STATE CIVIL PENALTY AUTHORITIES AND POLICIES

A Report Prepared By
The Environmental Law Institute
for the
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The Environmental Law Institute prepared this study under the direction of Daniel P. Selmi, who was a visiting scholar at ELI during 1993-94 and who drafted all of the study except the summaries of the state civil penalty policies and the charts. Elissa A. Parker, Director of Research, Policy and Training, supervised the overall project. Ivie Higgins, Staff Attorney, completed several of the state civil penalty summaries and interviewed the attorneys to gather the background information for the study.

The research on the state civil penalty statutes was carried out by a team of ELI research assistants consisting of Theodore (Ted) Endreny, Katie Goldberg, Lisa Vogel, and student intern Erika Preiss. The work of this team forms the bulk of the contribution to this study. Ms. Preiss also prepared the initial drafts of most of the charts included in the study. David Ackerly of Loyola Law School, Los Angeles, prepared initial drafts of the remaining charts. Student intern Laura

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[1] That letter is reproduced in Appendix C.

Ahn prepared the initial draft of the summary of state civil penalty policies included in the draft study. Mark Frampton and Caroline Green provide administrative support for the financial aspects of the project.

Cheryl Wasserman, Chief, Compliance Policy and Planning at the Environmental Protection Agency, served as the principal technical adviser.

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Finally, the views expressed in this study are those of the authors alone. They do not necessarily reflect the views of the U.S. Environmental Protection Agency or the Environmental Law Institute.

A STATE-BY-STATE ANALYSIS AND SUMMARY OF CIVIL PENALTY AUTHORITIES

I. INTRODUCTION

A. Scope of the Study

This study summarizes and analyzes state civil penalty statutes available to enforce state environmental laws. The principal state authorities researched were provisions governing violations of air, water, solid waste, hazardous waste, drinking water, and toxic substances laws.

The study's purpose is to help states share approaches to civil penalty authorities and assessments. The information in the study can be useful to states in evaluating and revising their own penalty authorities, and EPA's Steering Committee on the State/Federal Enforcement Relationship recommended that the study be carried out. The study is one of several efforts initiated by EPA to enhance state and local government enforcement authorities and penalty practices.

In 1986 EPA issued a similar study prepared by the Environmental Law Institute entitled State Civil Penalty Authority and Policies (Sept. 30, 1986). The present study is broader than the 1986 study, as it slightly expands the subjects covered to include statutes pertaining to pesticides. Like the earlier study, however, the current study does not analyze the full spectrum of state enforcement authorities. Revocation of permits, criminal sanctions, bond forfeitures, and recovery of environmental damages, among other enforcement tools, are potent tools for state enforcement. Furthermore, the number of criminal

actions brought to enforce state environmental laws has markedly increased in recent years, thus enhancing the importance of state statutes that define environmental crimes. Those types of enforcement methods, however, are not analyzed in this study.

In the vast majority of cases the civil penalty statutes grant states generous enforcement powers, including large "per day" penalties for violations. But those powers are not self-implementing; whether they provide a powerful tool for enforcement depends on the vigor and judgment of state prosecutors in putting them to use. While the study examines statutory authority, it does not evaluate use of that authority in particular instances.

Nonetheless, a study of the state civil penalty statutes is extremely useful in providing an overview of the framework within which state environmental laws are enforced. It can also identify and shed light on particular elements of enforcement authority that can make a critical difference in enforcement actions. While the number of judicial decisions construing civil penalty statutes has increased in recent years, many important questions of penalty imposition and procedure that remain unanswered by the courts are apparent from a review of the statutes. In the absence of such judicial interpretation, the statutory language assumes an even more critical role in enforcement programs undertaken by states.

B. Trends in Statutory Authority

An analysis of the changes that have occurred in the statutes since completion of the earlier study indicates several trends. These include:

(1) Increase in the Number of Statutes

While the 1986 study summarized 295 statutes, Appendix B of the present study summarizes penalty provisions in 919 statutes. Some of the increase is attributable to the inclusion of pesticide statutes in the present study, a subject not included earlier, but that category of statutes accounts for a relatively small part of the increase. The overall increase indicates that state legislatures continue to believe that civil penalties are a useful and effective tool for environmental law enforcement, and have increasingly utilized it.

(2) Increase in the Variety of Violations

Many of the civil penalty statutes included in the earlier study defined broadly the scope of the violations for which penalties were authorized. For example, they often would authorize a penalty for any "violation of this chapter" or for any "rule, regulation, or permit." In addition, those statutes tended to apply to air pollution, water pollution, and hazardous waste violations, for many of them were enacted to give state agencies sufficient authority to successfully apply to EPA for delegation of enforcement authority pursuant to federal law.

A significant proportion of the civil penalty statutes enacted since 1986 define violations more narrowly, outlining specific types of conduct for which a penalty may be imposed. They also authorize penalties for certain types of violations whose importance was not as apparent in the mid-1980s when the initial study was completed. These types of statutes include penalties for discharge of medical waste and releases from underground storage tanks.

(3) Increased Administrative Authority

The statutes increasingly authorize state agencies to impose civil penalties administratively, rather than requiring them to resort to the courts in the first instance to assess the penalty. In 1986, 45% of the total number of civil penalty statutes authorized either administrative penalties or both administrative and judicial penalties. By 1994, this figure had risen to 51%. See Figure A: "Comparison of Civil Penalties Authorized By Statute."

C. Methodology

The discussion below critically analyzes the various elements in the state civil penalty statutes from the standpoint of whether they provide an effective tool for enforcement. The study separately examines the various elements of state civil penalty authority, including topics such as the differences between judicial and administrative penalty authority, variations in state definitions of "violations," procedures in imposing penalties, methodologies for determining the penalty amount, and disposition of recovered penalties.

The researchers devised a protocol for undertaking the research into the civil penalty statutes. The protocol was designed to ensure that, to the extent possible within the project's funding, all the relevant state statutes were found. The research was carried out as follows:

(1) EPA initiated the study by sending a letter to the states asking them to update the information in the 1986 Study. The researchers compiled a list of each civil penalty statute that was included in the states' responses. They then

added to this list statutes included in other available compilations of state environmental statutes.

(2) A computer search was run for every state. The search sought statutes with the term "penalt!" combined with air, water, hazardous, toxic, chemical, and pesticide, and those not previously identified were added to the list of statute statutes.

(3) The statutes on the list were compared with the Appendix to the 1986 Study, and any statutes not found through the first two steps were added.

(4) The researchers consulted the appendix to State Environmental Law (Clark Boardman Callaghan 1989, 1993), which includes citations to the principal state legislation in the environmental law field, legislation which almost always includes civil penalty provisions.

(5) The statutes identified were then individually reproduced, analyzed, and summarized. Based upon this information, the charts were compiled and the text written.[2]

II. ANALYSIS OF STATE CIVIL PENALTY AUTHORITIES

All states have civil penalty authority of some sort to enforce their environmental laws, and these laws have common features. The analysis below focuses on those common features, an approach that allows for an informative comparison of how states have generally chosen to structure their penalty

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[2] Citation form in the report generally follows the Fifteen Edition of the A Uniform System of Citation. It does not, however, identify the year in which the state compilation or the update to the state compilation was issued.

statutes. The approach also allows for discussion of the pros and cons of different approaches.

A. Violations That Give Rise to Civil Penalty Liability

1. Differentiating Criminal Prosecution From Civil Liability

The imposition of civil penalties, whether by a court or an agency, is an institutional enforcement mechanism that differs significantly from the prosecution of an environmental crime. For example, the two types of enforcement actions utilize markedly different procedures. The prosecutor must prove all the elements of the crime beyond a reasonable doubt; in contrast, civil enforcement actions usually use the "preponderance of the evidence" standard of proof.[3] The penalties are also quite different. Criminal prosecution can result in incarceration, while an action seeking civil penalties merely has monetary consequences. Moreover, the defendant receives heightened constitutional protections in a criminal prosecution, in contrast to a penalty action which is civil in nature.

Determining whether a statute intends to impose a criminal sanction or civil liability is usually a simple proposition. If the statute authorizes a term of incarceration for the offenses, labels it either a felony or misdemeanor, or uses terminology of the criminal law such as "convicted," the legislative intent to impose a criminal sanction is usually clear. Alternatively, the structural

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[3] See, e.g., R.I. Gen. Laws § 42-17.6-4(a) ("In any adjudicatory hearing ... the director shall, by a preponderance of the evidence, prove the occurrence of each act or omission alleged by the director.")

characteristics of a statute may establish a clear line between those statutes intending criminal prosecutions and those intending civil liability,[4] or the statute may explicitly state that the action is a civil one.[5]

Nonetheless, overlap in terminology exists in some instances. The statute may use words like "offense," "fine," or "prosecute,"[6] words that can indicate either civil or criminal prosecution.[7] Use of the word "punished"[8] normally would seem to indicate a criminal action, since the principal purpose of civil penalties is to deter and compensate rather than to punish. These types of words, however, are not conclusive; one statute employing the word "guilty" and requiring

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[4] Mass. Gen. L. ch. 111 § 160 ("Whoever violates any such orders, rules or regulations (a) shall be punished by a fine of not more than twenty-five thousand dollars, to the use of the commonwealth, for each day that such violation occurs or continues, or by imprisonment for not more than one year, or both such fine and imprisonment; or (b) shall be subject to civil penalty not to exceed twenty-five thousand dollars per day for each day such violation occurs or continues"); Nev. Rev. Stat. Ann. § 459.221 subd. 2 ("...if licensed by the health division, he may be assessed an administrative penalty by the health division of not more than $5,000, or if not licensed, he is guilty of a misdemeanor.")

[5] See Haw. Rev. Stat. § 342C-5(e) ("Any action taken to impose or collect the penalty provided for in this section shall be considered a civil action.")

[6] See, e.g., Me. Rev. Stat. Ann. tit. 22. § 2617 subd. 1 ("Any person willfully violating section 2626 shall, on conviction, be punished by fine of not more than $500.")

[7] See, e.g., Conn. Gen. Stat. Ann. § 22a-461(e) ("Any person who violates any provision of this section may be fined not less than one hundred dollars nor more than three hundred dollars for the first offense.."); Del. Code Ann. tit. 16, § 1507 (violators "shall...be fined," and "prosecutions under this section may be brought before the alderman of the incorporated town in which the violation occurs.")

[8] See, e.g., R.I. Gen. Laws § 46-12-26 (person who fails to submit reports as required "shall be punished by a fine" of $400 per day).

proof "beyond a reasonable doubt" -- criminal law terms -- elsewhere seems to indicate its intent to impose a civil penalty.[9]

Even if the statute plainly differentiates between criminal and civil enforcement, the question may arise whether prosecution under one method, usually criminal prosecution, affects the state's ability to bring an action under the other mode. Two types of outcomes are possible: (1) the criminal prosecution precludes the state from seeking civil penalties; or (2) a successful criminal prosecution means that, a fortiori, the defendant will be liable for civil penalties in some amount.[10]

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[9] Utah Code Ann. § 26-13-18 first declares that a violator "shall be assessed a civil penalty" as "determined in a civil proceeding and based upon a finding that the evidence is sufficient to establish beyond a reasonable doubt" that the violation occurs. It then states that a person who "knowingly violates" under certain conditions "is guilty of an offense and subject to a fine." Id. While this latter language seems to have criminal overtones, subsection (2) of the statute makes certain willful violations a misdemeanor, thus apparently indicating by way of contrast that the penalties in subsection (1) are civil. See also Haw. Rev. Stat. § 342N-8(b) ("If the conviction is for a violation committed after a first conviction, the violator shall be subject to a civil penalty of not more than $20,000 for each day of each violation and guilty of a misdemeanor.")

[10] A successful criminal prosecution is one in which all the elements of the crime are proved beyond a reasonable doubt. See, e.g., In Re Winship, 197 U.S. 358, 364 (1970) (Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.") If a conviction is obtained, the elements of the crime will be deemed proven facts in any later civil action under the doctrine of collateral estoppel. See Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633 (D. Alaska 1982) ("at a minimum, collateral estoppel...extends to all elements of the individual crimes to which Hitachi pleaded guilty...") The amount of the civil penalty would still be an open issue, however, and the question addressed here is whether a statute establishes the effect that the criminal conviction will have on the amount of the penalty.

Most state civil penalty statutes are silent on these questions, but a handful of states address them. With respect to the first question, legislatures are split. In some instances they explicitly declare that prosecution under the criminal provisions precludes any further civil penalty prosecution;[11] in others, the legislature makes clear its intent that subsequent civil actions remain available.[12] In theory, since the function of a civil penalty prosecution is not to punish, no inconsistency exists in bringing the two actions. Furthermore, where an illegal emission or discharge has caused environmental damage, the compensatory aspect of civil penalties does not seem inconsistent with criminal punishment.

As to the second question, a few statutes explicitly link conviction of a criminal offense with a civil penalty. One Nevada statute declares that if a person is convicted criminally, that person "is liable for a civil penalty" and the court before whom the defendant is convicted "shall order" him or her to pay a

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[11] Cal. Food & Ag. Code § 11982 ("In lieu of seeking prosecution of any violation of this division as a misdemeanor, and the [criminal] penalty prescribed in Section 11891, the director may prosecute civilly...")

[12] Tenn. Code Ann. § 68-201-116(b)(1) ("In addition to the criminal penalties of § 68-201-115, any person who violates or fails to comply with any provision of this part or any rule, regulation, ordinance, or standard ... shall be subject to a civil penalty of up to twenty-five thousand dollars ($25,000) per day for each day of violation"); Pa. Stat. Ann. tit. 58, § 480(d) ("The department may, in lieu of, or in addition to, any criminal penalties herein prescribed, impose civil penalties...") See also S.D. § 34A-2-75 ("Any person subject to this section is guilty of a Class 1 misdemeanor... The violator is also subject to a civil penalty not to exceed ten thousand dollars per day of violation...")

civil penalty of at least $250 but not more than $2,000.[13] In general, however, the amount of any later civil penalty remains an open question to be litigated.

2. Activities Deemed Violations

An important component of the state civil penalty statutes is the definition of the types of actions that are deemed "violations" and thus subject to civil penalties. Initially, the state must decide upon the specific actions or omissions that are subject to a civil penalty. For example, if a legislature establishes a regulatory scheme in a series of statutes, is every violation of a command or prohibition in them going to subject the actor to a penalty? Or will some violations be treated differently than others?

Once this policy decision is made, the decision then must be translated into statutory language, and certain important secondary decisions flow from it. For example, the state legislature may decide that the failure to take certain action, such as applying for a permit, should subject a person to a civil penalty. If the failure extends over a period of time, it must be decided whether that course of conduct constitutes a single violation or multiple violations.

The present study does not attempt any specific conclusions about the underlying logic, if any, to state determinations about which types of conduct should be subject to penalties. Undoubtedly the largest influence on state determinations as to what type of conduct should be subject to penalties is federal legislation in the field. Under the major federal environmental laws, a state must

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[13] Nev. Rev. Stat. Ann. § 444.635 subds. 1, 2.

demonstrate that its program meets certain minimum criteria, including enforcement capability, to receive a delegation of authority from EPA. Thus, the liability provisions in federal law often shape the state decision to subject certain conduct to liability.

Many state civil penalty statutes use terms indicating an intent to impose liability for all conduct that does not comport with obligations imposed by the statutory scheme. This intent is implicit in language that authorizes civil penalties for "violations of this chapter" or "violations of this part." Statutes of this type require persons and entities subject to the regulatory scheme to strictly comply with all of its requirements, leaving it to the agency or the court to sort out significant violations from ones of less importance during the penalty imposition process.[14]

Other statutes adopt a different approach. Rather than sweeping in all "violations of this chapter," they attempt to specify the specific actions that are "violations" and thus subject to penalties, a sort of "laundry list" approach. For example, the statute might declare that any person who violates "any rule, regulation, permit condition, requirement, consent order or order which has become effective" is subject to civil penalties.[15]

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[14] Compare: Md. Envir. Code Ann. § 9-342.1(d) (administrative penalties authorized only for "significant violations").

[15] Idaho Code Ann. § 39-4113(A)(1)(a).

From a prosecutorial standpoint this approach has some advantages. If the agency lawyer or state attorney general can point out that a statute specifically proscribed the defendant's action, the defendant will find it difficult to argue for leniency because he or she was unsure about whether the conduct in question constituted a violation. Further, a "laundry list" is preferable if the legislature intends that certain actions transgressing statutory commands or prohibitions should not be subject to penalties; the listing of the specific violations allows the legislature to exclude those that it does not want penalized.

However, under this type of approach precision in the language chosen is very important. If a statute lists various specific actions as violations for which a civil penalty may be imposed, omissions from that list can give rise to arguments that the legislature did not intend the omitted acts to be covered. For example, one statute authorizes the state enforcement agency to institute a judicial action seeking penalties "for violations of this subchapter and of any rules, regulations, permits, or plans issued pursuant thereto."[16] The same statute also authorizes the department file an action to compel compliance with "any rules, regulations, orders, permits, or plans" it has issued.[17] The legislature may have

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[16] Ark. Code Ann. § 8-4-103(b)(4).

[17] Id. § 8-4-103(b)(1).

intended the reach of the two provisions to be identical, but the language does differ, and a court could find that difference meaningful.[18]

3. Preconditions to and Consequences of Violations

Notice to individuals or entities that they may be held liable by the government for certain actions or failures to act is, of course, an essential component of due process.[19] In the case of environmental violations, the notice in most instances is found in the substantive environmental statutes, regulations, orders, and other issuances which mandate or proscribe particular conduct. The law presumes knowledge of these legal requirements by those subject to environmental regulatory mechanisms, and a violation of them can lead to the imposition of a penalty without any further notification from the agency of the regulatory requirements or prohibitions (other than compliance with the actual procedural steps necessary to impose the penalty either administratively or judicially).

In some cases, however, states have required additional forms of notice or established other prerequisites -- requirements termed "preconditions" in

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[18] See also N.D. Cent. Code § 23-20.3-09. If the department finds that a person is violating "any permit, rule, regulation, standard, or requirement," it may issue an order requiring compliance and it may bring an action for a civil penalty. Subdivision (2) of the statute, however, authorizes a court to impose a penalty for "any person who violates any provision of this chapter or any regulation, standard, or permit condition." Whether the agency can seek a penalty for a violation of a compliance order is not explicitly stated.

[19] See, e.g., Reardon v. United States, 947 F.2d 1509, 1522 (1st Cir. 1991) (holding that notice is part of minimum requirement for due process when the government files a property lien under federal hazardous waste cleanup statutes).

the discussion below --before the agency may seek penalties.[20] These preconditions sometimes indicate a legislative policy determination that environmental regulation should proceed on a more consensual basis, and that penalties should only be a last resort after transgressors have been given additional opportunities to comply. In other cases the purpose of the precondition is more narrow, reflecting legislative concern that a particular class of defendants, such as small businesses, may not be as familiar with administrative agency mandates as larger ones, and thus should be given some additional type of notification before being subject to penalties that may be quite large.

