

Penalties in Civil Enforcement Cases

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EPA's Mission

- Protect human health and the environment.
- EPA works to ensure that federal laws protecting human health and the environment are administered and enforced fairly, effectively, and as Congress intended.



The Importance of Pollution Detection Equipment During Inspections

- If Inspectors do not have pollution detectors, they will miss problems
- EPA Inspectors use a variety of instruments to detect emissions
- Enforcement can focus on sources of excess emissions
 - Sources are identified
 - Cases are settled with new controls



The Instrumented Inspector

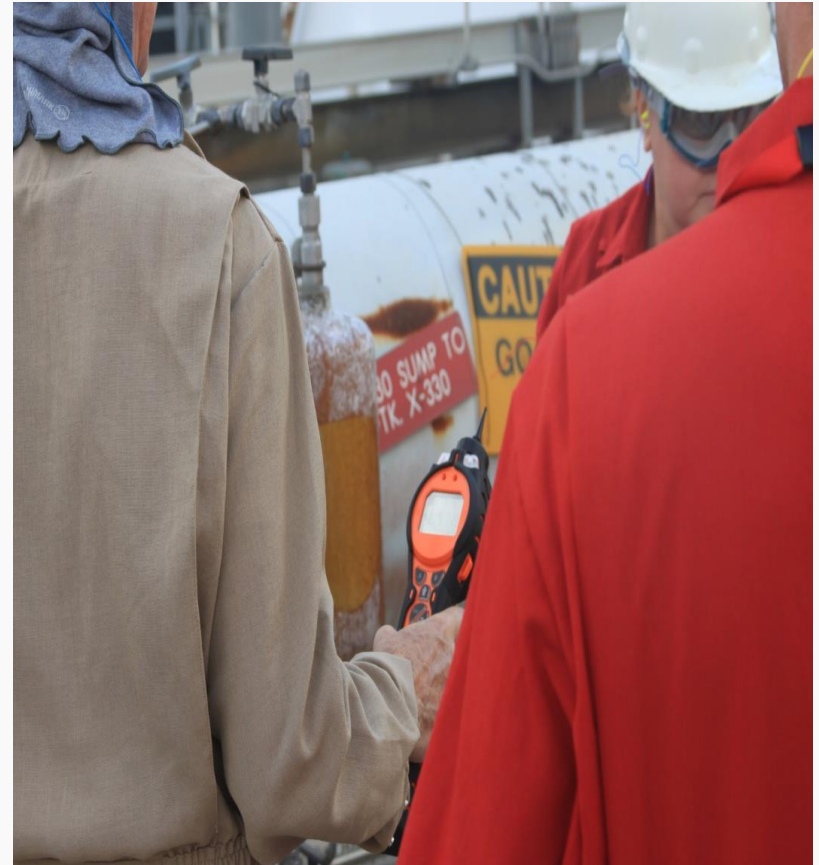
- Finding emissions of air pollutants requires the ability to find them using gas detection and gas imaging devices
- EPA Inspectors find emissions using field gas sensing instruments such as hand-held photo-ionization detectors and FLIR gas-imaging cameras
- Inspectors also have larger, vehicle-based pollution detectors





