Negotiating EPA Penalties: EPA's Penalty Policies and the 2013 Civil Monetary Penalty Inflation Adjustment Rule

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On December 6, 2013, the U.S. Environmental Protection Agency (EPA) increased the statutory maximums for 20 of the 88 civil penalties it administers. At the same time, EPA also revised its civil penalty policies and increased the gravity-based component of all penalties by 4.87% for violations occurring after December 6, 2013.[1] These recent increases are an important reminder that EPA has the statutory authority to pursue significant, and in some cases enterprise-threatening, penalties for environmental violations.[2] But in assessing civil penalties in environmental enforcement cases, EPA case managers and attorneys do not simply apply statutory maximums; instead, they are guided by EPA's well-established penalty policies, which require the Agency to assess a number of aggravating and mitigating factors before determining an initial penalty demand.[3]

Pursuant to the Debt Collection Improvement Act (DCIA) of 1996,[4] every four years EPA must conduct a review of the civil monetary penalties under the statutes it administers and adjust these penalties for inflation. Because this adjustment in civil monetary penalties is accomplished using EPA's statutory rulemaking authority, these changes not only alter EPA's administrative process for pursuing penalties, they also modify the amount that a court could assess in the event of litigation. Although not required by the DCIA, EPA also administratively adjusted the gravity component of all civil penalties in its penalty policies on December 9, 2013, as it has done following DCIA penalty adjustments in the past.[5]

EPA's penalty policies apply two primary criteria in calculating penalties: (1) the economic benefit of noncompliance to the violator; and (2) the gravity of the violation. The policies also provide significant discretion to case managers and attorneys to adjust penalties based upon enumerated, case-specific criteria including the violator's degree of negligence or willfulness, its cooperation with the Agency, its past violations, and EPA's (or the U.S. Department of Justice's (DOJ's)) perceived litigation risks in the case. Following an explanation of EPA's recent changes to the civil penalty maximums and its penalty guidance, this Article describes EPA's general penalty policy, provides examples of how the penalty policies work under different EPA programs, and identifies instances in which the Agency's penalty calculations may be negotiable.

I. The 2013 Civil Monetary Penalty Inflation Adjustment Rule

On November 6, 2013, EPA promulgated a rule increasing the civil monetary penalties that may be assessed under many of the statutes it administers.[6] Pursuant to the DCIA,

Authors' Note: The opinions expressed herein are the authors' own and do not necessarily reflect the views of the U.S. Department of Justice or Latham & Watkins LLP or any of its clients.

1. *See* Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. §2461, *as amended by* Debt Collection Improvement Act of 1996, 31 U.S.C. §3701; Civil Monetary Penalty Inflation Adjustment Rule, 40 Part 19, 78 Fed. Reg. 66643 [hereinafter Inflation Adjustment Rule]. *See also* Cynthia Giles, U.S. EPA, Amendments to EPA's Civil Penalty Policies to Account for Inflation (2013) [hereinafter Giles Memorandum], *available at* http://www2.epa.gov/sites/production/files/2014-01/documents/guidancetoamendepapenaltypolicyforinflation.pdf.
2. *See* Robert Esworthy, Cong. Research Serv., Federal Pollution Control Laws: How Are They Enforced? (2013) (providing overview of federal environmental enforcement).
3. *See* Giles Memorandum, *supra* note 1 (attaching a complete list of EPA's penalty policies).
4. Debt Collection Improvement Act (DCIA) of 1996, 31 U.S.C. §3701.
5. Giles Memorandum, *supra* note 1, at 2 ("While not required specifically by the Act, we believe revising our civil penalty policies to account for inflation is consistent with the Congressional intent in passing the DCIA and is necessary to implement effectively the mandated penalty increases set forth in 40 C.F.R. Part 19.").
6. Inflation Adjustment Rule, *supra* note 1.

EPA must conduct a review of the civil monetary penalties under the statutes it administers and adjust the penalties for inflation every four years. On December 6, 2013, the final rule went into effect and EPA increased the maximum for 20 of 88 civil penalties.

The well-known $37,500 per-day statutory maximum penalty—levied for certain violations under many environmental statutes including the Toxic Substances Control Act (TSCA),[7] Clean Water Act (CWA),[8] Safe Drinking Water Act (SDWA),[9] Resource Conservation and Recovery Act (RCRA),[10] Clean Air Act (CAA),[11] and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[12]—did not change under the current rulemaking. However, a number of other important penalty values were adjusted by EPA's new rule. These include:

- The maximum penalty for discharging oil or hazardous substances under the CWA nearly doubled from $1,100 per barrel or unit of a "reportable quantity" of hazardous substance to $2,100 per unit.
- The maximum penalty that may be administratively assessed for discharging a pollutant into navigable waters without authorization increased from $177,500 to $187,500.
- The maximum penalty that can be administratively assessed by EPA for a violation of a state implementation plan under the CAA increased from $295,000 to $320,000.
- The maximum penalty for repeated violations of CERCLA provisions regarding release of hazardous substances, destruction of records, and violations of certain consent decrees and administrative orders increased from $107,500 to $117,500 per day.
- The maximum penalty for failing to report the release of an extremely hazardous substance under the Emergency Planning and Community Right-To-Know Act[13] likewise increased from $107,500 to $117,500 per day.