[20] Because no violation can exist until the notice is given, the issue of preconditions is discussed in this part of the study. The issue involves procedure, however, and thus might also be viewed as part of the penalty procedures which are discussed below.

These requirements can take the form of notifications,[21] warnings,[22] abatement periods,[23] or prior inspections[24] that must take place before a penalty

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[21] N.C. Gen. Stat. § 143-215.114A(b) ("Each day of continuing violation after written notification from the Secretary shall be considered a separate offense"); Mass. Gen. L. ch. 111 § 142A ("Any municipality, corporation or person which, after due notice, continues to violate any such regulation" is subject to civil penalties).

[22] Tenn. Code Ann. § 68-211-816(a)(2) ("If noncompliance continues for one hundred eighty (180) days after issuance of the warning letter, then, in addition to any other penalty imposed by law, the commissioner may impose a civil penalty for each day of noncompliance beyond such one-hundred-eight-day period"); La. Rev. Stat. Ann. § 30:2371 subd. C(1) ("Small businesses who have an omission from the reporting forms shall receive a warning only for their first offense."); Fla. Stat. Ann. § 403.7234(5) (fine against "[a]ny small quantity generator who does not comply with the requirements of subsection (4) and who has received a notification and survey in person or through one certified letter from the county.")

[23] Ky. Rev. Stat. Ann. § 217B.193(1) ("The Commissioner shall set forth in his notice a reasonable time period, but not more than ninety (90) days, for the abatement of the violation. If any license holder has not abated the violation within the period of time prescribed in the notice of violation, the Commissioner shall issue an order for immediate compliance and assess the civil penalty provided for in this section...")

[24] Cal. Health and Safe. Code § 43012(f) (no civil penalty may be assessed against a dealer under certain circumstances, but a penalty may be imposed "if notices to correct are issued under this subdivision to more than 20 percent of the vehicles offered for sale on a dealer's premises during each of three consecutive inspections conducted 30 or more days apart during any one-year period").

Compare: Vt. Stat. Ann. tit. 3, § 2822(d), which declares that the secretary "shall make all practicable efforts to secure voluntary compliance," but this requirement "shall not restrict the secretary's authority to use the enforcement powers [thereafter described]." The statute, however, then goes on to state that the initial efforts to secure voluntary compliance of any individual violator "shall, for a reasonable time, be made without notification to state or county legal authorities in order to provide the opportunity to comply without compulsory legal sanctions." If these efforts secure compliance, this part of the statute would seem to disable the secretary from seeking any penalties for those violations, since he or she cannot contact legal authorities during this period. The two parts of the statute, therefore, might be in conflict.

can be imposed. The additional notice also might be in the nature of a compliance order that a source must violate before penalties are allowed,[25] and if a state wishes to drive the point home even more bluntly, it may include the actual penalties that the respondent will pay for violating the compliance order in that order itself.[26] Finally, the state may authorize the agency to assess a penalty without giving notice as a precondition, but if the respondent continues the violation after the respondent has received notice of the violation, a statute may empower the agency to recover a higher penalty.[27]

The purpose of these types of preconditions to the imposition of a penalty is to provide an additional warning to the respondent before a penalty is imposed.[28] At the same time, however, such requirements have the potential to

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[25] Ark. 15-38-307(c) (if an operator fails to complete corrective measures, he "shall be assessed" a civil penalty of not less than $750.)

[26] Okla. Stat. tit. 27A, § 2-5-109 subd. D (an incremental compliance schedule "may also include provisions whereby a penalty of up to Ten Thousand Dollars ($10,000) per day may be assessed for failure to achieve compliance by the date specified in the compliance schedule.") See also id. § 2-3-502(B).

[27] A Rhode Island statute declares that after "written notice of noncompliance or intent to assess an administrative penalty has been given," each day thereafter during which the noncompliance continues shall constitute a separate offense and shall be subject to a separate administrative penalty if reasonable efforts have not been made to come promptly into compliance. R.I. Gen. Laws § 42-17.6-3. The apparent intent of the statute is to allow daily penalties only after the initial intent to assess is served. Compare: Vt. Stat. Ann., tit. 10 § 1384. This statute initially provides for a $2,500 penalty "for a single violation." It then provides that in the case of a continuing violation, "each day's continuance after notification by a law enforcement officer shall be considered an additional offense for which a person shall be fined not more than $100 for each day's offense, in addition to the penalty imposed for a single violation."

[28] See Okla. Stat. tit. 27A, § 2-7-126.

seriously undermine the agency's regulatory scheme. For example, if a statute restrains the agency from seeking civil penalties until a compliance order is issued and violated,[29] it effectively immunizes a series of violations from prosecution. Should these types of violations occur frequently, the regulatory scheme as a whole could be compromised. Furthermore, preconditions that effectively immunize conduct occurring before the precondition is met may be unfair to businesses which do comply with all requirements during that period. These complying businesses could be disadvantaged in competing with other companies which are not in compliance. Perhaps for this reason, preconditions like these are not the norm.

A second type of precondition to the finding of a violation serves a quite different purpose: requiring the agency to structure the use of its penalty discretion before it exercises that discretion through the imposition of an administrative penalty. Perhaps the most common requirement of this type mandates the agency to adopt regulations for the imposition of a penalty before it may actually begin imposing that penalty.[30]

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[29] See Colo. Rev. Stat. Ann. § 25-7-122(b) ("there shall be no civil penalties assessed or collected against persons who violate emission regulations promulgated by the commission for control of odor until a compliance order ... ordering compliance with the odor regulation has been violated.")

[30] Ill. Rev. Stat. ch. 40 § 40/36 (in imposing a penalty, "any such actions by the Department shall be based on standards and procedures established by rules of the Department"); Cal. Health and Safety Code § 42402.5 (a district may impose administrative civil penalties for a violation "if the district board has adopted rules and regulations specifying procedures for the imposition and amounts of these penalties.")

Another type of precondition to the imposition of a penalty mandates the agency to undertake some sort of consultation with a third party.[31] For example, one statute requires that if a defendant is being prosecuted for a specific violation for the first time, the enforcing entity must secure the approval of a second state agency before imposing the penalty.[32]

All of the situations described above in this section concern preconditions before the agency may impose a penalty. The obverse situation also may present itself: once the penalty is imposed, certain "conditions subsequent" that affect the violation or the penalty may automatically follow as a consequence of the penalty. For example, if the agency has assessed a penalty, a statute may bar it from using another type of administrative enforcement mechanism, such as revoking the permit of the violator.[33]

These types of provisions, however, are uncommon. Recognizing that enforcement cases present a variety of factual contexts that do not lend

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[31] Cal. Food and Ag. Code § 13145(b) (if there is a dispute between the director and a registrant regarding the existence of a "groundwater protection data gap" and the director desires to levy a fine, he or she must first submit the issues of the dispute to a subcommittee of the director's pesticide registration and evaluation committee).

[32] Ind. Code Ann. § 15-3-3.5-18.3(c) ("The state chemist may impose a civil penalty for a person's first violation only after the board has approved the imposition of the civil penalty.")

[33] Ariz. Rev. Stat. Ann. § 49-924 subd. C. ("The director may suspend or revoke any permit issued to a person who violates this article or any permit, rule or order issued or adopted pursuant to this article, unless the director has previously assessed a civil penalty for the violation..." Compare Colo. Rev. Stat. Ann. § 25-7-123.1(b)(3) ("The division may not revoke a permit ... or certification ... solely for failure to pay penalties when due, unless an order is first issued and all administrative and judicial remedies are pursued unsuccessfully.")

themselves to "across the board" judgments about the appropriate combination of enforcement measures, the vast majority of state legislatures leave the agency free to exercise its informed discretion in choosing its enforcement tools. Indeed, rather than limiting the agency's freedom to utilize other enforcement mechanisms because a civil penalty has been imposed, some statutes mandate other enforcement consequences because of that penalty assessment. Thus, if a violator fails to pay a penalty, one statute decrees that this failure "shall constitute grounds" for revoking that person's permit or license.[34]

4. Post-Violation Actions To Limit Liability

Some statutes allow defendants to exonerate themselves from liability, or to limit the amount of their liability, by action taken after the agency has initiated a penalty action. The purpose of these statutes is similar to that group of penalty statutes, discussed above, which impose additional notice requirements on agencies before they may impose penalties.[35] Both sets of statutes reflect the determination that even if respondents have violated an environmental statute or rule, they should be given an additional opportunity to come into compliance before any penalty is actually imposed. The difference between the two is that one requires notice before any penalty is allowed, while the other allows the penalty process to start but gives a respondent the ability to terminate it through voluntary compliance.

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[34] Ala. Code § 2-28-18.

[35] See discussion in § II-A-3, supra.

A state hazardous waste statute exemplifies the latter type of law. It subjects violators to penalties of up to $25,000 per day for illegal deposits of waste, with each day on which the deposit remains deemed a separate violation, unless the respondent files a report of the deposit and complies with any cleanup order.[36] In that event, the penalties would terminate. Similarly, a Pennsylvania statute prohibits the imposition of a civil penalty for violations that do not lead to a cessation order where, among other requirements, the operator corrects the violations within the required time.[37]

This latter type of statute is certainly likely to affect a respondent's behavior. Because the "per day" or "per violation" form of most statutes can quickly lead to large penalties, and because the agency has demonstrated that it considers the violation serious by formally initiating a penalty proceeding, a defendant has a great incentive to take action to terminate the penalty.

B. "Per Day" and Per Violation" Penalties

The decision to define a particular action as a "violation" subject to a penalty only partly establishes the scope of liability under a penalty statute.

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[36] Cal. Health and Safe. Code § 25189(c).

[37] 52 Pa. Stat. Ann. § 3321(a)(1). Such statutes may also require a combination of pre-and post-violation conduct by the violator before the penalty will be avoided. See Me. Rev. Stat. Ann. tit. 38, § 349 subd. 9 (The commissioner may exempt from civil penalty an air emission or a wastewater discharge in excess of license limitations "if the emission or discharge results exclusively from an unavoidable malfunction entirely beyond the control of the licensee and the licensee has taken all reasonable steps to minimize or prevent any discharge or emission and takes corrective action as soon as possible.")

Another important factor that must be considered is the amount of the penalty for that particular violation.

One approach is to define the penalty in terms of an amount "per violation." If a violation continues over a period of time, the question then becomes how state law structures the length of a violation.[38] If the statute does not include a temporal component establishing that a new violation occurs if the previous continues into a second day, it is possible that only a single violation would take place from the time the violation begins until it is corrected.[39] That type of definition on interpretation, however, would run the risk of treating violations which took place over very different lengths of time in the same manner.

For this reason, most states incorporate a temporal component into their penalty statutes, commonly declaring that each day in which a respondent is in violation shall constitute a separate violation.[40] The following examples are typical:

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[38] As with any penalty case, the statute of limitations for the action also may play an important role. See, e.g., Pa. Stat. Ann. tit. 35, § 4010.3 ("actions for civil or criminal penalties under this act may be commenced at any time within a period of seven (7) years from the date the offense is discovered.")

[39] For example, one Massachusetts statute places a temporal component on a violation, while another does not. Compare: (1) Mass. Gen. L. ch. 131 § 40 (""shall be subject to a civil penalty not to exceed twenty-five thousand dollars for each violation") with (2) Mass. Gen. L. ch. 131 § 40A ("shall be subject to a civil penalty not to exceed twenty-five thousand dollars for such violation. Each day such violation continues shall constitute a separate offense.")

[40] While most penalty statutes use a "per day" basis, rare exceptions with longer time periods exist. See, e.g. N.J. Stat. Ann. § 27:26A-13 ("Each month of noncompliance with the provisions...shall constitute an additional, separate and distinct offense...")

(1). "Each violation for each separate day and each violation of any provision of this act, any rule or regulation of under this act, any order of the department, or any term or condition of a permit shall constitute a separate and distinct offense under this section."[41]

(2). "Each day of a continuing violation shall constitute a separate violation."[42]

(3). "[A]ny person who violates ... shall incur a civil penalty not to exceed $10,000 a day for each day that such violation occurs or that failure to comply continues."[43]

(4). "If the violation is of a continuing nature, each day during which it continues shall constitute an additional, separate and distinct offense."[44]

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[41] Pa. Stat. Ann. tit. 35, § 6018.

[42] N.C. Gen. Stat. § 130A-22(b).

[43] Ore. Rev. Stat. § 465.900(1).

[44] N.J. Rev. Stat. Ann. § 13:19-18. By utilizing such language, which determines that a "violation" is a particular act or omission which occurs within a set period of time, legislatures thereby limit the ability of agencies or courts to establish a temporal component to violations through the exercise of discretion. Compare Ky. Rev. Stat. Ann. § 217B.990(2) ("Each day of continuing violation may be deemed a separate violation for the purpose of penalty assessment") and Vt. Stat. Ann. tit. 6, § 15(c) ("each violation may be a separate and distinct offense and, in the case of a continuing violation, each day's continuance may be deemed to be a separate and distinct offense.") These statutes apparently give the agency or court discretion to decide whether a violation is on a "per day" basis.

When the statute declares that each day of a continuing violation constitutes a separate offense,[45] then a "per violation" statute in effect becomes a "per day" statute when the violation is continuous.[46]

The discussion above assumed that the "per day" limitation applies to a single act which is the violation. Another possibility, however, is to define the "violation" to encompass more than one act or omission.[47] One state air pollution statute declares that "[s]imultaneous violations of more than 1 pollutant or air contaminant parameter or of any other limitation or standard imposed under this chapter shall be treated as a single violation for each day."[48] Similarly, a New Mexico statute declares that a "single operational event that leads to simultaneous violations of more than one standard shall be treated as a single violation."[49]

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[45] Conn. Gen. Stat. Ann. § 22a-226(a) ("Each violation shall be a separate and distinct offense and, in the case of a continuing violation, each days's continuance shall be deemed to be a separate and distinct offense.")

[46] See also: Ga. Code Ann. § 12-5-247(b) (violator "shall be subject to a civil penalty not to exceed $10,000.00 for each day of violation. Each day of continued violation shall subject said person to a separate civil liability.") This is an extremely clear statement of how the penalty is to operate. Also clear is: Ill. Rev. Stat. § 45/12 ("Any business which operates in violation of this Act shall be liable for a civil penalty not to exceed $10,000 for each violation, and an additional civil penalty not to exceed $1,000 for each day during which such violation continues.")

[47] But see Mont. Code Ann. § 75-10-301 ("a civil penalty not to exceed $5,000.") The penalty is not imposed on a "per violation" basis.

[48] Del. Code Ann. tit. 7, § 6005(b)(3). See also N.J. Stat. Ann. § 58:10A:10.2 subd. e ("If a violator establishes...that a single operational occurrence has resulted in the simultaneous violation of more than one pollutant parameter," the department "may consider ... the violation to be a single violation.")

[49] N.M. Stat. Ann. § 74-6-10 subd. E.

This type of statute can negatively impact an agency's enforcement efforts, since it effectively announces to a violator that multiple violations will not trigger added sanctions. Few states adopt this approach.

In some instances, statutes treat second violations more severely[50] under what appears to be a two-fold theory: (1) first offenses generally should be given some leniency, and (2) if the first penalty was not sufficient to get the violator's attention, it is reasonable to assume in the statute that a larger penalty "club" is needed to do the trick. For that theory to operate as intended, however, the initial penalty proceeding should be concluded and the penalty imposed before the second violation occurred. Some of the statutes establishing larger penalties for second violations are not entirely clear about when the larger, second penalty may be imposed.[51]

Maine has a statute, which appears unique, that establishes a mechanism for increasing the civil penalty established by statute when the amount

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[50] See, e.g., Kansas Stat. Ann. § 19-27a02(n)(2) (Penalty "in an amount not to exceed $500 for the first violation and in amount not to exceed $5,000 for the second violation and in an amount not to exceed $10,000 for the third and each successive violation.")

[51] See N.Y. Envtl. Conserv. Law § 71-2705 subd. 1. The statute initially states that "in the case of a first violation," a violator is liable for a civil penalty of not more than $25,000 and an additional penalty of not more than $25,000 for each day during which such violation continues. It then goes on to declare that "[i]n the case of a second and further violation, the liability shall be for a civil penalty not to exceed fifty thousand dollars for each such violation and an additional penalty not to exceed fifty thousand dollars for each day during which such violation continues" (emphasis added). Presumably, the emphasized language indicates the legislature's intent that the first and second violations be differentiated in some manner. The statute, however, is not entirely clear on this point.

otherwise would be less than the economic benefit resulting from the violation. In that instance "the maximum civil penalties may be increased for each day of the violation."[52] The penalty may not, however, exceed an amount equal to twice the economic benefit resulting from the violation.[53]

Relatively few statutes establish minimum penalty amounts[54], and even fewer include a minimum without a corresponding maximum. As noted below,[55] such statutory minima are a strong indication of legislative concern about particular types of violations. Guam is an exception; its solid waste management statute declares that a violator shall pay a civil penalty "of not less than" $10,000 per day for each violation for non-compliance, an extraordinarily high minimum penalty.

C. Statutory Maximum and Minimum Penalty Amounts

1. Programmatic Penalty Amounts

The maximum and, in fewer instances, minimum penalty amounts established in the statute are an extremely important structural component of the

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[52] Me. Rev. Stat. Ann. tit. 38 § 349 Subd. 8.

[53] Id.

[54] See, e.g., Ky. Rev. Stat. Ann. § 174.900(2) ("Any person who operates a vehicle which transports municipal solid waste in violation of KRS 174.450 and administrative regulations promulgated by the cabinet pursuant to KRS 174.450 shall be fined not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) for each day of violation"); N.Y. Envtl. Conserv. Law § 71-2103 subd. 1 (violator "shall be liable for a penalty not less than two hundred fifty dollars nor more than ten thousand dollars for said violation and an additional penalty of not to exceed five hundred dollars for each day during which such violation continues").

[55] See discussion in § II-C, infra.

state civil penalty statutes. They establish the outside exposure that a respondent faces for a particular violation, mark the starting point in calculating a penalty assessment by an administrative agency or judge, and set the context for any settlement discussions between the parties. The penalty amounts constitute perhaps the most important indication of how seriously the legislature views a violation, and the penalty decisions of agencies or courts are likely to reflect that indication. Also, if part of the agency's enforcement strategy involves high-profile publicity, the amount of the penalty sought can greatly affect the public perception of the enforcement action, and thus its deterrent effect.

This section summarizes the maximum and minimum amounts of civil penalties included in the state statutes. Summary charts aggregate the statutes into the following program areas: (1) Air, (2) Hazardous Waste, (3) Radiation, (4) Pesticides, (5) Solid Waste, and (6) Other. Individual types of penalties encompassed under these broader categories are listed footnotes to each chart. For example, the category "water" includes, among other subcategories, water pollution, wetlands, coastal, sewers, drinking water, and groundwater protection. Additionally, a state may be listed more than once in a category if it has multiple statutes that fall within that category. The federal civil penalties in the categories of air, drinking water, water, and hazardous waste are included for comparison.

a. Air Programs

As was the situation discussed in the 1986 study, maximum penalties under most state programs are less than the federal maximum of $25,000 per day

for each violation.[56] Forty states have one or more penalty authorities specific to their air pollution programs. Of these, thirteen have maximum daily penalties as larger or larger than the federal penalty. In addition, three states have maximum "per violation" penalties of $25,000 or more.