Photoionization Detectors

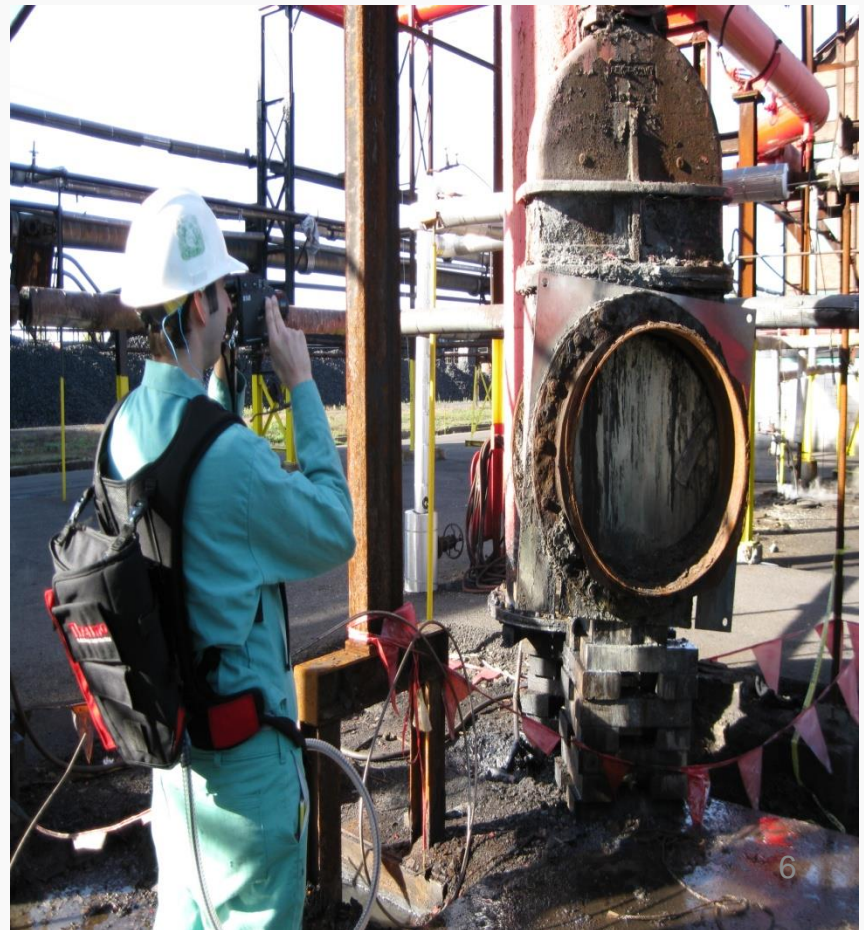
- Handheld
- Sensitive to ~1 ppb
- “Real-time” measurements
- Detects most VOCs and some inorganic gases
- Can detect process equipment leaks tens of feet away
- Used for screening storage tanks, wastewater treatment, and other sources for enforcement





FLIR (forward-looking infrared) Gas Imaging Cameras

- EPA inspectors can “see” VOC emissions using FLIR cameras
- Often used together with PIDs, FLIR cameras have transformed the way EPA conducts inspections





FLIR Camera Results



View of tank through naked eye.



View through FLIR camera



Paths to Resolve Enforcement

- Settlement
 - Judicial Consent Decree (penalty & pollution controls)
 - Administrative Settlement (penalty)
- Criminal Plea
- Litigation
 - Court (judge/jury) Decides if the Law Was Violated
 - If a Violation, Court (judge) Orders Action to Comply With Law and Imposes a Penalty



Three Enforcement Authorities

- Civil/Administrative
 - Internal, streamlined process with right to appeal
 - May still collect high penalties
- Civil/Judicial
 - Significant violations where judge's authority required
 - Useful for large penalties or expensive injunctive relief
- Criminal Prosecution
 - Knowing violation of environmental statutes.
 - May result in incarceration, fines, and/or other penalties



Overview of Civil Penalty Theory

- Deterrence Theory: 3 Factors
 1. Assurance of getting caught
 2. Promptness in the imposition of the sanction
 3. Appropriateness of the sanction



Types of Civil Enforcement Results

- Settlements
 - Administrative
 - Judicial
- Penalties
 - Monetary assessments paid by a person or regulated entity due to a violation or noncompliance.
- Injunctive Relief
- Supplemental Environmental Projects (SEPs) and Mitigation



Penalties and EPA Penalty Policy are Designed to:

1. Encourage compliance
2. Level the “playing field”
3. Provide incentives to fix problems quickly
4. Deter future noncompliance
5. Provide consistent, but flexible and fair, approach



Maximum Civil Penalties

- Environmental laws set maximum penalty amounts
- Inflation laws require penalty amounts to be adjusted periodically for inflation
 - Ensures EPA’s penalties remain sufficient to deter violations
 - EPA must issue inflation rule annually, using a formula provided by the inflation laws
- For instance, CWA 33 U.S.C. 1319(d) had a penalty of \$25,000 in 1987. In 2019, it’s \$54,833.



