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EPA's Penalties May Not Recover Economic Benefits Gained by Violators

Statement of
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Mr. Chairman and Members of the Committee:

We appreciate the opportunity to appear here today to discuss our report on the penalty policies and practices of the Environmental Protection Agency (EPA).[1] As you know, over the last several years, GAO and the EPA Inspector General have reported numerous instances in which EPA regional offices and the states assessed low penalties, or none at all, for significant violations of environmental regulations--this, despite an EPA policy that requires that penalties be at least as great as a company's economic benefit, that is, the amount by which a company would benefit by not being in compliance. These reports prompted you and the Chairman of the House Government Operations Committee to have us determine whether this situation still exists and, if so, what could be done to correct it.

In summary, we found that environmental enforcement problems are continuing and that EPA's actions to date have fallen short of correcting them. In nearly two out of three penalty cases concluded in fiscal year 1990 in EPA's four major regulatory programs--air, water, hazardous wastes, and toxic substances--there was no documentation showing that the economic benefit of the violation had been calculated or assessed. Thus, although the agency's final penalty assessments in these cases amounted to about

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[1] Environmental Enforcement: Penalties May Not Recover Economic Benefits Gained by Violators (GAO/RCED-91-166, June 17, 1991).

$28 million, the absence of documentation, a widespread problem, makes it impossible to calculate the amount that EPA should have collected at a minimum under its penalty policy. Furthermore, states and localities that are delegated the authority to enforce most EPA programs and that are responsible for the large majority of environmental enforcement actions taken in this country, are not even required to follow EPA's penalty policy of assessing a minimum economic benefit penalty. In our view, EPA will have to exercise much stronger oversight if it is serious about deterring violations, treating the regulated community consistently and fairly, and making sure that it has adequate management controls to ensure against fraud, waste, and abuse in its assessment and collection of penalties.

BACKGROUND

Before presenting our report findings in greater detail, let me offer some background on EPA's penalty policy and practices. EPA's Uniform Civil Penalty Policy, which has been in place since 1984, requires all EPA enforcement officials to assess penalties that are at least as great as the amount by which a company would benefit by not complying with the law. According to this policy, the final assessed penalty is supposed to include this minimum penalty--the economic benefit component--as well as a gravity component determined by the level of environmental harm caused by the violation. The policy allows enforcement officials to reduce

the gravity component during settlement negotiations for a variety of reasons, but it requires full recovery of the economic benefit component except under limited circumstances that EPA considers would occur only rarely. Each regulatory program also has its own civil penalty policy because of statutory differences, but they all establish economic benefit and gravity as the basis for penalties.

In a series of 10 program reviews conducted between 1988 and 1990, GAO and EPA's Inspector General documented numerous cases in which EPA regional offices and authorized states had not followed the agency's penalty policy and had assessed low or no penalties. Following these and other internal reviews, EPA identified enforcement as one of several areas within the agency particularly vulnerable to fraud, waste, and abuse because of the lack of management controls and the large dollar amounts involved. In its December 1990 report to the President under the Federal Managers' Financial Integrity Act, the agency said it believed that various activities undertaken in fiscal year 1990, such as greater headquarters' focus on penalties in annual reviews of regional enforcement programs, would correct penalty policy deficiencies. Overall, enforcement has received renewed attention under the current administration, as demonstrated by a recent strategic plan that emphasized strong enforcement practices, and according to officials we spoke with, EPA continues to believe that penalties should be high enough to serve as a deterrent to violations and to remove the economic benefit of noncompliance.

ASSESSED PENALTIES SHOW LITTLE RELATIONSHIP TO ECONOMIC BENEFIT

Despite the commitment of top management and recent increases in total penalties, penalty amounts still show little relationship to the economic benefit of the violations. Within the four programs we examined--air, water, hazardous wastes, and toxic substances--EPA provided data to us covering 685 cases that were concluded in fiscal year 1990. For 522 of these cases which had initial and final penalties recorded, EPA had initially assessed penalties of $66 million. Following settlement negotiations or litigation, the penalty amounts were reduced to about $28 million. However, in 65 percent of all 685 cases, EPA had no measure of how much it should have assessed, at a minimum, because the agency did not calculate--or at least document--the economic benefit to the violator, which, in theory, should have been the minimum amount of the penalty.