Nineteen of the other states employing a "per day" method of assessment have penalties within the $10,000 to $24,999 range. Eight states provide maximum air program penalties of less than $25,000 on a "per violation" basis. Thus, of the states with specific air program penalties, the vast majority of statutes authorize penalties of at least $10,000 per day or per violation. Finally, four states set out minimum penalties for violators that are measured on a "per violation" basis, while two states have a total cap on penalties.

b. Hazardous Waste Programs

Under the federal Resource Conservation and Recovery Act, the Administrator of the Environmental Protection Agency may administratively assess a civil penalty not to exceed $25,000 per day of noncompliance for each violation,[57] or the United States may seek a judicial civil penalty not to exceed the same amount for each violation.[58] Thirty-five states have maximum "per day" or "per violation" penalties of $25,000 per day or greater. In addition, twelve states have such penalties in the $10,000-$24,999 range, while five states have

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[56] 42 U.S.C. §§ 7413(b).

[57] 42 U.S.C. § 6928(a)(3).

[58] Id. § 6928(g).

penalties lower than that. Finally, four states specify minimum "per day" penalties. Thus, the hazardous waste statutes, as a whole, authorize higher overall amounts of penalties than do the air pollution statutes, perhaps reflecting legislative determinations that hazardous waste violations should be treated more severely.

c. Radiation Programs

The state radiation programs, relatively few in number, exhibit wide variations in the amount of civil penalties available. For example, the "per day" penalties are as follows: (1) one state over $25,000; (2) two states in the range of $10,000 to $24,999; (3) three states in the $5,000-$9,999 range; and (4) three states lower than $5,000. The maximum "per violation" amounts are similar: four states are over $25,000; four in the range of $10,000 to $24,000; five states in the $5,000-$9,000 range; and three states fall into the category of below $5,000. Interestingly, four of the relatively small number of states that have established penalties in this area place statutory caps on the total amount of penalties.

d. Pesticide Programs

The civil penalties available under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) are lower than those in the other federal statutory schemes discussed in this study. The general civil penalty provision authorizes the EPA Administrator to assess a penalty of not more than $5,000 for each offense.[59] The bulk of the state "per day" civil penalty statutes relating to pesticide violations

[59] 7 U.S.C. § 136l(a)1).

are likewise lower than the civil penalty statutes for other violations. While only one state has a penalty authorization of $10,000, two are in the $5,000-$9,999 range and five states below $5,000.

More states have "per violation" penalties. Here, three states have penalties of over $25,000, seven states fall between $10,000-$24,999, and twelve states between $5,000 and $9,999. The majority of states, 25 in number, have "per violation" penalties below $5,000. Finally, eight states place a maximum on the total amount of penalties.

e. Solid Waste Programs

The solid waste civil penalty statutes also exhibit a fair amount of variety in the amounts of penalties authorized, perhaps reflecting the lack of federal statutory leadership in the solid waste area. Thus, while sixteen state statutes authorize penalties of $25,000 or more on a "per day" basis, twenty-three such statutes fall into the $10,000-$24,999 range. Ten state statutes are in the $5,000-$9,999 category, while twenty states are less than $5,000.

The range of maximum "per violation" statutes leans toward lower penalty amounts. Here, only nine statutes authorize penalties of $10,000 or more, while seventeen statutes fall into the zero to $4,999 category. Thirteen state statutes set a maximum cap on the penalty, a relatively large number in comparison to the other categories.

f. Water Programs

Under the federal Clean Water Act, the EPA administrator may seek a judicial penalty of up to $25,000 per day for each violation.[60] Civil penalty statutes from twenty states authorize "per day" penalties in that range. In addition, twenty seven state statutes authorize penalties from $10,000-$24,999 on a "per day" basis, while twenty two other state statutes include "per day" penalties ranging from $5,000 to $9,999.

Those states with maximum penalties phrased in terms of amounts "per violation" exhibit a similar variety. Six of these states have penalties in the $25,000 range, nine from $10,000 to $24,999, and four from $5,000-$9,999 per day.

A somewhat greater percentage of the water pollution statutes authorize minimum "per day" or "per violation" amounts. Ten state statutes fall into each of these categories. Finally, a large number of state penalty statutes -- thirty-four -- provide for some sort of maximum total on the penalty that may be recovered.

2. Flat Amounts and Caps

Another type of penalty sets a flat amount for a single violation, thus establishing both the maximum and minimum at one time. These statutes generally concern violations where the penalty refers to a specific object that forms

[60] 33 U.S.C. § 1319(d).

the basis for the violation: a tank,[61] a battery,[62], an animal,[63] etc. Undoubtedly the reason for the single amount is that the legislature can rather easily make a judgment about the overall worth or cost of the object and thus can set a penalty that bears some reasonable relationship to that overall amount. Most types of penalties do not lend themselves to this type of legislative generalization.

Given the complexity and multiplicity of environmental regulations generally, permittees or defendants often are charged with violations of different statutes or regulations that arise from the operation of a single source. Moreover, because the penalty statutes typically authorize penalties for continuing violations on a "per day" basis, and the penalty amounts for daily violations are usually fairly large, the outside liability for a series of violations quickly mounts.

A few states express concern over this result and try to ameliorate it by placing some sort of "cap" on the total liability for a series of violations. One attempt places a cap of $20,000 "for any one shipment" of hazardous waste that is not properly packaged or labeled, or that leaks or spills its contents.[64] Another

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[61] Utah Code Ann. § 19-6-407(2) ("The executive secretary may issue a notice of agency action assessing a civil penalty in the amount of $1,000 if an owner or operator of a petroleum or underground storage tanks fails to register the tank...")

[62] N.C. Gen. Stat. § 130A-309.70(c) ("Each battery improperly disposed of shall constitute a separate violation").

[63] Ore. Rev. Stat. § 466.890 (listing specific amounts for various animals, e.g. "[e]ach elk, $750.")

[64] Nev. Rev. Stat. Ann. § 459.221 subd. 4.

possibility is to cap the penalties over a certain time period[65] by placing an overall limit on penalties imposed as a result of possible prosecutions by more than one agency.[66]

If the cap is not defined to encompass actions by the defendant, but rather is framed in terms of a cap on penalties for violations, this terminology[67] may create a loophole. For example, one statute declares that "[i]n no event shall the maximum amount of the penalty assessed under this section exceed $25,000.[68] The question is, however, for what is the "penalty assessed"? Because penalties are normally defined on a "per day" basis, the statute could be interpreted to place a cap on all violations in a single day only. If so, the agency

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[65] Nev. Rev. Stat. Ann. § 459.10 subd. 3 ("Penalties of no more than $3,000 per day for each separate failure to comply with a licensor agreement or $25,000 for any 30-day period for all failures to comply.")

[66] Tenn. Code Ann. § 69-3-125(b) ("the sum of penalties imposed by this section and by § 69-3-115(a) shall not exceed ten thousand dollars ($10,000) per day for each day during which the act or omission continues or occurs").

[67] See Okla. Stat. Ann. tit. 27A § 2-6-206 subd. E: The Director may assess an administrative fine of "not more than Ten Thousand Dollars . . per day of violation, for each day during which the violation continues," but the "total amount of such fine shall not exceed One Hundred twenty-five thousand Dollars . . . per violation." The second use of the term "violation" is somewhat unartful, since a violation is a single day event. The intent, apparently, was to put a cap on the total number of violations due to a single means by which a statute or regulation was transgressed. The terminology used in a Maine statute is better: "Each day that the violation continues is considered a separate offense." Me. Rev. Stat. Ann. tit. 7, § 616-A subd. 3.

[68] Vt. Stat. Ann. tit. 6, § 15.

could avoid the cap by charging the defendant on a per day basis over a period of time.[69]

Another statute declares that the relevant agency may assess civil penalties in an amount not to exceed $10,000 per day "for violations of this subchapter." [70] While it is unlikely that the legislature intended the cap to apply to all the violations found at a site, comparison of this language with the more usual form found in state civil penalty statutes -- a maximum "per day per violation" -- might give rise to such an argument.

D. Penalty Criteria

Many of the state civil penalty statutes include specific criteria that the agency or court is to consider in assessing a civil penalty. The 1986 Study found that thirty-one states had statutes specifying one or more penalty-setting criteria in at least one of the major program areas covered by the survey. The present study found that this number has increased: 41 out of the 55 jurisdictions covered now have statutes which include some type of criteria.[71] See Appendix A-2 entitled "States with Statutory Criteria for Major Programs," which lists, on a

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[69] Vt. Stat. Ann. tit. 6, § 15 ("In no event shall the maximum amount of the penalty assessed under this section exceed $25,000.00.")

[70] Ark. Code Ann. § 8-7-806(e)(4).

[71] One reason for the increase is that some subjects, e.g. pesticides, were included in the present study but not in the earlier one. Additionally, the present study does not consider instances in which a state civil penalty policy may set out specific criteria for consideration even if the statute does not contain those criteria.

state-by-state basis, whether individual states have statutory criteria for the following programs: air, water, hazardous waste, and pesticides.[72]

The number and content of the criteria in statutes are diverse. As far as numbers are concerned, the range is between statutes which call for consideration of as few as three criteria,[73] and others, such as those in Pennsylvania and Rhode Island, that list twelve separate factors which must be considered in the imposition of an administrative penalty.[74] With respect to content, the criteria generally fall into ten broad categories:

1. The economic benefit from delayed compliance.
2. The nature or gravity of the violation.
3. The degree of the violator's culpability.
4. The extent of the violator's good faith efforts to comply.
5. The history of prior violations.
6. The economic impact of a penalty on the violator.
7. The deterrent effect of the penalty.

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[72] This chart is based on the authors' judgment as to the principal single statute in each state for the particular subject area (i.e. air, water, etc.) Many states, of course, have a variety of different statutes that contain penalties to remedy violations in a subject area such as air pollution. The authors attempted to choose the most broadly applicable statute and then examined it to see if it contained criteria for setting the penalty amount.

[73] N.J. Stat. Ann. § 27:26A-13 (commissioner shall take into account "the nature, seriousness and circumstances of the violation, whether there is a pattern of noncompliance, and efforts which are being made by the employer to achieve compliance.")

[74] R.I. Gen. Laws § 42-17.6-6; Pa. Stat. Ann. tit. 35, § 4009.1(a).

8. The costs to the state of enforcing against the violator or of cleaning up its pollution.

9. A balancing of the competing interests served by penalizing or not penalizing the violator, and

10. Other relevant factors.

Appendix A-3 lists the criteria which states use to determine their civil penalties.[75]

A few statutes contain innovative, non-traditional penalty criteria. A Colorado hazardous waste statute authorizes consideration of "[t]he existence of a regularized and comprehensive environmental compliance program or an environmental audit program that was adopted in a timely and good faith manner and that includes sufficient measures to identify and prevent future noncompliance."[76] One interesting question that arises from this type of statute, perhaps more important in the future than at present, is an evidentiary one: does the statute abrogate any privileges that a company might claim over the fruits of its own environmental audit program? At least one state recognizes such a privilege by statute right now,[77] while in others the courts have rejected the

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[75] This chart was compiled by looking at all statutes in a subject area and determining whether any of them contained specific criteria. If one of them did, the state was listed on the chart as utilizing that criteria.

[76] Colo. Rev. Stat. Ann. § 25-15-309(3)(h).

[77] Ore. Rev. Stat. § 468.963 ("an environmental audit privilege is recognized to protect the confidentiality of communications relating to ... voluntary environmental audits.")

privilege absent specific statutory language.[78] The question might be avoided, however, if a court interprets the statute authorizing consideration of the compliance program in a penalty proceeding to authorize examination of the procedures of the compliance or audit program itself, in contrast to the substantive conclusions of that program.

An increasing number of penalty statutes allow the prosecuting agency to recover certain costs as part of the penalty amount, reasoning that these costs constitute part of the damage caused by the violation. These can include the costs of an adjudicatory hearing demanded by the violator,[79] the agency's investigative costs, and even attorney's fees expended by the state in the prosecution.[80] One state authorizes the imposition of costs but requires that they

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[78] State v. CECOS International, Inc., 583 N.E.2d 1118 (Ohio App. 1990); CPC International v. Hartford Accident, 620 A.2d 402 (N.J. Super. Law Div. 1992).

[79] La. Rev. Stat. Ann. 56 § 31.1 subd. B ("In any adjudicatory hearing in which civil penalties are assessed, the person against whom said penalties are assessed shall also be liable for all costs of the adjudicatory hearing.")

[80] Nev. Rev. Stat. Ann. § 555.460 ("If an administrative fine is imposed pursuant to this section, the costs of the proceeding, including investigative costs and attorney's fees, may be recovered by the department"); Me. Rev. Stat. Ann. tit. 22, § 42 subd. 3 ("In the prosecution of a violation by a municipality, the court shall award reasonable attorney's fees to a municipality if that municipality is the prevailing party, unless the court finds that special circumstances make the award of these fees unjust.")

first be determined generically by rule. [81] Extremely rare are statutes awarding attorney fees to prevailing defendants.[82]

The costs might be awarded as an adjunct to the penalty imposed at the end of an administrative proceeding. Alternatively, the costs could be included as part of the civil penalty itself.

Several important distinctions exist among the statutes containing penalty criteria, such as whether the criteria are a "closed set" or are open-ended. Those in the latter category typically include a list of criteria to be considered ending with any "other relevant factors." Statutes that constitute a "closed set" presumably indicate a legislative intent to focus the court's or agency's attention on those criteria to the exclusion of others.

If the statutory criteria are indeed exclusive, the agency would be prohibited from including additional criteria in any civil penalty policy that it adopted administratively, for if the agency did so, the criteria might be subject to legal challenge as inconsistent with state law. Open-ended criteria, on the other hand, do not constrain the purview of the penalty-assessing institution, allowing a more wide-ranging consideration of factors.

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[81] La. Rev. Stat. Ann. § 3:3226 subd. B ("In addition to civil penalties, the commissioner may assess the proportionate costs of the adjudicatory hearing against the offender. The commissioner by rule shall determine the amount of the costs to be assessed.").

[82] See Me. Rev. Stat. Ann. tit. 30-A, § 4452 subd. 3D ("If the defendant is the prevailing party, the defendant may be awarded reasonable attorney fees, expert witness fees and costs as provided by court rule.")

Another important difference among the statutes concerns how the criteria are to be considered. If a statute places the obligation upon the agency to consider a list of factors in imposing the penalty,[83], his or her failure to consider each criteria and to make that consideration apparent in the administrative record could lead to judicial reversal of the penalty. Other statutes make consideration of the factors discretionary with the agency, while a few seem to make consideration of the factors mandatory only if the violator introduces evidence concerning them.[84] Thus, if the violator chooses not to introduce such evidence, the agency need not take on that obligation, although consideration of those factors might support the reasonableness of the agency's decision in assessing the penalty if the amount were challenged on judicial review.

Few of the statutes examined for this study attempt to draw distinctions among the criteria listed, such as by dividing them into "principal" and "secondary" criteria or otherwise differentiating among them.[85] This feature of the statutes raises the question whether an agency may attempt, through the adoption

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[83] N.C. Gen. Stat. § 143-215.114A(c) ("In determining the amount of the penalty the Secretary shall consider the factors set out in G.S. 143B-282.1(b).")

[84] N.Y. Envtl. Conserv. Law §71-2115 ("the commissioner or the court shall take into consideration any evidence introduced by a party regarding the economic impact of a penalty on a business, the compliance history of a violator, good faith efforts of a violator to comply, any economic benefit obtained from noncompliance, the amount of risk or damage to public health or the environment caused by a violator, whether the violation was procedural in nature, or such other factors as justice may require.")

[85] But see Kansas Stat. Ann. § 65-170e(b) (the penalty "shall constitute an actual and substantial economic deterrent to the violation for which it is assessed," thus apparently making economic deterrence the principal goal of the penalty).

The 1986 Study posited that "legislatures generally do not make penalties mandatory" and tested this perception by examining a recently enacted class of statutes containing civil penalties, the hazardous waste statutes. It found that only seven of the more than 50 provisions reviewed used language that could possibly be construed as making penalties mandatory.[88] The project team compiling the present study decided that a similar comparison based solely on use of mandatory versus discretionary language in the statute -- and ignoring other factors that might result in interpreting language that seemed mandatory as discretionary -- would be useful.

The team chose two categories of statutes, many of which have been enacted since 1986: statutes imposing penalties for the violations of medical waste and underground storage tank regulations. This review found a total of ten medical waste statutes, and of that total, four had language that seemingly could be construed as mandatory. Thirty six statutes authorizing civil penalties for underground storage tank violations were found, and of these, only three were arguably mandatory. This data, while not constituting a statistically valid sample, nonetheless corresponds well to the conclusion of the first study that penalty provision generally are not mandatory.

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penalties"); Ark. 15-38-307(c) (if an operator fails to complete corrective measures, he "shall be assessed" a civil penalty of not less than $750).

[88] 1986 Study, 18.

Even if the statute includes mandatory language, this type of language is not conclusive as to whether the penalty is mandatory.[89] Courts often interpret the word "shall" as being directory rather than mandatory.[90] If, in addition, an agency assessing the penalty interprets the statute as discretionary, that interpretation will play some role in a court's determination of whether the penalty provision is mandatory, with the court conceivably deferring to that interpretation. In short, the fact that language in the statute itself seems mandatory may not be determinative.

An agency may be more likely to treat a penalty as mandatory if the logic for such a conclusion is obvious from the statute. For example, if the statute includes two penalties, with the first cast in discretionary language but the second in mandatory terms, the choice of language indicates that the legislature deliberately differentiated between the two penalties. Moreover, if a statute calls for the second penalty to be imposed based on conduct by the respondent that takes place after completion of the events leading to the first penalty, the

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[89] But see N.J. Stat. Ann. § 58:10A-10.1 subd. a ("the department shall assess, with no discretion, a mandatory minimum civil administrative penalty for the violations enumerated in subsections b,c, and d of this section.") The use of the phrases "shall assess," "with no discretion" and "mandatory minimum" makes the penalty mandatory beyond all cavil.

[90] State v. Town of Wallkill, 572 N.Y.S.2d 758 (A.D. 1991) (rejecting state's contention that once a defendant was found to be in violation, the use of the word "shall" mandated that the court had no discretion in deciding whether to impose a penalty). Compare: State Dept. of Envtl. Protection v. Lewis, 215 N.J. Super. 564, 522 A.2d 485 (1987) (where statute provided that a person "shall be subject" to a civil penalty, "[i]f the Legislature had intended that a trial judge should have discretion in whether penalties should be imposed at all, it could easily have so provided.")

legislative intent is even more plain: the respondent's conduct deserves a mandatory penalty.[91] In that case, the agency should feel more comfortable treating the penalty as mandatory.

