlement is announced. Administrative penalties are collected by EPA's Office of the Chief Financial Officer (OCFO). Civil judicial and criminal penalties are collected by the Department of Justice (DOJ) through the individual U.S. Attorneys' offices. The amounts collected are tracked by these many different offices. We have begun making changes to our information systems and operating procedures that will enable us to track when judicial penalties have been paid in full under judicial Consent Decrees, and expect to begin collecting this information in FY09.

Response: OECA continues to regard the reporting of assessed penalties alone to be of greater deterrent value than reporting both assessed and collected penalties. However, we will discuss this recommendation with EPA's Office of Chief Financial Officer and the Department of Justice.

Recommendation 3: Provide time-series data adjusted for inflation.

Response: OECA concurs and will begin reporting this information for FY 2008.

Recommendation 4: Report states' share of penalties in federal cases.

The report is correct that EPA has not included state penalties in reporting of annual results. This conservative approach was taken to avoid claims that we overstated our results. If we had included the state share of penalties in federal cases, our penalty numbers would have been higher during the period reviewed by GAO. However, OECA recognizes that the State penalty amounts we obtain in our settlements do contribute to deterrence.

Response: Starting in FY 2009, OECA will report states' share of penalties assessed. This information will be reported separately from federal penalty amounts assessed.

Recommendation 5: Make clear that the value of injunctive relief reported is based on estimates of future amounts that defendants expect to spend to achieve outcomes as agreed in Consent Decrees.

OECA strives to ensure that it is clear that its injunctive relief values reflect estimates of future commitments by the defendants to achieve compliance as specified in the consent decree.

Response: OECA will redouble its efforts to ensure that our reports make clear what this measure represents.

Recommendation 6: Clearly disclose that the pounds of pollution reduced represent the anticipated reduction for a one-year period at the anticipated time of completion.

The pollutant reductions in many cases can be expected to continue for many years or indefinitely. This poses a question of what future time period OECA should use in projecting and reporting the pollutant reduction results. OECA has chosen to limit its projections to the one year period following completion of the injunctive relief. OECA has adopted this approach to avoid the potential for overstating results. OECA has endeavored to make this clear in its reporting of results but acknowledges that a full explanation has not been present in all documents.

Response: OECA agrees that its report of results should make clear the time period over which estimated results are projected.

II. Response to Technical Inaccuracies

Page 1 of draft report, footnote 1: "EPA generally depends on DOJ...in some federal lawsuits."

Response: Revise footnote 1 to read, "Congress has limited EPA's authority to pursue violations in an administrative forum under some of the environmental statutes that EPA is responsible for enforcing. For instance, under the Clean Air Act, EPA may pursue penalties in an administrative forum only if the total penalty sought does not exceed \$270,000 (as adjusted by the Civil Monetary Penalty Inflation Adjustment Rule) and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where EPA and the Department of Justice "jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action." See 42 U.S.C. § 7413(d)(1). Additionally, Congress limited EPA's compliance order authority under the Clean Air Act in the administrative forum. EPA may only issue an order "to require the person to whom it was issued to comply with the requirement as expeditiously as practicable, but in no event longer than one year after the date the order was issued, and shall be nonrenewable." See 42 U.S.C. § 7413(a)(4). Where a matter

does not satisfy the above statutory criteria, it is not appropriate for the administrative forum. EPA will have to refer the matter to the Department of Justice for enforcement in the civil judicial forum."

Page 4, second paragraph, last sentence: "Specifically, we found that... do not clearly...":

Response: Revise to read: "Specifically we found that EPA's reports do not in every instance clearly disclose the following:"

Page 5, first paragraph, second sentence: "...DOJ, not EPA, is responsible for prosecuting and settling civil judicial and criminal enforcement cases. Therefore, EPA does not have ultimate control of enforcement outcomes."

Response: Revise to read, "...DOJ, working with EPA, is primarily responsible for prosecuting and settling civil judicial and criminal enforcement cases and for collection of civil judicial penalties. Therefore, EPA does not have ultimate control of all enforcement outcomes or the collection of all penalties."

Page 10: "...peaked at 1.1 billion pounds in fiscal year 2005 and leveled off at 890 million pounds..."

Response: Delete "leveled off at" and replace with "has been". Given the variance from year to year, and a record increase already achieved for FY 2008 greater than that achieved in FY 2005, FY 2006 and FY 2007 combined, the values for 2006 and 2007 do not reflect a "leveling off."

Page 12, second paragraph, last sentence, "EPA officials told us they based the estimate on advice from their technical experts... through discovery."

Response: Revise to read, "EPA officials told us . . .from their technical experts, examination of a 3-page document the company provided through discovery, and that their decision was further informed by pollution control planning documents obtained during discovery, representations made in the litigation and transcribed statements made to the federal court judge supervising confidential settlement negotiations."

Page 13, bottom paragraph, first, third and fifth sentences: "...DOJ, not EPA, is responsible for prosecuting...cases... Consequently, DOJ officials said EPA's proposed ... do not govern DOJ's decisions. While EPA and DOJ...enforcement outcomes."

Response: As written, this statement implies that EPA doesn't play a role. Revise first sentence, to read, "...DOJ, with participation from EPA on all civil and many criminal matters, is primarily responsible for prosecuting... Revise third sentence to read, "Consequently, DOJ officials said EPA's proposed penalty estimates do not exclusively govern DOJ's decisions. Revise fifth sentence by deleting "While" and "EPA does not have ultimate control over the enforcement

outcomes” so that sentence reads, “EPA and DOJ officials say they cooperate and reach mutually agreeable decisions on civil judicial cases.”

Page 14, bottom paragraph, last sentence: “Second, no court has considered an award of civil penalties... in such a case.”

Response: The last sentence is inaccurate and should be deleted. Two federal courts have imposed penalties in NSR cases. See U.S. v. Louisiana-Pacific Corp., 682 F. Supp. 1141 (D. Colo. 1988); and U.S. v. Chevron U.S.A., Inc., 639 F. Supp. 770 (W.D. Tex. 1985). Second, the sentence goes on to say that “so there is no precedent on how high a penalty a court may award in such a case.” Although these two cases are twenty years old, they do supply some evidence as to how courts addressed the amount of civil penalties to award for NSR violations. Finally, the statement does not support the GAO’s theory that “unclear legal standards have hindered EPA’s enforcement efforts.”

Page 15, first paragraph, third sentence: “While EPA... retroactive.”

Response: This sentence should be deleted.

Page 15, first paragraph:

Response: Add the following sentence before the last sentence in the paragraph: “The decline in cases between 2002 – 2003 is also, according to EPA, due to EPA not initiating coal-fired power plant cases during the proposal and promulgation of the new rule.”

Page 15, last sentence: “EPA officials said they concluded a number... since 2004.”

Response: Revise to read, “EPA officials said they initiated and/or concluded ... since 2003.” See case list provided below on page 6.

**CAA NSR Power Plant Cases Initiated (Either Filed or Settled)
2003-2008**

Case Name	Date Filed or Settled
Virginia Electric Power Company	4/17/03
Wisconsin Electric Power Company	4/27/03
South Carolina Public Service Authority (Santee Cooper)	3/16/04
Minnkota Power Cooperative	4/24/06
Kentucky Utilities	3/12/07
Nevada Power	6/13/07
East Kentucky Power Cooperative	7/2/2007
Salt River Project	8/12/2008

If you have any questions concerning our response please contact me at 202/564-2440 or Margaret Schneider, Director of Administration and Policy, at 202/564 2530.

Sincerely,


Granta Y. Nakayama

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