State and local penalty practices remain a concern as well since earlier reports indicate that economic benefit is not routinely recovered. In our 1990 review of enforcement in the Stationary Source Air Pollution Program,[2] we found that over half of the more than 1,100 significant violators that states and

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[2] Air Pollution: Improvements Needed in Detecting and Preventing Violations (GAO/RCED-90-155, Sept. 25, 1990).

localities had identified in 1988 and 1989 had paid no cash penalties at all. In another case, a facility that had failed to install required control equipment and had been emitting excess air pollutants for more than 6 years was ultimately assessed a penalty of $15,000. At our request, EPA's Enforcement Office calculated the economic benefit of the violation and found that it was in fact more than $231,000--about 15 times more than the penalty imposed. The local air agency official explained that the assessed penalty was in keeping with the customary penalty for such violations.

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

One of the most dramatic examples of this situation was the case of Avtex Fibers in Virginia. Avtex violated its wastewater discharge permit at least 1,600 times over a 9-year period. EPA and the State of Virginia also cited the company for contaminating groundwater and emitting into the air 770 times the allowed levels per hour of carbon disulfide. Yet, according to the Virginia Assistant Attorney General and information in EPA files, Avtex never paid a fine. The plant remained open until November 1989

when the State of Virginia revoked Avtex's discharge permit because it was discharging PCBs (a toxic substance) into the Shenandoah River. Because of groundwater contamination, the plant was placed on the Superfund National Priorities List for cleanup, after which the plant owners filed for bankruptcy protection. While the full amount cannot yet be reliably estimated, taxpayers may ultimately have to bear the brunt of cleanup costs, which EPA's project officer for the site believes will be the among the highest to date for Superfund sites.

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

Pressures To Reduce Penalties

According to both EPA headquarters and regional office officials, there are a variety of pressures and differing views that prevail within EPA regions that deter them from following the agency's penalty policy and recovering economic benefit. Some regional and program officials strongly endorse EPA's penalty policy and aim to carry it out. Others, however, who have a different philosophy of enforcement, choose to de-emphasize

penalties in favor of working with a violator to obtain compliance because of a belief that this approach will bring a larger number of facilities back into compliance. In addition, pressures to meet program targets for settled cases and limited budgetary resources may encourage regional officials to settle cases quickly rather than continue to negotiate or pursue a case through a hearing or trial in order to obtain an appropriate penalty. However, a continued reluctance to pursue high penalties can have a negative effect: Once violators recognize that EPA is unlikely to take them to court, they are less likely to settle on terms favorable to the government. And, in the long run, this can undermine the goal of having penalties serve as a deterrent to violations.

State and local enforcement agencies are likewise subject to pressures that make them reluctant to follow a penalty policy based on recovering economic benefit. For example, in a municipality we visited during a review of enforcement under the industrial wastewater pretreatment program,[3] we found that no industrial users had been fined, taken to court, or subject to any formal enforcement action. The town administrator told us he felt it was more prudent to obtain the cooperation of the town's industry than to alienate it by escalating enforcement action--even though the town's major industry was repeatedly violating its effluent

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

discharge limits. In addition, some states have legal limits on the dollar amounts they can assess for penalties.

OVERSIGHT OF REGIONAL AND STATE PENALTY PRACTICES IS INSUFFICIENT

Given the pressures that work against its penalty policy, EPA's oversight of penalty practices is critical. Yet EPA headquarters does not routinely monitor most regional penalty assessments. Civil judicial cases, which are imposed by the courts and make up 10 percent of EPA's caseload, are individually reviewed by EPA's Office of Enforcement, but these reviews are time-consuming and labor-intensive, according to EPA, and they are not capable of discerning any overall patterns or trends among programs and regions. Administrative penalties imposed by EPA, which make up about 90 percent of the caseload, are subject to review during annual audits, but these audits are concerned with many other aspects of enforcement besides penalties, and, because of time and resource constraints, only a small percentage of administrative cases are reviewed.

The Enforcement Office has a central reporting system that permits a review of trends in penalty practices among programs and regions, but it includes only civil judicial cases and, even for these, records only the initial and final penalty assessments. Although the system was originally designed to include information

on economic benefit and gravity components, these fields were eventually removed from the system because regional officials often did not enter the data.

In addition to the lack of information, oversight is also made more difficult by the fact that the organizational responsibilities for enforcement within EPA are diffuse: 15 offices are responsible for either setting or carrying out enforcement policies. Although at one time enforcement responsibilities were consolidated within EPA, two reorganizations in the early 1980s moved responsibility for enforcement to the individual program offices. Thus, for example, the Office of Water became responsible not only for writing regulations but also for enforcing them. This left a core of legal staff in the Office of Enforcement, but with little line authority over any of the program offices.

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

the program assistant administrators but have no formal connection to the Office of Enforcement.