Even if it is assumed that the language in a statute intends a mandatory penalty, whether in practice a mandatory penalty actually is imposed depends upon several factors. First, before the penalty can be imposed, the agency must decide to prosecute the violation, and the courts have always emphasized the vast discretion which agencies and prosecutorial agencies have in choosing how to allocate their resources in prosecutions. If an agency chooses not to bring a case in a given instance, no penalty will be imposed even if the statute seems to call for a mandatory penalty in that set of circumstances.

A second factor is the existence of an agency's authority to mitigate or remit penalties. If this authority is explicitly established by statute[92], a conflict may exist between this power, which would allow the agency to settle the case without any penalty or to forgive the penalty, and the requirement of a mandatory penalty. The agency might resolve the conflict by concluding that a penalty is mandated except in those instances where the agency chooses to mitigate the penalty completely. Thirdly, even if a statute sets a minimum penalty, the agency may choose to settle an enforcement action at less than the minimum. It may

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[91] Pa. Stat. Ann. tit. 35, § 6018.605 (initial penalty "may be assessed," but "[if] the violation leads to the issuance of a cessation order or occurs after the release of security for performance, a civil penalty shall be assessed.")

[92] See discussion of mitigation and remission statutes in § II-K, infra.

recognize that given certain weaknesses in its case, the distinct possibility exists that if the proceeding is tried to conclusion, a court or hearing examiner might find no violation.

In short, even if a statute seems to mandate a penalty by using words like "shall impose" or establishing a minimum penalty amount, other considerations make it likely that the mandatory penalty will not be imposed in every instance. Nonetheless, the mandatory language is an important indication that the legislature believes that such violations are serious. Accordingly, while there may be some instances in which the agency does not impose a penalty for a violation, in many others the court or agency is likely to consider it their obligation to set penalty amounts that are greater than would be the case if the mandatory language or mandatory minimum did not exist.

F. Fault Requirements

One of the most important themes in American law is the concept of fault as a requirement for the imposition of liability.[93] The question of whether fault is an element of the violation is particularly important to public law enforcement of environmental regulatory statutes. If an agency must prove that a respondent acted negligently, engaged in "willful" or "reckless" activity, or acted

[93] See W. Page Keeton et al., Prosser and Keeton on the Law of Torts §4 (5th ed. 1984) ("In short, it is undoubtedly true that in the great majority of cases liability in tort rests upon some moral delinquency on the part of the individual.")

with intent when it violated an environmental standard,[94] environmental enforcement would be severely compromised. Proving fault is a difficult undertaking that can require the use of considerable resources in the penalty proceeding. Equally important, a fault requirement can lead to anomalous outcomes from an environmental protection standpoint: two actions with identical environmental consequences are treated completely differently if one of the two actors was negligent but the other was not. These factors, as well as the general importance of deterring environmental violations, suggest that strict liability is a more appropriate standard than fault in the design of state civil penalty statutes.

The terms of the state civil penalty statutes indicate general legislative agreement with this conclusion. Most civil penalty statutes are silent about whether fault must be proven, and this silence will be construed as enacting a strict liability offense. Alternatively, the statute itself may indicate a legislative intent to eliminate the need for the prosecutor to prove fault.[95]

Including language in statutes concerning fault requires some care to avoid unintended results. To take one example, if a statute expressly imposes

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[94] See, e.g., Kan. Stat. Ann. § 19-27a02(n)(5) (the governing body is authorized to assess a civil penalty where, among other requirements, "the industry user knew or should have known that its violation could cause" certain effects).

[95] Apparently that is the intent in Pa. Stat. Ann. tit. 35 § 721.13(g) ("Such a penalty may be assessed whether or not the violation was willful or negligent.") An argument could be made that the elimination of those two states of mind left the possibility that the violation must be intentional, but that seems doubtful. Rather, the purpose seems to be to eliminate scienter requirements that are specifically included in the same statute for certain criminal offenses. See, e.g., id. at subsection (d) ("Any person who willful or negligently violates..." is guilty of a misdemeanor).

"strict liability" for certain actions,[96] legislative silence in other statutes about fault arguably indicates the legislature's intent to require fault in those other statutes. Similarly, if a statute imposes liability "for such violation, failure, neglect, refusal, or any misstatement for which said person is personally responsible,"[97] arguments are likely to arise about its meaning. Does the term "neglect" imply that negligent conduct is necessary? And what is meant by the term "personally responsible"? Here, the statutory imprecision is likely to cause confusion if not actively hamper the agency's enforcement efforts.[98]

The selective imposition of fault requirements is a rational policy response to differences in the types of conduct for which liability is imposed. For example, a legislature may decide that certain types of minor paperwork errors or omissions do not justify a penalty unless the defendant acted wrongfully. Thus, where a regulatory scheme requires a company to file a report or otherwise provide information, the legislature may determine that penalties are appropriate only if that failure was "knowing,"[99] "willful" or perhaps simply negligent.[100]

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[96] See, e.g., Alaska 46.04.030 ("strict, joint and several liability").

[97] N.H. Rev. Stat. Ann. § 485-A:43 subd. III ("for a civil forfeiture ... for such violation, failure, neglect, refusal or any misstatement for which said person is personally responsible.")

[98] See also Mass. Gen. L. ch. 111F § 3 ("Any employer or manufacturer who wrongfully fails to comply with or otherwise violates the provisions of this chapter shall be liable for a civil penalty...") (emphasis added).

[99] N.C. Gen. Stat. § 130A-309.70(c) "Any person who knowingly places or disposes of a lead-acid battery in violation of this section" is subject to a penalty); La. Rev. Stat. Ann. § 30:2371 subd. C(1) ("For owners and operators who knowingly fail to report the manufacture, use or storage of hazardous materials as required...the

Even more justifiable are gradations in penalty amounts -- rather than in the imposition of penalties at all -- based upon the presence or absence of fault.[101] Typical of this type of statute is one which authorizes "an additional penalty of not more than one million dollars" for certain intentional, willful, or knowing violations.[102] A fault requirement like this one is closely related to requirements, discussed above,[103] that agencies give notice as a precondition to imposing liability. If the respondent is aware of a requirement and deliberately flouts it, i.e. acts intentionally or knowingly, the state legislature can reasonably

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department may levy a civil penalty which shall not exceed twenty-five thousand dollars per hazardous material not reported").

100 Fla. Stat. Ann. § 252.86(1) (civil penalty for false statements "if such person knew or should have known the information was false, or if such person submitted the information with reckless disregard of its truth or falsity.")

101 Compare: Del. Code Ann. tit. 7 § 6617(a) (any person who "intentionally or knowingly" commits a violation "shall be fined not less than $500 or more than $10,000 for each offense"); with id. § 6617(b) ("any person "who violates any rule, regulation, order, permit condition, or provision of this chapter shall be fined not less than $50 or more than $500 for each violation.") See also Ore. Rev. Stat. § 468.996 (maximum $100,000 penalty for "any person who intentionally or recklessly" violates certain provisions.")

102 La. Rev. Stat. § 30:2025 subd. E(a) ("However, when any such violation is done intentionally, willfully, or knowingly, or results in a discharge or disposal which causes irreparable or severe damage to the environment of if the substance discharge[d] is one which endangers human life or health, such person may be liable for an additional penalty of not more than one million dollars.") See also Cal. Health & Safe. Code § 39674(b)(2) (if the agency is seeking a civil penalty of more than $1,000 for each day of violation, no liability attaches if the defendant, by way of affirmative defense, "establishes that the violation is caused by an act which was not the result or intentional or negligent conduct.")

103 See discussion in § II-A-3, supra.

assume that a greater penalty is necessary to deter future violations. Furthermore, this dichotomy between intentional or willful conduct and other types of conduct is consistent with the general theme of American law that an intentionally wrongful act should be subject to a greater penalty than one which is merely negligent.[104]

Finally, even if strict liability is applied, that choice does not mean that evidence relating to fault is irrelevant in civil penalty proceedings. Rather, if the statute defines a violation in terms of strict liability, the character of the defendant's actions -- including whether it acted with intent, negligently, or with knowledge -- remains an extremely relevant consideration in the decision on the actual amount of the penalty. The state penalty statutes often explicitly require consideration of fault in determining the amount of the specific penalty that is to be assessed.[105]

Thus, a Maine statute requires a court setting a penalty to consider both "the foreseeability of the violation" and "the standard of care exercised by the violator."[106] Alaska oil spill legislation uses fault as a "multiplier" in fixing the penalty; a civil penalty "may be multiplied by four" if, among other factors, the

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104 W. Page Keeton et al. Prosser and Keeton on the Law of Torts § 1 (5th Ed. 1984) ("Where the defendant's wrongdoing has been intentional and deliberate ... courts have permitted the jury to award in tort actions 'punitive' or 'exemplary' damages ...")

105 See, e.g., Colo. Rev. Stat. § 25-15-309(3)(b) ("[w]hether the violation was intentional, reckless, or negligent"); Ga. Code Ann. § 12-8-30.6(c)(7) (penalty criteria include "[t]he character and degree of intent with which the conduct of the person incurring the penalty was carried out");

106 Me. Rev. Stat. Ann. tit. 7, § 616-A Subd. 7F(1), (2).

defendant was grossly negligent or acted intentionally.[107] And a Delaware statute strongly implies that some leniency may be in order for non-negligent violators of pesticide rules, declaring that whenever the Secretary concludes that the violation occurred despite the exercise of due care, the Secretary may issue a warning instead of a penalty.[108]

G. Administrative or Judicial Authority to Impose Penalties

1. In General

States can assign the power to impose civil penalties for environmental violations to the courts, to state administrative agencies or officers, or to both. Some state statutes explicitly authorize the agency to choose between judicial and administrative assessment, thus allowing the agency to analyze each case individually and determine which enforcement forum is more appropriate in that case.[109] In situations where an agency possesses both judicial and administrative authority, legislative silence or inference about the choice also indicates that the agency retains full discretion to choose between them.

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107 Alaska Stat. § 46.03.759.

108 Del. Code ann. tit. 7, § 1225(a)(3).

109 R.I. Gen. Laws § 23-23-14(a) (violator "shall be punished by an administrative or civil penalty"). Unified Authority: Alabama 22-22A-5. See also Idaho Code Ann. § 39-108 subd. 3(b) ("The director shall not be required to initiate or prosecute an administrative action before initiating a civil enforcement action.")

2. Procedural Differences in Administrative Imposition of Penalties

Most statutes that assign courts the power to impose civil penalties assume that the court will treat the penalty case as it does other types of civil litigation. In contrast, those statutes assigning the penalty-imposition power to administrative agencies include important provisions on how the agencies are to exercise that power. As a practical matter, these differences are often outcome-determinative.

The procedures used by states which assess civil penalties administratively can usefully be grouped under one of three models:

(a) The Civil Litigation Model: This model closely patterns the state administrative penalty procedure after civil litigation in the courts. The agency imposes a penalty only after completion of an administrative process, including a right to a hearing. For example, under Georgia solid waste management law, when the Director of the Environmental Protection Division of the Department of Natural Resources has reason to believe that a violation has occurred, the Director "may upon written request cause a hearing to be conducted" before an administrative law judge.[110] The judge then hears the case and at its conclusion issues a decision imposing civil penalties. Thus, under this system the judicial officer assesses the penalty, and it is not decided upon until completion of the administrative proceeding, much as is the norm in civil litigation in the courts.

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110 Ga. Code Ann. § 12-8-30.6(b).

(b) The Immediately Effective Penalty Model: A second, quite different administrative model is used in Pennsylvania. In that state, the agency initiates the penalty proceeding by assessing an administrative penalty which the statute renders immediately effective upon service before any hearing takes place. After a party receives an assessment, it has thirty days to pay the full penalty or, if it wishes to contest either the amount or fact of the violation, to forward the proposed amount to the department for placement in an escrow account. Alternatively, the respondent may post an appeal bond in the amount of the proposed penalty.[111] In Louisiana, a person cited for a violation can post a bond, and if he or she does not appear for the adjudicatory hearing, the bond is forfeited.[112]

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[111] Pa. Stat. Ann. tit. 35, § 691.605(b)(1). Compare: Utah Code Ann. § 19-2-109.1 (If the owner or operator of a source fails to pay an annual emissions fee, the executive secretary may impose a penalty on the fee. The owner or operator may then request a hearing but "must pay the fee under protest prior to being entitled to a hearing.")

[112] La. Rev. Stat. Ann. 56 § 31.1 subd. A(2) (person cited for a class one violation may post a bond equal to the amount of the civil penalty for the offense with which he is charged, and any person failing to appear for the adjudicatory hearing held in accordance with the Louisiana Administrative Procedure Act shall forfeit such bond.)

Massachusetts requires posting of a bond after a hearing if respondent wishes to seek judicial review of a penalty assessment. Mass. Gen. L. ch. 21A § 16 ("Any person who institutes proceedings for judicial review of the final assessment of a civil administrative penalty shall place the full amount of the final assessment in an interest-bearing escrow account in the custody of the clerk/magistrate of the reviewing court. The establishment of such an ... account shall be a condition precedent of the jurisdiction of the reviewing court unless the party ... demonstrates ... either the presence of a substantial question for review by the court or an inability to pay.")

(c) The Intermediate Model: The third model lies somewhere in between the first two. The initial assessment is rendered immediately effective but is subject to hearing rights which do not include any requirement that the alleged violator file a bond before being allowed to litigate the penalty. Thus, under Colorado hazardous waste statutes, the administrative penalty assessment by the Department of Health "shall be effective immediately upon issuance," with the respondent given thirty days in which to file a notice of appeal.[113] Unlike the Pennsylvania enforcement mechanism, however, that appeal stays the obligation to submit any monetary penalty payment pursuant to the order, although it does not stay the respondent's obligation to meet the terms of any compliance order that also was issued.[114]

3. The Trend Toward Administrative Authority

The data gathered for this study indicates that on a long-term basis, a somewhat increasing percentage of states place the penalty imposition power in administrative agencies. The 1986 Study reached the following conclusions: (1) Twenty-four states must go to court to impose civil penalties in all of their programs that authorize such penalties; (2) Eight states have solely administrative civil penalty authority (although the state may have to resort to the courts if defendants refuse to pay); and (3) The remainder of the states have some mix of administrative and judicial authority. The present study indicates a change in those

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113 Colo. Rev. Stat. Ann. § 25-15-308.

114 Id. § 25-15-308.

figures. Now, two states have judicial authority only. Fifty-one now have both judicial and administrative authority, while two have solely administrative authority. (See Appendix A-5, "Comparison of Civil Penalties Authorized by Statute.")

Another useful measure of comparison is to examine the overall percentages of all statutes that fall into the three categories of penalties -- civil, administrative, or both -- in 1986 and now. That information is contained in Appendix A-6: "Percentage of States Having Judicial Authority, Administrative Authority, or Both." In 1986, 18% of the statutes were administrative, while 27% of them contained both administrative and judicial authority. That total figure is now up to 51% -- 37% administrative and 14% containing both judicial and administrative authority. Thus, the number of statutes that contain purely administrative authority has risen rapidly.

Finally, Appendix B-4, entitled "Type of Authority for Primary Civil Penalty Statutes," lists whether a state uses administrative or judicial authority to impose penalties in the major program areas of air, hazardous waste, water, and pesticides.[115]

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[115] Because many states have a multitude of civil penalty statutes that pertain to a particular subject, e.g. hazardous waste, the authors attempted to choose one statute in the subject area which was most broadly applicable in that subject area. Appendix B-4 is based solely on those statutes.

4. The Relationship Between Administrative and Judicial Authority Over Penalty Determinations

Even if the agency can initially assess a civil penalty, there remains the question of the relationship between the agency's initial penalty assessment and later review of or involvement in the penalty process by the courts. A number of issues concerning this relationship have important practical implications for the effectiveness of the agency's penalty imposition process. For example, even if the agency has statutory authority to impose the penalty, the respondent may seek judicial review of the agency's final penalty imposition.[116] Another possibility is that the respondent will not voluntarily pay the amount assessed, forcing the agency to file a judicial action to collect the unpaid amount. Here, issues concerning the relationship between the agency's authority and the court's powers have important practical implications for the effectiveness of the agency's penalty imposition process. The relationship is usefully put into perspective by examining alternative "models" in which the statutes might fall.

One possibility is that, although the agency has the authority to impose a penalty initially through a hearing process, the assessment is thereafter

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[116] S.C. Code Ann. § 44-96-450(A) ("The department also may impose reasonable civil penalties established by regulation... After exhaustion of administrative remedies, a person against whom a civil penalty is invoked by the department may appeal the decision of the department or board to the court of common pleas.")

subject to de novo review by the court.[117] This type of model is relatively rare, for it wastes the resources of the agency by requiring it to undertake a hearing that may have no legal consequences. A related scheme, with almost the same outcome, has the agency hold an administrative hearing but, if it finds that a violation has occurred, it then turns the matter over to the Attorney General for the filing of a civil action.[118]

Under a second model, an initial agency assessment may be reviewed in the courts, but the court must defer in some fashion to the agency's conclusions. Thus, statutes may instruct the court to apply the "substantial evidence" test or the "arbitrary and capricious" test in reviewing the agency's penalty assessment, tests which embody considerable deference to the agency's

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117 See R.I. Gen. Laws § 46-23-7.1 ("The party may within thirty (30) days appeal the final order, of fine assessed by the council to the superior court which shall hear the assessment of the fine de novo.") A Florida statute even further limits the agency's authority. The agency may charge the person with a civil penalty, but the person charged may pay the civil penalty within 10 days, or elect to appear for a hearing before the county court in the county where the facility is located. Fla. Stat. Ann. § 376.06. Under this scheme, the agency's administrative action, if contested by the respondent, amounts to nothing more than the functional equivalent of filing a complaint in court.

118 See Utah Code Ann. § 19-6-721(1)(b): "If, after a formal adjudicatory hearing the board finds that there is substantial evidence in the record to support the board's determination that a violation has been committed," it may "in a civil proceeding find the person subject to a penalty." While the phrase "civil proceeding" would indicate a suit filed in court, the use of the word "find" would point toward an administrative action. Thus, after that finding was made, the board would be required to initiate a civil proceeding to actually impose the penalty.

conclusions.[119] This model is the most common one found in those state statutes which authorize environmental agencies to assess civil penalties administratively, perhaps because it is the model generally incorporated into state administrative procedures acts. Even if the statutes do not apply the state's administrative procedure act to the review of the agency's penalty assessment, the institutional relationship between courts and agencies embodied in those laws -- one which defers generally to agency expertise and fact-finding, but which also authorizes the right to judicial review so as to correct agency errors -- is embedded in state administrative law generally.[120]

A recent Colorado decision considered a statute in the Colorado Water Quality Control Act providing that the court "may consider the appropriateness of the amount of the penalty in a collection action." Such language could be interpreted as indicating a legislative intent to follow the first model, i.e. to "collect" the penalty, the agency must prove all the elements of the offense once again in court even though it has already done so during an administrative process. The court, however, concluded that the statute does not authorize de novo

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119 See Iowa Code Ann. § 455B.477 subd. 5 l (if the attorney general brings an enforcement proceeding, "previous findings of fact of the director of the commission after notice and hearing are conclusive if supported by substantial evidence in the record when the record is viewed as a whole.")