Civil Penalties and Penalty Policies

- To calculate and assess penalties, EPA uses:
 - statutory penalty factors, and
 - civil penalty policies that interpret how to apply the factors
- Civil penalty policies promote consistency and fairness
 - Penalties calculated using such policies are also easier to document and explain to violators, judges, and the public
 - Penalty policies typically include calculation sheets for computing penalty amounts



Two Main Components of Penalties

1) Gravity-Based Penalty

- Seriousness of the violation
- Actual and potential harm to the environment
- Harm to the regulatory program

2) Penalty to Recapture Economic Benefit

- Removes the economic advantage the violator received from not complying with the law
- Delaying or avoiding the payment of compliance costs, i.e., the money it saved
- To calculate economic benefit, EPA uses a computer model called BEN (available to public) that considers time value of money, inflation, and tax rates
- Wrongful profits



Additional Factors that Affect Penalties

- Degree of willfulness and/or negligence
- Degree of cooperation
- History of noncompliance
- Ability to pay
- Litigation risk
- Other factors as justice may require



Concept of Economic Benefit

- Definition: Economic benefit is the amount by which a company is financially better off due to not complying in a timely manner.
- Purpose of recapturing economic benefit:
 - Remove the economic savings a violator derives from its noncompliance.
 - Eliminate the incentive to delay or avoid compliance with laws and regulations.
 - Level the playing field among all regulated entities.



Economic Benefit Theory

- Underlying Financial Theory
 - Three ways a violator can save money by not installing pollution control equipment:
 - Delaying purchase of equipment
 - Avoiding purchase of equipment altogether
 - Avoiding annually reoccurring costs of operating and maintaining equipment.
 - Wrongful Profits (aka, illegal competitive advantage, beyond BEN)



Economic Benefit Theory (con't)

- Time value of money
 - A dollar today is worth more than a dollar one year from now. Why? Alternative investment returns.
- “Opportunity Cost” of compliance is based on what the company could earn if it reinvested back into company.



BEN Computer Model

– Using BEN

- Enter case data
- Create a “run”
- Enter run data
- Click “Calculate”.

A screenshot of the BEN computer model software interface. The window title is "BEN" and it has a menu bar with "File", "Window", and "Help". Below the menu bar are icons for file operations and help. The main area is titled "Case1" and is divided into several sections:

- Case:** Includes fields for "Case Name:", "Office/Agency:" (a dropdown menu), "Analyst:", "Statute:" (a dropdown menu), and "Taxes".
- Taxes:** A sub-section with "Entity" options: "C-Corporation" (selected with a radio button), "For-Profit Other than C-Corporation", "Not-for-Profit Organization", "Municipality", and "Federal Facility". Below this is a "State:" dropdown menu and a "Customize Taxes" button.
- Runs:** Includes a "New Run:" field with an "Add" button below it. Below that is an "Existing Runs:" area, which is currently empty, with buttons for "Enter/Edit", "Calculate", "Copy", "Rename", and "Remove" to its right.
- Penalty Payment Date:** A field at the bottom of the window.



Violator's Ability to Pay a Penalty

- Ability to pay (ATP) arises when EPA's statutes require case teams to consider the economic impact of the penalty on the violator
- ATP also arises when the violator cannot afford to pay the penalty and through policy EPA determines a lower penalty is warranted.



ATP Process

- Violator's duty to proffer enough financial information (e.g., federal tax returns, balance sheets) to show that it would suffer an undue financial hardship if it had to pay the full penalty
- If the violator meets its burden, the penalty may be adjusted down and/or the violator can pay penalty in installments
- If the violator does not meet its burden, it must pay the full penalty amount



EPA's ATP Computer Models

- ABEL Model – evaluates a corporation's or partnership's ability to afford civil penalties
- INDIPAY Model – evaluates an individual's ability to afford civil penalties
- MUNIPAY Model – evaluates a municipality's or regional utility's ability to afford civil penalties.



Special Circumstances that Can Affect Penalties

- Expedited Settlement Agreements (ESAs)
- Violator self-discloses violations to EPA – Penalty incentives for self-policing
- Violator is willing to perform a voluntary Supplemental Environmental Project (SEP)



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