EPA has acknowledged that oversight of regional penalty practices has been a problem, and in its fiscal year 1990 report to the President describing efforts to correct material weaknesses, it outlined a series of completed corrective actions. Among them was a memorandum from the Office of Enforcement to the regions reemphasizing the need to adhere to its uniform civil penalty policy and to document the reasons for any reductions of initial penalty requests. However, while these actions may emphasize the importance of the agency's penalty policy, they do not provide for comprehensive reviews or for a mechanism to follow through and make sure that regions are acting on this guidance.

EPA Oversight of States is Limited

EPA's oversight of state penalty practices is even more limited. Although we believe that EPA has the authority to do so, it has not required the states to adopt its own civil penalty policy. Instead, it has simply recommended that state penalty policies include an economic benefit component. One way in which EPA could require states to adopt an economic benefit policy is as a condition of its approval of a state program. We have, in fact, recommended that EPA impose such a requirement in recent reviews of

both air and hazardous waste programs.[4] While EPA would like to see states adopt an economic benefit policy, many officials are concerned that if states are required to do so, they will relinquish authority for their programs to EPA, a burden that these officials believe would be too difficult to assume.

Another way in which EPA can attempt to change state penalty practices is through its state program grants. The Resource Conservation and Recovery Act, the Clean Water Act, the Clean Air Act, and other statutes that provide for state delegation authorize EPA to provide grants to the states to run their programs. In theory, EPA can use a grant to bring about a change in a state program by attaching conditions to it. In those states that are willing to accept such a condition, requirements for an economic benefit penalty policy may be imposed relatively quickly--as part of an annual grant negotiation. By contrast, changing state programs through new regulatory requirements can take 3 to 5 years, or, in the case of state implementation plans, even longer.

CONCLUSIONS

In conclusion, I would like to offer several observations. The first has to do with EPA's civil penalty policy itself. This policy, in our view, is a reasonable one: It is simple to

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

understand, it treats all regulated entities fairly and comparably, it can be applied in any state or region, and it allows for exceptions when circumstances call for it. Moreover, having a standard on which to base penalties permits management to oversee numerous decisions with important monetary consequences.

My second point is that although EPA's top management remains committed to this policy, we are skeptical that its actions to date will be enough. Without evidence of sustained headquarters interest, EPA regional offices and states have little reason to make changes in their customary practices and beliefs. In order for its penalty policy to be successfully implemented over the long term, EPA needs to hold states and regions accountable for carrying it out by establishing internal controls to monitor their performance. Given the large dollar amounts involved in penalty collections, strengthening internal controls is crucial to avoid fraud, waste, and abuse.

Besides needing better information to oversee its penalty policy, EPA needs to have clearer lines of responsibility for taking any corrective action indicated by the information. However, we would not necessarily advocate a reorganization to remedy this situation. While consolidation of enforcement responsibilities may be needed to remedy the diffuse responsibility for enforcement within the agency, the need for and desirability of

such a move should be decided on the basis of more than just implementation of penalty policy.

Finally, with regard to state penalty practices, we believe that EPA has not only the authority but also sound reasons for requiring states to have a penalty policy that requires recovery of economic benefit. With states responsible for the large majority of enforcement actions, any policies that are set for federal practices alone will ultimately have little effect. As a basis for assessing penalties, economic benefit ensures that regulated facilities are penalized in the same way regardless of which state they are in or whether they are regulated by a state or federal agency. Using state grants as a vehicle for change may be effective as an interim step for states which are inclined to change their policies. However, EPA can only compel adherence by changing state program requirements. While such a requirement could cause states to return responsibility for regulatory programs to the federal government, we believe EPA has to be prepared to assume this burden when there is good reason, if its oversight role is to be taken seriously.

In our June 1991, report we recommended that the EPA Administrator institute the internal controls necessary to ensure that the agency's uniform civil penalty policy is followed:

-- First, he should require that EPA's regional offices provide information on all civil penalties for the Office of Enforcement's penalty reporting system and that they include initial calculations of economic benefit and gravity, subsequent revisions to these calculations, reasons for penalty reductions, and final penalty amounts.

-- Once the reporting system has been modified, the Administrator should identify the individuals or offices within the agency that will be responsible for monitoring penalty practices and for taking any corrective actions indicated.

-- The Administrator should also require states, in their federally-delegated air, hazardous waste, and water programs, to adopt economic benefit policies that are based on EPA's uniform civil penalty policy. In the interim, he should require economic benefit policies as conditions of annual program grants.

-- Finally, the Administrator should require states, once they have adopted economic benefit policies, to report final calculations of economic benefit and gravity, subsequent revisions to these calculations, reasons for penalty reductions, and final penalty amounts, as part of the enforcement information they now provide.

Mr. Chairman, this concludes my prepared remarks. I would be pleased to respond to any questions.