120 It should be noted that many state statutes require a respondent to seek judicial review of the agency's penalty determination within a specific period of time. If that review is not sought, then all issues concerning the substance of the penalty are waived and cannot be raised in any subsequent action filed by the agency to collect the penalty. See discussion of penalty collection, infra.

determination of the penalty amount; instead, it merely provides for judicial review of the penalty decision under an abuse of discretion standard.[121]

5. Practical Differences Between Judicial and Agency Authority to Impose Penalties

Whether the state civil penalty statutes include administrative or judicial authority to impose penalties is a critical structural issue, for the institutional mechanism chosen has vast ramifications for the penalty process. It is certainly not possible to conclude, on a generic basis, whether administrative or judicial imposition of penalties is a "better" type of enforcement mechanisms, but the practical differences between the two methods are unquestionably important to any enforcement program. Those differences fall into five categories:

Procedure: Judicial processes employ procedures which can be quite different from those used by administrative agencies, differences that are often

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121 See Water Quality Control Div., Dept. of Health v. Casias, 843 P.2d 665 (Colo. App. 1992). The court reasoned:

> [T]he statute provides that the court "may consider the appropriateness of the amount of the penalty" in a collection action. The familiar and generally accepted meaning of these words compels the conclusion that the amount of the penalty has already been determined and that the role of the court is to consider only its appropriateness. Thus, while the statute is not a model of clarity, we conclude that it provides only for additional review of the amount of an existing penalty on an abuse of discretion standard, but does not authorize a de novo determination of the amount of the penalty.

Id. at 666-67.

reflected in the formality of the procedures used (e.g. the availability of wide-ranging discovery) and evidentiary rules applicable to the admission of evidence;

Timing: Differences exist in how long the penalty imposition process will take, an important factor in whether the penalty acts as a deterrent to future illegal conduct;

Prosecutorial Control: Whether the environmental agency or the state Attorney General's Office takes the lead in prosecuting the case, and thus exercises more control over its outcome, may depend on whether the action is brought judicially or administratively;

Expertise: In administrative cases the hearing officer may have expertise in the specific environmental discipline at issue, while many judges do not; and

Consistency in Penalties: Whether the state can administer a cohesive and consistent civil penalty policy across a variety of violations may depend on whether the penalties are imposed administratively or judicially.

H. The Enforcement Mechanism

1. Public Enforcement

In almost every instance a state administrative agency will be the body charged with investigating and initially determining whether an enforcement proceeding should be brought. If the proceeding is administrative, statutes commonly speak of the "director" or the "secretary" either bringing the action or requesting the state attorney general to initiate it. If the enforcement proceeding is

to be judicial, however, the state attorney general usually represents the agency pursuant to the general provisions of state government law or the state constitution.

Some statutes contain provisions that address the relationship between the attorney general's office and state environmental agencies concerning the choice to bring the action. For example, one air pollution statute declares that "[t]he attorney general at the request of the director shall file an action in superior court" to recover penalties.[122] The statutory language is framed in mandatory terms and would seem to require the attorney general to act.[123] Similarly, an Ohio statute declares that after a violator ignores written notification from the director about a violation, the director is to notify the attorney general in writing requesting him or her to commence an action, and the attorney general "shall" do so.[124]

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122 Ariz. Rev. Stat. Ann. §49-463 subd. A.

123 Compare: Cal. Water code § 13385(h) ("The Attorney General, upon request of a regional board or the state board, shall petition the appropriate court to collect any liability imposed pursuant to this section") (emphasis added) with Cal. Food and Ag. Code § 11894 ("Upon a complaint by the director, the Attorney General may bring an action for civil penalties in any court of competent jurisdiction...") (emphasis added). See also R.I. Gen. Laws § 23-19-28.1(a) ("The attorney general may assist the corporation in carrying out any civil or administrative proceedings" but "[i]t shall be the duty of the attorney general to carry out all criminal proceedings initiated by the executive director.") (Emphasis added).

124 Ohio Rev. Code Ann. § 6111.09(A).

Other statutes address the respective rights of the Attorney General and the agency to settle litigation.[125]

But in practice, the officials and agencies are unlikely to treat the duty as mandatory for at least two reasons. First, courts are inclined to interpret seemingly mandatory language in terms of the law of prosecutorial discretion, which accords great deference to prosecutorial decisionmaking.[126] If they do, a court may conclude that language which seems mandatory is not, and that the agency may choose not to bring the enforcement action. Second, if the state attorney general is an elected official, he or she may take the position that the attorney general is obligated to determine independently whether a penalty action is warranted.

As a result of these two factors, the decision whether to file an action is often determined by consultations between the state attorney general's office and the environmental agency involved, instead of the attorney general treating the decision to file as ministerial.[127] The agency and the attorney general will likely

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125 N.Y. Envtl. Conserv. Law § 71-2503 subd. 1(a) ("any such penalty may be released or compromised and any action commenced to recover the same may be settled and discontinued by the attorney general with the consent of the commissioner.")

126 See, e.g., Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.")

127 Similar factors apply where a statute seems to require the Attorney General to cede authority over a case upon request of the agency. See Ky. Rev. Stat. Ann. § 24.99-020(2) ("It shall be the duty of the Attorney General, upon the request of the cabinet, to appoint departmental counsel as a special Attorney General

reach some sort of informal administrative accord about their respective roles. In the process of reaching that accord, statutes like these summarized above will play a role, but they are unlikely to be the decisive factor in fashioning the final relationship reached by the attorney general and the agency.[128]

Statutes also may regulate the relationship between the attorney general and other prosecutorial offices in the state, such as local district attorneys.[129] Issues about that relationship rarely arise, but they are potentially potent. For example, an invalid delegation of prosecutorial authority from the state to a local prosecutor could invalidate an entire enforcement proceeding.[130]

2. Private Enforcement

Unlike the enforcement provisions of federal environmental law, the state civil penalty statutes contain few provisions authorizing so-called "citizen suits" in which a private citizen may initiate an action seeking civil penalties.[131] In

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in order to institute an action for an injunction against any person violating or threatening to violate any provision of this chapter...")

[128] In most individual cases, of course, no dispute between the respective offices is likely to arise.

[129] Idaho Code Ann. § 39-4413(A)(3) ("In addition, the attorney general may delegate this authority regarding civil enforcement actions to the prosecuting attorney of the county where a civil enforcement action may arise.")

[130] See State v. General Development Corp., 448 So. 2d 1074 (Fla. App. 1984), aff'd 469 So. 2d 1381 (Fla. 1985), holding that the state attorney, a local official under Florida law, had no authority to bring a civil penalty action for violation of state air and water pollution statutes.

[131] Examples of the few citizen suit provisions include: D.C. Code Ann. § 6-6995.11 (citizen suit to enforce underground storage tank law); La. Rev. Stat. § 30:2026 ("any person having an interest, which is or may be adversely affected, may

those few cases where authority exists, the likelihood that it will provide a useful supplement to public enforcement actions may well depend upon the conditions under which a citizen suit is allowed,[132] and upon whether the statute authorizes the private citizen or group to recover attorney's fees for the action.[133]

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commence a civil action on his own behalf against any person whom he alleges to be violation of this Subtitle or of the regulation promulgated hereunder." The court may assess a penalty, which shall be collected by the State of Louisiana and deposited in the state treasury); Ill. Rev. Stat. ch. 415 § 1512 (the court "may award costs and reasonable attorney fees to the State's Attorney, Attorney General, or any person who has prevailed against a person who has committed a wilful, knowing or repeated violation for this Act.")

Compare: Haw. Rev. Stat. § 342B-56(a) ("After June 30, 1995, any person may commence a civil action on that person's behalf against: (1) Any person (including the state and the director) who is alleged to be in violation of this chapter, including any emission standard or limitation or any order issued by the director.") It is not clear from the face of this statute whether it encompasses civil penalties or is limited to injunctive-type relief.

[132] For example, Tennessee Code Section 69-3-115(e) allows citizens forty-five days to contest a consent judgment entered into by the agency and the violator. The citizen has the right to intervene in such proceeding "on the grounds that the remedy or remedies provided are inadequate or are based on erroneously stated facts." At that late point in the litigation, however, such a showing could well be very difficult. Compare: Tenn. Code Ann. § 68-215-121(e) ("[a]ny persons qualified under the Tennessee Rules of Civil Procedure may intervene in any court action brought by the commissioner or board" seeking penalties). Under this statute citizen participation can occur at a much earlier stage; indeed, unlike other environmental laws of this type, no showing of inadequate prosecution seems to be necessary for intervention under it.

[133] Ariz. Rev. Stat. Ann. § 3-367 (authorizing a "private right of action" against any person, including the state or a political subdivision of the state, alleged to be violation of certain pesticide laws and empowering the court to award costs of litigation, including reasonable attorney and expert witness fees, to any party and to the defendant "in the case of a frivolous action"); Pa. Stat. Ann. tit. 35, § 4013.6(f) (the court "may award costs of litigation, including attorney and expert witness fees, to any party whenever the court determines such an award is appropriate.")

Any penalties recovered usually will go to the public treasury.[134] A handful of statutes, however, call for part of the penalty collected to be awarded to a member of the public who supplies information resulting in the imposition of a penalty,[135] a variation on the venerable "qui tam" action authorized by early environmental laws.[136]

I. Procedures in Imposing Penalties

The effectiveness of a civil penalty depends in part on the state's ability to impose the penalty swiftly. At the same time, a respondent's due process protections at their most fundamental level encompass the right to contest the violation through a hearing of some sort. Thus, the state civil penalty statutes must balance these two objectives.

The discussion below examines some of the procedural requirements which the state civil penalty statutes impose during the penalty process. The discussion generally centers on requirements used for the administrative imposition of penalties; if the penalty is imposed by a court in the first instance, the usual rules of procedure governing civil litigation generally will apply. Additionally, the

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134 Ariz. Rev. Stat. Ann. § 3-367 subd. D(2) (monies collected as civil penalties shall be transmitted to the state treasurer for deposit in the state general fund). Compare: R.I. Gen. Laws § 46-6-1 (violators who deposit substances in public tidewaters "shall be fined for each offense one hundred dollars ($100), one-half (1/2) thereof to the use of the state and one-half (1/2) thereof to the use of the complainant.")

135 N.J. 131E-9.2 (person supplying information "shall be entitled to a reward of 10% of the civil penalty collected, or $250,000, whichever amount is greater.")

136 See, 33 U.S.C. § 407 (1986), part of the Refuse Act of 1899.

discussion emphasizes those areas where the statutes impose differing requirements, as opposed to requirements which are common among many or all states, such as those imposed by state administrative procedure acts. The discussion is thus illustrative rather than comprehensive.

1. Pre-Hearing Procedural Requirements

Notice: Notice to a respondent charged with violating the law is, of course, a requirement of due process in penalty cases.[137] The notice will specify the statutes allegedly violated, and it will almost invariably set forth the amount of the civil penalty which the agency either claims is due or seeks.[138] In rare circumstances notice to some other third party also must be given before the action may proceed. For example, a statute might require that the attorney general of the state be notified,[139] perhaps so that he or she can determine whether to take independent prosecutorial action and thereby avoid allegations of double prosecution if the attorney general brings an action later. Alternatively, the state law might require notice to the public that the agency intends to assess a penalty,

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137 See, e.g., Mont. Code Ann. § 80-8-306(a)(6) ("No civil penalty may be assessed unless the person charged was given notice and opportunity for a hearing pursuant to the Montana Administrative Procedure Act.")

138 Idaho Code § 39-108 subd. 3(a) ("the notice of violation shall identify the alleged violation with specificity, shall specify each provision of the act, rule, regulation, permit or order which has been violated, and shall state the amount of civil penalty claimed for each violation.")

139 Ariz. Rev. Stat. Ann. § 49-923 ("Before issuing an order assessing a civil penalty pursuant to subsection B, the director shall give reasonable notice of his intent to issue the order and the circumstances of the case to the attorney general.")

with the public being given a right to comment on the assessment or perhaps even to take other action, such as intervening in the proceeding.[140]

Pre-Assessment Conference: Most states do not burden enforcing agencies with required conferences prior to administrative imposition of penalties; indeed, such "conferences" under pre-1970 federal air pollution law turned out to be a particularly ineffective means of assuring effective enforcement.[141] Still, in rare instances conferences are referenced in the statutes, as either mandatory requirements or discretionary procedures.[142]

Requests for Hearing: If the administrative process in a particular state closely follows the judicial model, the agency's request for a penalty may automatically trigger the setting of the matter for hearing before a hearing officer.[143] In that instance the hearing will go forward unless the respondent

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140 Ark. Code Ann. § 8-4-103(d)(1) ("Before assessing a civil penalty under subsection (c) of this section, the director shall provide public notice of, and a reasonable opportunity to comment on, the proposed issuance of such order." Any person who comments "shall be given notice of any hearing" and "shall have a right to intervene upon timely application." Id. § 8-4-103(d)(3)(A), (B).) Colorado requires notice to the public, but only after the initial assessment is served on the respondent and the respondent appeals to the state commission. Colo. Rev. Stat. § 25-15-308(i).

141 See U.S. v. Bishop Processing Co., 423 F.2d 469 (4th Cir. 1970), cert. den. 398 U.S. 904 (1970).

142 See Idaho Code § 39-108 subd. 3(a)(i): "If a recipient of a notice of violation contacts the department within fifteen (15) days of receipt of the notice, the recipient shall be entitled to a compliance conference." The conference must be held within 20 days of the date of the receipt of the notice, unless a later date is agreed upon between the parties.

143 La. Rev. Stat. Ann. § 3:3209 subd. C ("If the alleged offender does not pay the prescribed penalty within thirty days after receipt of notice, the commissioner shall call a hearing to adjudicate the matter...")

affirmatively waives it or the case settles. Many states, however, follow a slightly different model in which the respondent must affirmatively request a hearing or the hearing is waived.[144] Moreover, the time within which a defendant must make that request is often quite limited, ranging from 30 days to as few as 10.[145]

The purpose of a establishing a short period for an alleged violator to request a hearing is to place the burden on a respondent to move quickly. If the agency has already determined to assess a penalty, a statute setting a short deadline evidences a willingness to respect that assessment, for the short deadline will result in a smaller number of hearings. However, the short time period also puts a premium on knowledge of the regulatory system, for those respondents who are most sophisticated about agency procedures are more likely to act within extremely short periods such as ten days. Thus, as a practical matter the short

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144 Ga. Code Ann. § 12-13-19(e) ("[director] may upon written request cause a hearing to be conducted before a hearing officer appointed by the board.")

145 Tenn. Code Ann. § 69-3-115(a)(2)(B) ("If a petition for review of the assessment is not filed within thirty (30) days after the date the assessment is served, the violator shall be deemed to have consented to the assessment and it shall become final"); Cal. Food and Ag. Code § 12999.5(b) (person charged "shall have the right to request a hearing within 20 days after receiving notice of the proposed action..."); Vt. Stat. Ann. tit. 6, § 1111(c)(5) (the recipient of the notice "shall have 15 days from the date on which notice is received to request a hearing"); Ohio Rev. Code Ann. § 3704.17(A) (violator shall pay the amount "within fourteen days after issuance of the order, unless, within that time, the owner, operator, or inspector files a notice of appeal"); R.I. Gen. Laws § 42-17.6-4(a) ("A person shall be deemed to have waived his or her right to an adjudicatory hearing unless, within ten (10) days of the date of the director's notice" the person files a denial or assertion that the amount of the proposed penalty is excessive.)

time period may mean that more sophisticated respondents request hearings, but less sophisticated ones (perhaps small businesses) do not.

Pre-Hearing Procedures: While some statutes simply incorporate by reference pre-hearing procedures set forth in the state administrative procedure act,[146] others adopt specific procedural requirements for environmental penalty assessments.[147] For instance, an agency might be instructed to adopt its own procedures for assessing fines.[148]

2. Hearing Procedures

Decisionmakers: Some statutes address whether an agency may delegate the task of initially hearing the evidence.[149] The issue is important, for a consistent delegation to a hearing officer with expertise in the field may benefit the agency's enforcement efforts. For example, if the agency hearing officer is knowledgeable in the field, presumably he or she would have a better

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146 Haw. Rev. Stat. § 342J-7(d): ("Any hearing conducted under this section shall be conducted as a contested case under chapter 91. If after a hearing held pursuant to this section, the director finds that a violation or violations have occurred, the director shall affirm or modify any penalties imposed...)

147 See N.M. Stat. Ann. § 74-2-12 subd. H ("In connection with any proceeding under this section, the secretary or the director may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents and may adopt rules for discovery procedures.")

148 Ill. Comp. Stat. § 2605/7bb.

149 Nev. Rev. Stat. Ann. § 445.546 subd. 3 ("In a county whose population is 400,000 or more, the local air pollution control board may delegate to an independent hearing officer or hearing board its authority to determine violations and levy administrative penalties...); N.C. Gen. Stat. § 143-215.6A ("the hearing shall afford minimum due process including an unbiased hearing official.")

understanding of why the agency must enforce such matters as paperwork requirements. A less knowledgeable judge might be inclined to treat violations of these requirements as minor. Additionally, the agency's burden of explaining basic technical matters will be easier to meet before a judge who understands the fundamental technical principles of the field. Finally, the likelihood diminishes of wildly varying penalty decisions among different judges in similar cases.

Burden of Proof and Admission of Evidence: The norm is that either in court or in an administrative proceeding, the agency bears the burden of proving all the elements of the violation, usually under a "preponderance of the evidence" standard. A few states modify this requirement; Kentucky, for example, uses the conclusions of a prior administrative proceeding as prima facie evidence in a later judicial proceeding, thus easing the agency's burden of proving its case.[150] In Louisiana, certified reports by the state chemist are deemed prima facie evidence of the facts contained in them and are admitted without further establishment of a foundation.[151] And in Rhode Island, once the violation is proved, the burden of

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150 Ky. Rev. Stat. Ann. § 217B.990(3) (after an administrative assessment, either the attorney general or the department is authorized "to bring an action for the recovery of the penalties hereinabove provided for, and to bring an action for an injunction against any person violating or threatening to violate any order or determination of the department promulgated pursuant thereto. In any such action any finding of the department shall be prima facie evidence of the fact or facts found therein.")

151 La. Rev. Stat. Ann. § 3:3225 subd. F ("In all civil and criminal actions, all reports by the state chemist, when certified and sworn to by him, shall be prima facie evidence of the facts contained therein and shall be admitted into evidence without further foundation.")

proof shifts to the defendant to prove by a preponderance of the evidence that the imposition of the full penalty is inappropriate.[152]

Florida provides an example of a change intended to increase the burden of proof on the agency rather than diminish it. A statute incorporates the criminal standard of proof of "beyond a reasonable doubt" into one of its civil penalty statutes.[153] That requirement, of course, constitutes a significant impediment to the enforcing agency's effective use of the statute. Ironically, although the statute is obviously intended to benefit defendants by increasing the burden on the agency, in at least some cases it conceivably could disadvantage them. Under a statute like this, the agency faces the same standard of proof if it proceeds civilly or criminally. Faced with that choice in a case where the violation is serious, the agency may decide that since it must meet this enhanced standard in any proceeding, it may as well prosecute criminally rather than civilly -- an outcome that, presumably, a defendant would not prefer.

One particular evidentiary difficulty that prosecuting agencies face arises out of the procedures by which environmental laws are enforced. Typically an agency will conduct an inspection or a source test and find that a respondent is out of compliance on that day. The agency will suspect that the violation

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152 R.I. Gen. Laws § 46-12.5-6 (c).

153 Fla. Stat. Ann. §376.06(5)(b) ("If the court determines that an infraction has been proven beyond a reasonable doubt, the court may impose the civil penalty prescribed in this subsection...")

continued over a period of time, but the only evidence will be the test or inspection on a single day. The question is whether this proof will be sufficient to infer the existence of a violation on other days as well.

One solution is to create an evidentiary presumption. A statute could declare that once the violator is notified that it is out of compliance, if the agency charges a violation after that date, the days of violation "shall be presumed to include the date of such notice and each and every day thereafter" until the violator demonstrates compliance.[154] The violator can escape liability for this period only by disproving the non-compliance by a preponderance of the evidence.[155]

Factual Findings: A statute might require that the decision of the penalty case be accompanied by the agency's factual conclusions about why the penalty is appropriate.[156]

Public Participation: Aside from the citizen suit provisions discussed above,[157] one statute encourages public participation in determining the amount of

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154 Colo. Rev. Stat. Ann. s 25-70-123.1(c)(2).

155 Id. ("except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.")

156 Colo. Rev. Stat. § 25-18-107 ("The enforcement order shall set forth the facts which allegedly constitute the violation and the provisions which have been allegedly violated").

157 See discussion in § II-H-2, supra.

the penalty by requiring public notice and comment before the imposition of the penalty.[158]

J. Allocating Liability Among Defendants

Because they result in the imposition of monetary liability, civil penalty actions bear some similarity to tort actions in the issues that arise. Some common issues, such as burden of proof and fault requirements, have been discussed above.[159] Another common issue is the extent to which an employer will be held liable for the acts of employees or others acting for the employer or in concert with it.[160]

Some of the few statutes that directly address this question seem to extend the employer's liability beyond the traditional tort test, under the doctrine of respondeat superior, of liability for an employee's actions "in the scope of employment."[161] Under these statutes a broader range of employee actions will be

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158 La. Rev. Stat. Ann. § 30:2025 subd. E(5) ("After submission for a penalty determination at a hearing, the commission, secretary, or assistant secretary shall provide an opportunity for relevant and material public comment relative to any penalty which may be imposed.")

159 See discussion in § II-F, supra.

160 Compare: Mont. Code Ann. § 75-11-223(l) ("If an installer [of an underground storage tank] who is an employee is in violation, the employer of that installer is the entity that is subject to the [civil penalty] provisions of this section unless the violation is the result of a grossly negligent or willful act.") This statute seems to make the employer liable but exonerate the employee.

161 W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 69, p. 502 (5th Ed. 1984).

imputed to the employer.[162] The rationale here may be that given the importance of environmental protection, the liability features of environmental regulatory statutes should be structured to provide a greater incentive for employers to oversee the work of their employees.

Other possibilities include codifying "aider and abetter liability"[163] or laying out the circumstances under which corporate officers are liable for environmental violations by lower company officials.[164] A Connecticut statute declares that if two or more persons are "responsible" for a violation, they shall be jointly and severally liable,[165] but it is hard to see the point of such an enactment, for the question of what "responsible" means is unanswered. Presumably, such responsibility is determined through the normal course of proving the elements of a civil penalty violation, in which case the statute adds nothing to preexisting law.

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162 See N.D. Cent. Code § 4-35-23 ("the act, omission, or failure to act of any officer, agent, or other person acting for or employed by any person must also be deemed to be the act, omission or failure of such person...")

163 Fla. Stat. Ann. § 377.37(2) ("Any person knowingly and willfully aiding or abetting any other person in the violation of any statute of this state relating to the conservation of oil or gas or the violation of any provision of this law, or any rule, regulation, or order made hereunder shall be subject to the same damages as are prescribed herein for the violation by such other person"); Ore. Rev. Stat. § 767.470(i)(a) ("every person who violates or who procures, aids or abets in the violation" shall incur a penalty).

164 Ala. Code Ann. 22-22A-5 ("Whenever such person is a corporation... the same civil penalties ... may be imposed upon the responsible corporate officers.")

165 Conn. Gen. Stat. Ann. § 22a-180 (If two or more persons are responsible for a violation of any provision of this chapter, or any regulation, order or permit adopted or issued thereunder, such persons shall be jointly and severally liable.")

K. Remission or Mitigation of Penalties

Civil litigants generally have the ability -- and, indeed, are encouraged by courts -- to settle the litigation at any point during the proceedings. Accordingly, it seems reasonable to presume that, just as in civil litigation, agencies may settle penalty cases at any time. Some statutes make that point explicitly,[166] but in general, such authority will be presumed.

Mitigation statutes, however, can be structured to provide incentives that may affect the conduct of the respondent in ways that either support or hinder the agency in its enforcement. One factor that can provide such an incentive is the time during which mitigation is allowable. A mitigation provision that is not well-considered conceivably could provide incentives for respondents to continue contesting penalties during the penalty collection process even though the penalties otherwise are final. For example, some state statutes expressly authorize the state attorney general to collect penalties but, in doing so, accord him or her wide-ranging power to mitigate or compromise the penalty amount.[167] In some instances, this power to compromise is even deemed "exclusive," thus

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166 Md. Envir. Code § 8-501(b)(2) ("Whether or not a court action has been filed, the Secretary, with the concurrence of the Attorney General, may compromise and settle any claim for a civil penalty under this section.")

167 N.Y. Envtl. Conserv. Law § 71-1127 subd. 3 ("An action or cause of action for recovery of a penalty... may be settled or compromised in an amount to be approved by the department either before or after proceedings are brought to recover such penalties and prior to the entry for judgment therefor.")

theoretically preventing the enforcing agency from playing any role in the decision to compromise.[168]

A respondent might well view this type of statute as a second opportunity to re-argue the penalty amount. If the penalty was imposed administratively, agency attorneys rather than the attorney general's office may have prosecuted the case. When the matter of mitigation comes up during a collection action, the attorney general's office will not be as familiar with the case as the agency attorneys, and a respondent might try to exploit this situation. Thus, at least some potential exists for disrupting the enforcement process when the focus at this point should be only on collecting a penalty that has already been finally determined, not on compromising or remitting the penalty on an ad hoc basis.

If the agency or attorney general does have the power to compromise a penalty after it is initially imposed, the legislature may wish to place boundaries on such action. One means of assuring some consistency is by limiting the

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[168] See Ga. Code Ann. § 31-13-13(b)(3) ("On the request of the Department of Human Resources, the Attorney General is authorized to institute a civil action to collect a penalty imposed pursuant to this subsection. The Attorney General shall have the exclusive power to compromise, mitigate, or remit such civil penalties as are referred to him for collection"); Me. Rev. Stat. Ann. tit. 22, § 690 Subd. 2C ("Only the Attorney General may compromise, mitigate or remit such civil penalties as are referred to him for collection.")

amount of the penalty that may be forgiven, perhaps to a percentage of the overall penalty charged.[169]

A remission statute technically differs from mitigation in that it authorizes the agency to forgive a final penalty rather than to lower a pending one.[170] For example, under a Maryland remission statute, 75% of a penalty may be returned to the person if, within 36 months after the penalty is compromised and settled, the violation has been eliminated or the order satisfied.[171] The net effect on the respondent, however, is much the same under either type of statute.

One system that appears unique is found in North Carolina, which authorizes a party served with an assessment to file a "remission request" with the Secretary "accompanied by a waiver of the right to a contested case hearing . . . and a stipulation of facts upon which the assessment is based."[172] A special body, entitled the Committee on Civil Penalty Remissions of the Environmental Management Commission, decides the matter if the Secretary and the violator are

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169 N.J. Stat. Ann. § 58:10A-10(c)(4) ("any civil administrative penalty assessed under this section may be compromised by the commissioner upon the posting of a performance bond by the violator, or upon such terms and conditions as the commissioner may establish by regulation, except that the amount compromised shall not be more than 50% of the assessed penalty, and in no instance shall the amount of that compromised penalty be less than the statutory minimum amount, if applicable."

170 See Black's Law Dictionary (6th ed.)(mitigation is the "alleviation, reduction, abatement or diminution of a penalty or punishment imposed by law"; remission is "the act by which a forfeiture or penalty is forgiven.")

171 Md. Envir. Code § 2-610(c).

172 N.C. Gen. Stat. § 143-214.2A(b)4).

unable to agree.[173] The elaborateness of the remission procedure gives it the appearance of constituting a parallel, separate track in which the penalty amount may be decided. That process would be particularly attractive to a respondent when, as is the situation in many cases, the respondent does not contest the facts of the violation but is greatly concerned that the amount of the penalty, as indicated in the initial assessment instituting the proceeding, is too large.[174]

L. Collecting the Penalty

The question of how the agency may collect a civil penalty arises if the penalty is imposed administratively rather than judicially. In the latter instance the case will end in a judgment, and the matter of collection proceeds as in any other civil case. Where the penalty is administrative, however, questions may arise concerning the agency's ability to collect.[175]

A partial answer is found in statutes informing the agency that it is to refer all uncollected penalty matters to the state attorney general.[176] The term

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173 Id.; see N.C. Gen. Stat. § 143B282.1(c) (discussing the Commission).

174 See also Ore. Rev. Stat. § 767.470(b)(4) (commission may reduce the penalty if the defendant admits the violations and makes a timely written request for reduction of the penalty within 15 days from the date the penalty order is served).

175 Compare: Tenn. Code Ann. § 68-212-114(c)(5) ("The commissioner may issue an assessment of civil penalties . . . against any person who fails to comply with an assessment of administrative penalties lawfully issued in accordance with this subsection.")

176 See, e.g., Del. Code Ann. tit. 7, § 1225(a)(4) ("In cases of inability to collect such civil penalty or failure of any person to pay all, or such portion of such penalty as the Secretary may determine, the Secretary shall refer the matter to the Attorney General's Office of the State who shall recover such amount by action in the appropriate court"); Haw. Rev. Stat. § 149A-41(b)(4) ("In case of inability to collect

"uncollected penalty" implies that the agency may make some attempt to collect the penalty. If it remains unpaid, however, the agency must turn the matter over to the state attorney general before further judicial relief can be sought.

A second question may then arise in such litigation: may the respondent in the collection case raise defenses concerning the substantive merits of the administrative penalty imposed upon it? The issue of defenses ought not to unduly trouble courts even in the absence of explicit statutory guidance on the point. If an agency imposes a penalty, the agency's final decision -- i.e. the decision after all administrative appeals have been exhausted -- in the normal case will be judicially reviewable. After that review is over and the penalty is upheld, or if no judicial review is finally sought, the agency should be able to collect it in the same manner as any other case that has been tried to judgment. At that point defenses concerning the substantive merits of the penalty imposition should be irrelevant; the only question is whether the money has been paid.

A statute may explicitly make this point,[177] but it should not be necessary. The statute could, however, aid the agency's collection efforts by

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the civil penalty or failure of any person to pay all or such portion of the civil penalty as the board may determine, the board shall refer the matter to the attorney general, who shall recover the amount by action in the appropriate court.")

177 See Tenn. Code Ann. § 69-3-115(a)(2)(C) ("Whenever any assessment has become final because of a person's failure to appeal the commissioner's assessment, the commissioner may apply to the appropriate court for a judgment and seek execution of such judgment and the court, in such proceedings, shall treat a failure to appeal such assessment as a confession of judgment in the amount of the assessment"); Okla. Stat. Ann. tit. 27A, § 2-6206 subd. 2 (in a collection action "the validity, amount, and appropriateness of such penalty shall not be subject to review.")

authorizing it to collect its attorney's fees when a separate judicial action is needed to collect the penalty.[178]

Statutes also may attempt to aid the collection process by imposing additional consequences on respondents who fail to pay their penalties in a timely fashion.[179] For example, if the statute makes clear that one ground for revocation of a respondent's facility permit -- the "death penalty" of administrative sanctions -- is "failure to pay a civil penalty within thirty days after a final determination is made that the civil penalty is owed,"[180] collections will likely become more timely. Similarly, if the respondent faces a large, separate civil penalty simply based on nonpayment of the first penalty,[181] timely payment again is likely, although recovering a second penalty through a new administrative process seems a bit cumbersome. Finally, the statute may require the respondent to pay interest on

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178 Del. Code Ann. tit. 7, § 6005(b)(3) ("In the event of nonpayment of the administrative penalty after all legal appeals have been exhausted, a civil act may be brought by the Secretary in Superior Court for collection of the administrative penalty, including interest, attorneys' fees and costs, and the validity, amount and appropriateness of such administrative penalty shall not be subject to review.") [Check]

179 See, e.g., Md. Envir. Code Ann. § 7-266(b)(5) ("If any person who is liable to pay a penalty imposed under this subsection [authorizing administrative penalties] fails to pay it after demand, the amount, together with interest and any costs that may accrue, shall be (i) A lien in favor of this State on any property, real or personal, of the person. . .")

180 N. D. Cent. Code § 4-35-24 subd. 7.

181 N.J. Stat. Ann. § 26:2C-19 subd. d (Any person "who fails to pay a civil administrative penalty in full . . . is subject, upon order of the court," to additional penalties st forth in the statute).

the penalty which, if the statutory rate is higher than the market rate, again would operate as an incentive for earlier payment.[182]

M. Disposition of Recovered Penalties

While any firm conclusions would need an empirical base for verification that is beyond the scope of this study, it seems possible that statutory language about the disposition of penalties could have a marked effect on an agency's enforcement efforts. The majority of civil penalty statutes call for placing the penalties in the state general fund,[183] but some statutes earmark part of any recovered penalty for full or partial reimbursement of the agency's or the attorney general's expenses in bringing the action.[184] In such cases the agency will be less concerned that the cost of the enforcement action is effectively diverting

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182 Okla. Stat. Ann. § 2-6-206 subd. 3 ("shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceeding and quarterly nonpayment for each quarter during which such failure to pay persists. such nonpayment penalty shall be in an amount equal to twenty percent (20% of the aggregate amount. . .")

183 See, e.g., Iowa Code Ann. § 455B.466 ("Civil penalties collected pursuant to this section shall be forwarded by the clerk of the district court to the treasurer of state for deposit in the general fund of the state.")

184 Del. Code Ann. tit. 7, § 6205(a) ("Any civil penalties collected under this section are hereby appropriated to the Department to carry out the purposes of this chapter"); Utah Code Ann. § 19-3-109(b) ("The department may reimburse itself and local governments from monies collected from civil penalties for extraordinary expenses incurred in environmental enforcement activities.")

budgetary resources from other administrative tasks, and thus that it must "ration" its enforcement efforts in some fashion.[185]

Traditionally, the assumption has been that a civil penalty must be recovered in the form of a cash payment. In most instances the payment goes into the state's general fund or into a particular fund that supports the agency's regulatory efforts. To penalize a respondent, however, the only requirement is that resources in an amount equal to that of the penalty flow from the respondent. Thus, in theory a penalty need not be paid solely in cash; other types of payments might be possible.

For example, a settlement might include a commitment by the respondent to take other types of actions, such as paying for environmental improvements.[186] Additionally, a limited number of states have now authorized receipt of "in kind" payments in lieu of cash. In Arkansas, the Director of the Department of Pollution Control and Ecology is authorized to accept "in-kind services."[187] Those services may utilize the violator's own expertise, or they may be offered through subcontractors who are compensated for performing the services. Two limits are set in the statute: (1) the payments may not duplicate

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185 Compare: Me. Rev. Stat. Ann. tit. 22 § 690 subd. D ("Money collected from civil penalties shall not be used for normal operating expenses of the department, except as appropriations made from the General Fund in the normal budgetary process.")

186 Colo. Rev. Stat. § 25-15-309(4) ("Any settlement agreement may include but is not necessarily limited to the payment or contribution of moneys to state or local agencies or for other environmentally beneficial purposes.")

187 Ark. Code Ann. § 8-6-204(e)(3)(A)-(C).

services already provided by the department through its normal budgetary allotment, a provision apparently intended to ensure that the legislature retains control over the agency's level of spending for specific activities, and (2) the financial arrangements must be such that the violator "retains no monetary benefit" in them, however remote.[188]

Presumably, this prohibition means that the "in-kind" services could not result in any physical improvements, such as construction of pollution control facilities, which might somehow benefit the defendant. It also may mean that the defendant cannot receive any favorable tax treatment as a result of the in-kind contribution.

III. STATE ADMINISTRATION OF CIVIL PENALTY AUTHORITY

A. IN GENERAL: FEATURES AND THEMES

State civil penalty policies can be adopted in one of two ways. First, the legislature may expressly delegate the formulation of a penalty policy to the agency in a statute, perhaps requiring it to "adopt by rule a schedule and the criteria for determining the amount of the civil penalty that may be imposed."[189] Alternatively, the agency may be instructed to adopt a rule containing "a range established by regulation ... for violations of similar type, seriousness, and

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188 Id. § 8-6-204(e)(2)(B),(C).

189 Ore. Rev. Stat. § 468.996(1). See also Ohio Rev. Code Ann. § 921.17 ("the director shall adopt ... rules which establish a schedule of civil penalties for violations...")

duration."[190] Second, the agency may choose to adopt a penalty policy to guide its exercise of discretion, even though no statute demands that it do so.

B. EXAMPLES OF STATEWIDE POLICIES

Indiana:

The civil penalties of Indiana range from $1,000 to $25,000. Calculation of a penalty consists of three parts: (1) determining a base civil penalty dependent on the severity of the violation, (2) adjusting the penalty for special factors and circumstances, and (3) considering the economic benefit of noncompliance.

(1) The Base Penalty

The base civil penalty is determined by considering two factors: the potential for harm to human health and the environment and the extent of deviation from a statutory or regulatory requirement. Emphasis is placed on the potential harm posed by a violation rather than on actual harm; the policy does not advocate assessing lower civil penalties when the violations do not result in actual harm. Both potential for harm and extent of deviation contain the categories of major, moderate, and minor, each with different penalty ranges. When placed on separate axes these categories form a nine-celled matrix that is used to determine the penalty range of the violation. Multi-day penalties are calculated in the case of continuing violations; the base civil penalty derived from the matrix is then multiplied by the number of days of violation.

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190 N.J. Stat. Ann. 58:10A-10 subd. 10.

(2) Adjustment to the Base Penalty

After determining the appropriate penalty based on the severity of the violation, the penalty may be adjusted upward or downward to reflect particular circumstances surrounding the violation. Adjustment of a penalty may take place before issuing the proposed penalty in the complaint or after assessment to the proposed penalty, as part of the settlement process. Among the factors that may be considered are the following: actions before the violation, actions after the violation, history of noncompliance (upward adjustment only), ability to pay (downward adjustment only), cost to the Department of Environmental Management (DEM) of the enforcement action, or other unique factors.

(3) Economic Benefit

The third consideration in determining the final penalty is economic benefit. When a violation results in significant economic benefit to the violator, the amount gained from noncompliance will be calculated and added to the base and adjusted penalty. The types of economic benefit considered are: benefit from delayed costs, benefit from avoided costs, and other benefits. A delayed cost is an expenditure that has been deferred by the violator's failure to comply with the requirements. An avoided cost is an expenditure that has been nullified by the violator's failure to comply. Other benefits include, for example, profits for the period of start-up prior to obtaining the necessary permit.

The civil penalty policy also provides for stipulated penalties, separate from and in addition to the assessed civil penalty. An Agreed or Unilateral Order

may specify certain actions that must be taken by the Respondent in order to remedy the environmental problem or to comply with the rule. The Order will list the actions and provide a milestone date for each action. The stipulated penalties should be assessed in amounts that provide sufficient incentive to meet the milestone.

All civil and stipulated penalties will be deposited into the Environmental Management Special Fund, other Funds established under the statute for this purpose, or a project that has clear environmental benefits.

Minnesota:

The maximum penalty in Minnesota is $25,000 per day per violation for violations involving hazardous waste. For other violations the maximum is $10,000 per day per violation. The two main factors that determine the penalty are a "gravity-based component" and economic benefits.

(1) The Gravity-Based Component

The gravity-based component reflects the seriousness of the violation: its severity and its impact. To assess severity, the factors considered are the extent of deviation from the regulatory or statutory requirement, the duration of noncompliance, and the number of violations. To assess impact, the factors considered are the harm or potential harm to public health and the environment, and the extent of irreparable harm caused by the violation.

The gravity-based component may be adjusted based on the following factors: history of noncompliance, culpability (intent or carelessness of the violator

may cause an upward adjustment of the penalty), response to violation, deterrence (the penalty must be sufficient to deter future noncompliance), ability to pay (reduction only), cleanup costs as an adjustment to economic savings, penalties in other enforcement actions, litigation, and other unique factors.

(2) Economic Benefits

Economic benefits are divided into two categories: delayed or avoided costs and violation-related profits. They are determined for the entire period of noncompliance. Additional costs may be included in the settlement of violations. These are separate from and in addition to the civil penalty, and may include the reasonable cost of cleanup after an unauthorized discharge of pollutants, compensation for the loss of natural resources and other actual damages to the State, or other State expenses.

Penalties may, in certain cases, be reduced by payments to organizations such as the Minnesota Environmental Education Board, or to funds such as the Clean Water Partnership Supplemental Account. They may also be reduced if the violator undertakes a project that will benefit the environment within the State. The final civil penalty is the sum of the gravity-based component, economic benefits, additional costs, and adjustment factors, but it may not exceed the statutory maximum for the violations involved.

Missouri:

Missouri calculates its civil penalties based on either or both of the following components: a gravity-based measure and of limitation.

(1) The Gravity-Based Measure

The gravity-based component measures the seriousness of the violation based on two factors: the potential or actual harm involved and the extent of deviation from the statutory or regulatory requirement. Both factors are expressed on point scales. Based on the number of points, violations are classified into categories of major, moderate, or minor. These three categories, in both potential for harm and extent of deviation, form a nine-celled matrix that determines the range of the penalty amount. The base penalty is then multiplied by the number of days the violation occurred.

There are adjustment factors to allow flexibility in the determination of the penalty. These include good faith efforts, degree of culpability, and history of compliance.

(2) Economic Benefit Adjustments

An economic benefit component is considered in addition to the gravity-based component if the violator has profited financially from the violation. Delayed costs, avoided costs, and actual income derived from noncompliance are all considered in the calculation of the economic benefit.

There are also case-specific factors that the Department of Natural Resources may use to adjust the penalty up or down. These include recalculation of the penalty based on new information, ability to pay, environmental projects undertaken by the violator, and other unique factors.

New York:

In New York, a civil penalty is composed of a benefit component and a gravity component. The penalty is equal to the sum of the two, plus or minus any adjustments.

(1) Benefit Component

The benefit component is an estimate of all the economic benefits of delayed compliance. These include temporarily and permanently avoided costs, avoided liquidated damages under contracts, and enhanced value of business or real property.

(2) Adjustments to the Benefit Component

Though in general the calculated economic benefit of noncompliance should be the minimum penalty, there are three circumstances where the benefit component may be lowered.

(a) De Minimis Benefits

The first of these is de minimis benefits, where the Department of Environmental Conservation may decide that the commitment of its resources to seeking the benefit component is unnecessary in cases where it is insignificant.

(b) Compelling Public Interest

The second is compelling public interest, where the public interest would not be served by taking the penalty action to full adjudicatory hearing. If there is a likelihood of continued harmful noncompliance, the full economic benefit should be recovered.

(c) Litigation Practicalities

The third is litigation practicalities, where the exercise of prosecutorial discretion may be exercised.

(3) Gravity Component

The gravity component reflects the seriousness of the violation. It is based on the following two factors: (1) potential harm and actual damage caused by the violation and, (2) the relative importance of the type of violation in the regulatory scheme.

(a) Potential Harm and Actual Damage

In order to determine the extent to which the violation resulted in or could potentially result in loss or harm to the environment or human health, the sensitivity of affected environmental sectors is relevant. Where natural resource or environmental damage is caused, enforcement should obtain remedial action as well as assess a penalty. The longer a violation continues, the greater is the harm or risk of harm, and thus the greater the size of the gravity component.

(b) Importance to the Regulatory Scheme

This factor is intended to determine the importance of the violated requirement in achieving the goal of the underlying statute.

(4) Adjustments to the Gravity Component

The gravity portion of the penalty may be adjusted to provide flexibility and equity. Adjustments may be made on the basis of culpability, violator cooperation, history of noncompliance, ability to pay, or other unique

factors. Approval to accept an environmental benefit project as a means of reducing the penalty must be obtained on a case-by-case basis for projects in excess of $2,500.

In order to ensure future compliance and remedial action, suspended penalties may be imposed. These are based on past violations, and collection occurs only on a subsequent violation of the order. Stipulated penalties may be used along with suspended penalties as a disincentive for delaying the completion of an environmental benefit project. Other assurance mechanisms may also be employed.

Oregon:

Oregon classifies all violations as Class I, Class II, or Class III, with Class I the most serious and Class III minor. Civil penalty calculations are made by using a matrix with the classification (I, II, III) and the magnitude (major, moderate, minor). The base penalty ranges from $6,000 to $100; all violations of hazardous waste, solid waste, air quality, or water quality requirements are subject to a maximum civil penalty of $10,000 per day.

The base penalty may be adjusted according to the following:

(1) Prior violations may increase the penalty by 100%.

(2) Past history of efforts to correct violations may decrease the penalty by 20%.

(3) A continuous or repeated violation may increase the penalty by 20%.

(4) Negligence may increase the penalty by 20%, intentional violation may increase the penalty by 60%, and flagrant violation may increase the penalty by 100%.

(5) Cooperation of the violator to correct the violation or minimize its effects may decrease the penalty by 20%.

(6) The amount of economic benefit gained through noncompliance.

The Oregon Department of Environmental Quality may also reduce the penalty when a violator is unable to pay the full amount. In certain circumstances the Department may impose a penalty that results in the violator's going out of business. It may do so if the violation was intentional or flagrant or if the violator seems financially unlikely to be able or willing to comply in the future.

Finally, the Department may also impose a penalty on any person who intentionally or recklessly commits a violation that results in harm or potential harm to the public health or the environment. The penalty may be $50,000 if the violation is reckless, $75,000 if the violation is intentional, or $100,000 if the violation is flagrant.

Rhode Island:

In Rhode Island, the penalty range is calculated by determining the "Type of Violation" and the "Deviation from the Standard," and then placing the two on the axes of a nine-celled matrix. The economic benefit of noncompliance is then added, along with any additional costs incurred by the Department of Environmental Management during the investigation, enforcement, or resolution of

the violation. Each day during which a person fails to pay the penalty constitutes a separate violation.

(1) Type of violation

Violations are categorized into Types I, II, and III depending on their relation to the protection of the public health, safety, welfare, or environment. Type I violations involve regulations that are directly related to the protection of the above; Type II violations involve regulations that are indirectly related; and Type III violations involve regulations that are only incidental.

(2) Deviation from the Stand

The degree to which the violation is out of compliance with the legal requirement is categorized as major, moderate, or minor. This is determined through the evaluation of the following factors: the extent to which the act or failure to act was out of compliance, environmental conditions, the amount of pollutant, the toxicity or nature of the pollutant, the duration of the violation, the real extent of the violation, whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance, previous noncompliance, the degree of willfulness or negligence, and any other factors that may be relevant.

(3) Economic Benefit of Noncompliance

In addition to the base penalty, the final penalty will include an amount intended to offset the economic benefit of noncompliance. It includes delayed or avoided costs as well as interest and market or competitive advantage over other regulated entities which are in compliance. The economic benefit

portion may be excluded from the penalty only if the benefit from noncompliance is either unidentifiable or unquantifiable.

South Carolina:

The civil penalty policy of South Carolina is a general one. It provides guidelines for the administrative assessment of civil penalties, and then it lists circumstances in which the penalty may be adjusted downward.

(1) Civil Penalty Assessment Guidelines Civil penalties are assessed through the consideration of any one or combination of the following factors:

(a) Degree of harm or potential harm to the public health, safety, or environment;

(b) Extent of deviation from the requirements;

(c) Frequency or duration of the violation;

(d) Economic benefit resulting from noncompliance;

(e) Cost of restoration of the environment or abatement of the environmental harm;

(f) Past history of violations;

(g) Degree of willfulness and/or negligence; and

(h) Other pertinent factors.

(2) Downward Adjustment

The violator is responsible for presenting evidence of mitigating circumstances that may be considered in adjusting the amount of the penalty. Any one or combination of the following factors may be considered:

(a) Degree of cooperation in remedying the violation;

(b) Any measures taken to avoid repetition of the violation, beyond those taken solely in order to comply with the regulations;

(c) Good faith efforts to comply with requirements, beyond those of merely coming into compliance;

(d) Ability to pay; and

(e) Other pertinent factors.

West Virginia: General

In assessing a penalty, several factors are considered and corresponding dollar amounts are assigned. The factors are: history of noncompliance, seriousness of the violation, operator negligence, and good faith.

The dollar amount assigned as a penalty for a history of noncompliance is the number of violations times a factor of one hundred. The seriousness of the violation is rated on a scale of 0 to 10, with each rating corresponding to a dollar amount between zero and $3,500. operator negligence is rated on a scale of 0 to 8, corresponding to amounts between zero and $1,000. Good faith is rated on a scale of 0 to 8, corresponding to percentages of zero to 40% that are used to diminish the penalty.

C. EXAMPLES OF PROGRAMMATIC POLICIES

Arizona: Water

The maximum penalty in the State of Arizona water pollution control program is $25,000 per day per violation. Penalties are calculated using the formula:

Proposed Penalty = Economic Benefit + Gravity x R x C

Where R = Recalcitrance Level Factor and C = Plant Design Capacity Factor.

(1) Economic Benefit Component

The state will make every reasonable effort to calculate and recover the economic benefit of noncompliance for the entire period of noncompliance.

(2) Gravity Component

An additional amount is added to the economic benefit component in order to reflect the seriousness of the violation and to ensure that the violator is at an economic disadvantage for having disobeyed the law. The gravity component is calculated for the entire period of noncompliance.

(3) Adjustment Factors

(a) Recalcitrance Level Factor

The adjustment for recalcitrance allows for higher penalties for bad faith, unjustified delay in preventing, correcting, or mitigating violations, failure to provide full and timely information, and other similar situations.

(b) Plant Design Capacity

This adjustment allows for higher penalties for owners of larger wastewater treatment plants than owners of smaller plants.

Arizona: Air

Arizona has a maximum penalty of $10,000 per violation per day for air quality violations. There is a complicated mathematical formula for the calculation of the penalties for these violations. Essentially, the penalty is determined by first calculating the base penalty by considering the factors of Seriousness, Economic Benefit, and Aggravating Factors.

(1) Seriousness Component

The Seriousness component is determined on a matrix plotting the Extent of Deviation from Requirement and the Potential for Harm, with each factor categorized into subdivisions of major, moderate, and minor. This component is also corrected for multi-day violations, where the penalty is discounted to a greater degree the longer it continues. This step is intended to ensure that the penalties are not over-inflated.

(2) Economic Benefit

The base penalty can be adjusted upwards by the Economic Benefit Factor if there has been a clear economic benefit from noncompliance, and it can be adjusted downward if the economic impact on the violator would be too great.

(3) Adjustment Factors

There are four "Discount Factors" that may be used to adjust the penalty.

(a) Dr is the discount factor for reporting the noncompliance prior to the discovery of the violation by the Arizona Department of Environmental Quality. It can provide up to a 15% discount.

(b) De is the discount factor for efforts made to comply after learning of a violation. It can provide up to a 15% discount, or it can increase the penalty by up to 25%.

(c) Dw is the discount factor for willfulness or negligence. This factor may be used only to raise the penalty. It may cause an increase of up to 25%.

(d) Dh is the discount factor for a history of noncompliance. It may be used only to raise a penalty, and it may be increased up to the maximum of $10,000 per day per violation. The factors considered are: the similarity of the violation to prior violations, the time elapsed since the prior violation, the number of prior violations, and the violator's response to prior violations.

Arizona: Asbestos NESHAP

Arizona provides separate guidelines for the calculation of civil penalties for asbestos NESHAP cases because of the unique aspects of asbestos demolition and renovation. The base penalty is calculated by assessing a gravity component and an economic benefit component.

(1) Gravity component

This calculation of this component is based on the sum of the notice penalties, the work practice and emissions penalties, and the gravity component adjustment factors.

(a) Notice Violations

Because notification is essential to enforcement, a notification violation may warrant a high gravity component. Table 1 of the policy outlines the different penalties that may be assessed for various violations, ranging from $200 to $10,000.

(b) Work-Practice, Emission and other Violations

Penalties for these violations are calculated on a matrix of the total amount of asbestos involved in the operation and the length and number of violations. These penalties range from $400 to $10,000.

(c) Gravity Component Adjustments

The gravity component may be adjusted based on four factors: whether the violation was a second or subsequent offense, the duration of the violation, the size of the violator, and other adjustment factors such as the degree of willfulness or negligence, and the economic impact.

(2) Economic Benefit Component

This factor measures the benefit of noncompliance. Table 4 of the policy provides figures to help in determining the cost of compliance.

California: Hazardous Waste

The maximum penalty for violation of the Hazardous Waste Control Law is $25,000 per day per violation. In order to determine the penalty, the Department of Toxic Substances Control considers two kinds of factors: those associated with the specific violation and those associated with the violator.

(1) Individual Violation

The penalty must be appropriate to each violation. The factors considered are the actual and potential harm to public health or safety or the environment, and the extent of deviation from regulatory standards. This base penalty is multiplied by the number of days of violation if a multi-day penalty is appropriate.

(a) Actual and Potential Harm

The Department considers the characteristics of the substance involved, the amount of substance involved, and the specific situation in order to determine the extent of the actual or potential harm of the violation. Violations are classified as major, moderate, or minor accordingly.

(b) Extent of Deviation from Regulatory Standards

Violations are classified as major, moderate or minor depending on the extent to which they impair the function of the requirement. These categories, along with the major, moderate, and minor categories of Potential for Harm, are placed on the axes of a nine-celled matrix which determines the range of the penalty.

(2) Violator

Once the base penalty is determined, the Department considers the factors associated with the violator in order to adjust the penalty up or down. The factors considered are cooperation, intent, enforcement history, ability to pay, and prophylactic effect. Afterwards, the penalty is adjusted upward to the maximum, if necessary, to deprive the violator of any economic benefit gained from noncompliance.

Colorado: Hazardous Waste

The civil penalties of Colorado range from $100 to $25,000. The calculation system consists of (1) determining a gravity-based penalty for a violation, (2) considering economic benefit of noncompliance, and (3) adjusting the penalty for special circumstances.

(1) Gravity-Based Penalty

The gravity-based penalty is composed of two factors: the potential for harm and the extent of deviation from the requirement. Violations are divided into categories of major, moderate, and minor for each of these two factors, and together they form a nine-celled matrix that determines the range of the penalty.

(a) Potential for Harm

The potential for harm resulting from a violation may be determined by considering the likelihood of exposure to hazardous waste posed by noncompliance, or the adverse effect noncompliance has on the statutory or

regulatory purposes or on the procedures for implementing the Resource Conservation and Recovery Act (RCRA) program.

(b) Extent of Deviation

The extent of deviation relates to the degree to which the violation renders inoperative the requirement violated.

Multiple and multi-day penalties may also be assessed. Multiple penalties are assessed when a particular firm has violated several RCRA regulations, when different violations of the same section of the regulations constitute independent and substantially distinguishable violations, and when one company has violated the same requirement in substantially different locations. Multi-day penalties can be assessed up to $25,000 per violation per day, with each day of noncompliance considered a separate violation. In this case the gravity-based penalty is multiplied by the number of days of violation.

(2) Economic Benefit

After the appropriate penalty is determined based on gravity, the amount of economic benefit gained by the violator from noncompliance is calculated and added. This amount includes the benefit from delayed and avoided costs. The economic benefit component need not be calculated where it appears to be less than $2,500. Generally, the penalty should not be less than the economic benefit of noncompliance, but there are four exceptions:

(a) The economic benefit consists of an insignificant amount;

(b) There are compelling public concerns that would not be served by taking a case to trial;

(c) It is highly unlikely that the EPA will be able to recover the economic benefit in litigation; or

(d) The company has documented an inability to pay the total proposed penalty.

(3) Adjustment

In general, these adjustment factors apply only to the gravity-based penalty from the matrix, and not to the economic benefit component. The penalty may be adjusted upwards or downwards to reflect the particular circumstances of the violation. The factors considered are: good faith efforts to comply/lack of good faith, degree of willfulness and/or negligence, history of noncompliance, ability to pay, and other unique factors.

Colorado: Air

The Colorado Air Pollution Prevention and Control Act lists different kinds of violations and their corresponding penalty ranges. In general, eight factors and circumstances are considered in making a penalty assessment.

(1) Violator's Compliance History

If the violator has no previous noncompliance problems, the base penalty amount applies. If the violator does have a history of noncompliance, the penalty should be increased.

(2) Good Faith Efforts on Behalf of the Violator to Comply

If no good faith effort is made to comply with the regulation, the penalty increases.

(3) Payment by the Violator of Penalties Previously Assessed for the same violation

If a source has previously paid a penalty for a similar violation, the penalty increases.

(4) Economic Benefit of Non-Compliance to the Violator

(5) Impact on or Threat to the Public Health or Welfare or the Environment as a Result of the Violation

(6) Malfeasance

If the Division determines that an illegal act has been committed, the penalty increases.

(7) Whether Legal and Factual Theories were Advanced for Purposes of Delay.

If legal and factual theories were advanced for purposes of delay, the penalty increases.

(8) Duration of the Violation

The penalty is multiplied by the number of days of violation. The penalty increases as it multiplies.

Six circumstances are considered that may reduce or eliminate civil penalties. The maximum reduction is 40% of the penalty amount, but elimination of the penalty is permitted for amounts less than $1000.

(1) Voluntary and Complete Disclosure by Violator of Such violation in a Timely Fashion After Discovery of the Noncompliance.

(2) Full and Prompt Cooperation by the Violator Following Disclosure of the Violation Including, When Appropriate, Entering Into a Legally Enforceable Commitment to Undertake Compliance and Remedial Efforts.

(3) The Existence and Scope of a Regularized and Comprehensive Environmental Compliance Program or an Environmental Audit Program.

(4) Substantial Economic Impact of a Penalty on the Violator.

(5) Non-feasance.

If a source complied within thirty days after being notified by the Division, the penalty may be reduced by 10%.

(6) Other Mitigating Factors.

The size of the source and the significance of the violation are also considered in determining where in the penalty range the actual penalty will fall.

Florida: Asbestos

In Florida, civil penalties are calculated by first determining a "preliminary deterrence amount" made up of a gravity component and an economic benefit component. This amount may then be adjusted by consideration of other factors.

(1) Gravity Component

This component should account for the environmental harm resulting from the violation, the importance of the requirement to the regulatory scheme, the duration of the violation, and the size of the violator.

(2) Gravity Component Adjustments

The gravity component may be adjusted based on the following factors: whether the violation is a second or subsequent violation, the duration of the violation, and the size of the violator.

(3) Economic Benefit

This component measures the economic benefit accruing to the violator as a result of noncompliance with the asbestos regulations.

This policy is intended to yield a minimum settlement penalty figure for the case as a whole. In many cases, more than one party will be named as a defendant. In such instances, the Government should seek a sum f or the case as a whole, which the multiple defendants can allocate among themselves as they wish. Yet if one party is particularly deserving of punishment so as to deter future violations, separate settlements may be necessary to ensure that the offending party pays the appropriate penalty.

Idaho: Pesticides

Idaho lists violations of the Idaho Pesticide Law and divides them into four categories: use violations, non-use violations, licensing violations, and sales of restricted use pesticides. A different Penalty Assignment Schedule corresponds to

each of these categories. Within these schedules, the probability of adverse effects and the number of subsequent offenses are the factors used to determine the number of points a violation is assigned. (Except for licensing violations, which have no time limit, subsequent offenses are those occurring within three years of the first offense.) Each point range corresponds to an Enforcement Code, which in turn determines the penalty. The penalties range from a warning letter to license revocation with the stipulation that the violator cannot reapply for licensing for two to five years.

Idaho: Hazardous Waste

The penalty calculation system has three parts: (1) determining a gravity-based penalty for a particular violation, (2) considering economic benefit of noncompliance where appropriate, and (3) adjusting the penalty for special circumstances.

(1) The Gravity-Based Penalty

Two factors are considered in determining the gravity-based penalty: the potential for harm and the extent of deviation from a statutory or regulatory requirement. These factors are divided into categories of major, moderate, and minor, and they are placed on each axis of a nine-celled matrix that determines the penalty range of a violation. The penalties range from $100 to the maximum of $10,000.

(a) Potential for Harm

The potential for harm resulting from a violation may be determined by the likelihood of exposure to hazardous waste posed by noncompliance and/or by the adverse effect noncompliance has on the purposes or procedures of the Hazardous Waste Management Act program.

(b) Extent of Deviation

The extent of deviation refers to the degree to which the violation renders inoperative the requirement violated.

Multiple penalties are assessed when a particular firm has violated several HWMA regulations, when different violations of the same section of the regulations constitute independent and substantially distinguishable violations, or when one company has violated the same requirement in substantially different locations.

Per-day penalties of up to $10,000 per day may be assessed for each day that noncompliance is assessed as a separate violation. In this case the gravity-based penalty from the matrix is multiplied by the number of days of violation.

(2) Economic Benefit Component

Where a company has derived significant savings by its failure to comply with the HWMA, the amount of economic benefit from noncompliance will be calculated and added to the gravity-based penalty. The types of benefit considered include delayed and avoided costs. The following formula is used:

Economic Benefit = Avoided Costs (1-T) + (Delayed Costs x Interest Rate)

[T = the firm's marginal tax rate, assumed to be 0.39]

In general the Idaho Department of Hazardous Waste will not settle a case for less than the amount of the economic benefit of noncompliance. However, there are four circumstances where such action may be appropriate: (1) when the economic benefit component is less than $200, (2) when there are compelling public concerns that would not be served by taking a case to trial, (3) when it is highly unlikely that IDHW will be able to recover the economic benefit in litigation, and (4) when the company has documented an inability to pay the total proposed penalty.

(3) Adjustment Factors

After the appropriate penalty is determined based on gravity and economic benefit, it may be adjusted based on the following factors: good faith efforts to comply/lack of good faith, degree of willfulness and/or negligence, history of noncompliance, ability to pay, or other unique factors. These adjustments apply only to the gravity-based penalty from the matrix, and not to the economic benefit component.

Idaho: Pesticides

Idaho lists violations of the Idaho Pesticide Law and divides them into four categories: use violations, non-use violations, licensing violations, and sales of restricted use pesticides. A different Penalty Assignment Schedule corresponds to

each of these categories. Within these schedules, the probability of adverse effects and the number of subsequent offenses are the factors used to determine the number of points a violation is assigned. (Except for licensing violations, which have no time limit, subsequent offenses are those occurring within three years of the first offense.) Each point range corresponds to an Enforcement Code, which in turn determines the penalty. The penalties range from a warning letter to license revocation with the stipulation that the violator cannot reapply for licensing for two to five years.

Idaho: Hazardous Waste

The penalty calculation system has three parts: (1) determining a gravity-based penalty for a particular violation, (2) considering economic benefit of noncompliance where appropriate, and (3) adjusting the penalty for special circumstances.

(1) The Gravity-Based Penalty

Two factors are considered in determining the gravity-based penalty: the potential for harm and the extent of deviation from a statutory or regulatory requirement. These factors are divided into categories of major, moderate, and minor and are placed on each axis of a nine-celled matrix that determines the penalty range of a violation. The penalties range from $100 to the maximum of $10,000.

(a) Potential for Harm

The potential for harm resulting from a violation may be determined by the likelihood of exposure to hazardous waste posed by noncompliance and/or by the adverse effect noncompliance has on the purposes or procedures of the Hazardous Waste Management Act program.

(b) Extent of Deviation

The extent of deviation refers to the degree to which the violation renders inoperative the requirement violated.

Multiple penalties are assessed when a particular firm has violated several HWMA regulations, when different violations of the same section of the regulations constitute independent and substantially distinguishable violations, or when one company has violated the same requirement in substantially different locations.

Per-day penalties of up to $10,000 per day may be assessed for each day that noncompliance is assessed as a separate violation. In this case the gravity-based penalty from the matrix is multiplied by the number of days of violation.

(2) Economic Benefit Component

Where a company has derived significant savings by its failure to comply with the HWMA, the amount of economic benefit from noncompliance will be calculated and added to the gravity-based penalty. The types of benefit considered include delayed and avoided costs. The following formula is used:

Economic Benefit = Avoided Costs (1-T) + (Delayed Costs x Interest Rate)

[T = the firm's marginal tax rate; assumed to be 0.39]

In general the Idaho Department of Hazardous Waste will not settle a case for less than the amount of the economic benefit of noncompliance. However, there are four circumstances where such action may be appropriate: (1) when the economic benefit component is less than $200, (2) when there are compelling public concerns that would not be served by taking a case to trial, (3) when it is highly unlikely that IDHW will be able to recover the economic benefit in litigation, and (4) when the company has documented an inability to pay the total proposed penalty.

(3) Adjustment Factors

After the appropriate penalty is determined based on gravity and economic benefit, it may be adjusted based on the following factors: good faith efforts to comply/lack of good faith, degree of willfulness and/or negligence, history of noncompliance, ability to pay, or other unique factors. These adjustments apply only to the gravity-based penalty from the matrix, and not to the economic benefit component.

Kansas: Water

Of the enforcement options listed in the Wastewater Enforcement Policy of Kansas, civil penalties are only assessed under the category of Administrative Orders. Orders are the strongest remedies available short of court

action. In order to select the appropriate enforcement option, the following factors are considered: environmental impact, recalcitrance or attitude, compliance history, organization size, and correction cost.

To calculate the penalty amount, this formula is used:

Number of days x $2,000 x A x B x C + D = Penalty Amount.

A = Stream Classification Factor

B = Environmental Effect Factor

C = Willfulness Factor

D = Economic Benefit

A) Stream Classification

Streams are classified according to their functions and their aquatic life. Streams that are listed for body contact recreation, special aquatic life use, and domestic water supply have a higher factor number than streams listed for non-contact and consumptive recreation and expected aquatic life, while those in turn have a higher factor number than streams listed for industrial, agricultural, or groundwater recharge use.

B) Environmental Effect

Violations are classified according to the resulting loss of fish, habitat, or wildlife, or the creation of a human health hazard. Those with more significant effects have correspondingly higher factor ratings.

C) Willfulness and Cooperation

The more intransigent and uncooperative the violator, the higher the factor rating.

D) Economic Benefit Factor

This factor includes the economic benefit of noncompliance plus the investigative costs. It also includes interest for the period of noncompliance and takes into account the inflation rate for the period of noncompliance. This penalty amount may be adjusted in the case of a small municipality where a significant hardship to the inhabitants would result. The amount may also be adjusted if it would result in extreme hardship or would impair the company's ability to make needed corrections.

New York: Air--Gasoline Vapor Recovery Systems

Penalties for violations of vapor recovery system requirements range from $2,500 to $20,000. Regulatory requirements affecting gasoline stations differ based on: installed tankage, annual throughput, and the age of the tankage.

Annual Gasoline Throughput for Facility (gallons) and Gasoline Tanks Size (gallons) form the axes of a matrix that determines the penalty range. There are separate matrices, one for the five boroughs of New York City, and one for counties of Nassau, Rockland, Suffolk, and Westchester.

Annual Gasoline Throughput for Facilities with Tanks of At Least 250 Gallons in size (gallons) and Tank Installation Date form the axes of another matrix that determines the penalties for violations of requirements. There are, again,

separate matrices for the boroughs of New York City and for the counties listed above.

A third type of matrix lists some operational violations and the corresponding recommended minimum enforcement response.

New York: Air--Other

Appendix IV of the Air Pollution Control Enforcement Guidance Memorandum lists a range of responses to the following categories of sources: (1) stationary combustion installations with a heat input less than 50 million BTU/hour, (2) process sources with actual emissions less than 10 tons per year, and (3) incinerators with a charging rate less than 2,000 pounds per hour. The penalties range from $150 to $2,000, plus any regulatory fees avoided.

New York: Freshwater Wetlands

The statutes applicable to the Freshwater Wetlands Enforcement Guidance Memorandum are the Freshwater Wetlands Act, the Stream Protection Act, Water Pollution Control, the Wild, Scenic, and Recreational Rivers System Act, Solid Waste Management Facilities, the Federal Clean Water Act, and Section 401 Water Quality Certification.

This memorandum lists a range of enforcement procedures and sanctions under state law. Under the latter category, a range of responses to ongoing violations is provided along with guidelines for determining penalty amounts. These amounts are based on the statutory maximum, the economic benefit of noncompliance, and the gravity of harm.

The Department requires complete restoration of the full functions and values of regulated wetland areas that have been illegally altered. Certain agricultural activities are expressly excluded from regulation under the Freshwater Wetlands Act.

New York: Pesticides

The Pesticide Enforcement Guidance Memorandum lists four sets of circumstances warranting the imposition of significant payable penalties: (1) where a business or individual engages in willful, bad faith, or negligent conduct that results in violation; (2) where a business or individual gains economic advantage by noncompliance; (3) where tangible public health and/or environmental damages are detected; and (4) where substantial administrative or judicial efforts are required to bring a business into compliance with well-defined legal obligations.

Violations are categorized into three tiers, with Tier #1 comprising those of the highest priority.

The memorandum lists enforcement procedures and minimum enforcement responses. The minimum penalty levels are doubled for second offenses and can be multiplied by the number of days a violation continues. Different types of violations are listed along with the corresponding minimum penalty levels. The penalties range from $25 to $5,000.

Utah: Air

Violations are grouped into four general categories based on the potential for harm and the nature and extent of the violations. The penalties range

from a maximum of $299 for Category D to a maximum of $10,000 for Category A. They may be adjusted based on five factors: (1) good faith efforts to comply or lack of good faith, (2) degree of willfulness or negligence, (3) history of compliance or noncompliance (4) economic benefit of noncompliance, and (5) inability to pay.

Monetary penalties may be suspended in exchange for expenditures resulting in additional controls and/or emissions reductions beyond those required to meet the existing requirements. Suspended penalties may be increased in amount as a deterrent to future violations.

Utah: Hazardous Waste

Violations of the Utah Solid and Hazardous Waste Act are classified as follows: a Class I violation is any deviation from the rule which poses direct and immediate harm or a potential for harm to public health and/or the environment. Class II includes any violation not considered Class I.

In determining whether to impose a civil penalty or the amount of a penalty, the following factors are considered: the magnitude of the violation, the degree of actual environmental harm or the potential for such harm created by the violation, the response and/or investigation costs incurred by the State and others, the economic benefit of noncompliance, recidivism of the violator, good faith efforts of the violator, the financial condition of the violator, and the possible deterrent effect of a penalty to prevent future violations.

Penalties range from $500 to $10,000 per violation. A penalty is multiplied by an appropriate factor based on the duration of the violation.

Utah: Radiation Control

Violations are categorized as either electronically produced radiation operations or radioactive materials operations. They are assigned one of five levels of severity based on their relative hazard, with Severity Level I for violations that are the most significant.

There are five enforcement actions that are available to the Executive Secretary: (1) notice of violation, (2) civil penalty, (3) orders, (4) escalation of enforcement sanctions, and (5) related administrative actions.

The maximum civil penalty is $5,000, and the minimum is $250. Each Severity Level has a corresponding penalty amount. Penalties may be adjusted based on the following factors: reporting and immediate correction of the violation, promptness and extent of corrective action, prior compliance, or multiple violations.

Utah: Underground Storage Tanks

When calculating a penalty, the Executive Secretary considers the following factors: economic benefit, gravity of the violation, environmental sensitivity, length of noncompliance, inability to pay, response and investigation costs incurred by the State and others, and the possible deterrent effect of a penalty to prevent future violations.

The gravity component, based on the extent of deviation from the rules and the potential for harm to health and the environment, may be adjusted depending on four considerations: (1) the degree of cooperation or noncooperation,

(2) the willfulness or negligence of the violation, (3) the history of noncompliance or compliance, and (4) other unique factors.

All cases involving major violations with actual or high-potential for harming public health or the environment, and all cases involving a history of noncompliance, will require a penalty.

Penalties are classified as major, moderate, or minor. The penalties range from a maximum of $3,000 for a minor violation to a maximum of $10,000 for a major violation.

Utah: Water Quality

Under the Utah Water Pollution Control Act, the maximum penalty is $10,000 per day for violations and $25,000 per day for willful violations. The following formula is used to determine the penalty:

Civil Penalty = Penalty + Adjustments - Economic and Legal Considerations

(1) Penalty

Violations are grouped into four main categories based on the nature and severity of the violation, and each category has a corresponding penalty range. The following factors are considered in determining where a penalty will fall within its range: history of compliance or noncompliance, degree of willfulness and/or negligence, and good faith efforts to comply.

(2) Adjustments

The penalty amount may be adjusted by the following factors: economic benefit resulting from noncompliance, investigative costs incurred by the State and/or other governmental levels, and documented monetary costs associated with environmental damage.

(3) Economic and Legal Considerations

The penalty may be adjusted downward or a delayed payment schedule may be used if there is a documented inability of the violator to pay. Also, a penalty may be adjusted downward in consideration of the potential for protracted litigation.

In exceptional cases, the penalty may be reduced if the violator undertakes in good faith an environmentally beneficial mitigation project.

West Virginia: Hazardous Waste

Civil administrative penalties are calculated by taking into account the following factors: the seriousness of the violation, negligence or good faith on the part of the violator, the type of facility, and any history of noncompliance by the violator.

(1) Seriousness of Violation

Each violation is rated on the extent of deviation from the requirement and on the potential harm which may have resulted from the violation. These ratings are used to determine the base penalty amount; there are different base penalties for hazardous waste and for solid waste violations. Base penalties for

hazardous waste violations range from $200 to $5,000, while base penalties for solid waste violations range from $100 to $3,500.

(2) Negligence/Good Faith

The negligence/good faith factor is rated on a scale from 1 to 10, where 1 is absolute good faith and 10 is absolute negligence. This rating is used to determine the multiplying factor to be applied to the base penalty amount. The multiplying factors range from 0.5, corresponding to a rating of 1, and 2.0, corresponding to a rating of 10.

(3) Adjustment Factor

The adjustment factor relates to the type of facility involved. Different facilities are assigned factors between 0.5 and 1.5. The subtotal calculated by the seriousness of the violation and negligence/good faith is multiplied by the adjustment factor.

(4) History of Noncompliance

The number of previous enforcement actions determines the dollar amount to be added to the penalty. For hazardous waste noncompliance, these amounts range from $250 for one previous violation to $5,500 for 7 or more previous violations. For solid waste noncompliance, the amounts range from $100 for one previous violation to over $3,000 for 10 or more previous violations.

The civil administrative penalty may not exceed the maximum assessments prescribed by the West Virginia Hazardous Waste Management Act and the West Virginia Solid Waste Management Act. The maximum for hazardous

waste violations is $7,500 per day per violation, up to a maximum total of $22,500. The maximum penalty for solid waste violations is $5,000 per day per violation, with a maximum total of $20,000.

West Virginia: Mining

The maximum civil penalty is $5,000 per violation, with each day of a continuing violation considered a separate violation. In determining the amount of the penalty, consideration is given to the operator's history of previous violations at the particular surface-mining operation, the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public, whether the operator was negligent, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of the violation.