In order to calculate each new penalty, EPA compared the Consumer Price Index for All Urban Consumers (CPI-U) between 2012 and the last year that a specific penalty was adjusted. It then multiplied the percentage increase by the current civil penalty amount. If the resulting increase was sufficiently large to clear a rounding threshold, the rounded inflation increase was added to the current penalty amount. Because of the low rate of inflation since 2008, many penalties did not surpass this threshold.[14]

At the same time that EPA finalized these adjustments to statutory maximums, it also adjusted the gravity component of civil penalties in its civil penalty policies by 4.87%. The adjustment applies to all of EPA's civil penalty policies with the exception of the expedited settlement agreement program. EPA's latest inflation adjustment of 4.87% is much lower than the last three adjustments the Agency made to increase civil penalties, including adjustments of: 10% (1997-2004); 17.23% (2004-2009); and 9.83% (2009-2013).[15] In order to calculate penalty amounts for violations occurring after December 9, 2013, under penalty policies that predate January 30, 1997, a party must multiply the penalty amount found in the old policy by all of the previous inflation adjustments (cumulatively 1.4853 or an increase of 48.53%).[16]

II. Components of a Civil Penalty

In February 1984, EPA issued two policy memoranda setting forth the underlying basis and objectives for its penalty policies under its various programs.[17] Although EPA left it to each program to develop its own individual penalty policy, the Agency's policy memo and framework memo provide a general outline of the basic components considered in each program penalty policy. The primary goal of EPA penalties is deterrence. The penalties are intended to "persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence)."[18] According to EPA, in order to achieve the goal of deterrence, the penalty must prevent a violator from benefiting competitively from its noncompliance. At a minimum, the Agency therefore seeks to remove any economic benefit derived from noncompliance with environmental laws. EPA refers to this as the economic benefit component of the civil penalty and it is only intended to place the violator on the same footing as if the violator had complied with the law. But in order to punish the violator, EPA also takes into account an additional gravity component to the penalty. The gravity component of the penalty considers the seriousness of the violation, the scale of the violation, and the potential for harm to human health and the environment.

Together, the economic benefit component and gravity component comprise the preliminary deterrence amount. After calculating this preliminary deterrence amount, EPA then considers issues of fairness, equity, and program goals and adjusts the penalty amount up or down based on additional factors including: (1) the degree of willfulness or negligence of the violator; (2) the violator's history

7. 15 U.S.C. §§2601-2692, ELR Stat. TSCA §§2-412.
8. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
9. 42 U.S.C. §§300f to 300j-26, ELR Stat. SDWA §§1401-1465.
10. 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011.
11. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
12. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.
13. 42 U.S.C. §§11001-11050.
14. A list of all of the updated penalty values can be found in Table 1 of the rule, and has been codified at 40 C.F.R. §19.4. *See* Inflation Adjustment Rule, *supra* note 1.
15. Giles Memorandum, *supra* note 1, at 5.
16. *Id.*
17. *See* U.S. EPA, Policy on Civil Penalties (General Enforcement Policy #GM-21) (1984) [hereinafter EPA Penalty Policy] *and* U.S. EPA, A Framework for Statute-Specific Approaches to Penalty Assessments (General Enforcement Policy #GM-22) (1984) [hereinafter EPA Framework Policy], *available at* http://www2.epa.gov/sites/production/files/documents/epapolicy-civilpenalties021684.pdf. *See also* Giles Memorandum, *supra* note 1, and attachments.
18. EPA Penalty Policy, *supra* note 17, at 3.

of noncompliance; (3) the violator's ability to pay; (4) the violator's degree of cooperation with EPA; and (5) other case-specific factors including litigation risk.[19] The civil penalty amount EPA ultimately pursues from the violator depends on the context of the case and can change over the course of settlement negotiations and during litigation. EPA provides incentives to violators to settle cases early with the Agency, and disincentives to aggressively litigate alleged violations.[20] If a case proceeds to trial, EPA often pursues statutory maximums, but it will ultimately be left to the discretion of the court to determine how to apply the penalty factors under the statute.[21]

A. *Economic Benefit*

Under EPA's penalty policies, the economic benefit component of a civil penalty focuses on the benefits an environmental violator derives from noncompliance with environmental laws including:

- benefits from delaying environmental expenditures.
- benefits from avoiding environmental costs.
- benefits derived from an unfair competitive advantage.[22]

The Agency focuses on recovering any benefits the violator accrues from deferring or avoiding environmental costs. For example, a party may intentionally delay capital improvements to a sewer system or a party may seek to permanently avoid costs of compliance by failing to install air pollution control equipment. In such cases, EPA will seek recovery of any financial benefit realized from delaying or avoiding compliance, including operation and maintenance and financing costs. The Agency uses a computer program, known as the BEN model, to determine the economic benefit of delayed or avoided compliance.[23] The BEN model includes tax rates, inflation rates, compound interest, and discount rates and helps EPA calculate the costs a defendant would have incurred by delaying capital improvements, one-time nondepreciable expenditures (for example, setting up a pollution reporting system), and the costs the defendant may have avoided by not operating and maintaining pollution control equipment during the period of noncompliance.[24]

In some situations, EPA may also seek to recover economic benefits related to the competitive advantage realized from violating environmental laws. For example, in *United States v. Union Township*, EPA and the defendant, Dean Dairy, agreed that under the BEN model, the dairy had not realized any cost savings by delaying capital improvements to its wastewater management system. In fact, delaying these improvements had resulted in *increased* capital costs. But EPA nonetheless pursued, and had over $2 million in economic benefit penalties upheld by the U.S. Court of Appeals for the Third Circuit, because the dairy was able to maintain increased milk production during the period in which it delayed installation of upgrades to its wastewater treatment system.[25]

Although it is "general Agency policy not to settle for less than" the amount of economic benefit, and many environmental statutes specifically require recovery of economic benefits,[26] EPA may make exceptions if the economic benefit is insignificant, there are compelling public policy reasons for not pursuing economic benefit (including plant closings, bankruptcy, or extreme financial burdens), or if there are litigation practicalities militating against a higher economic benefit penalty (including the risk of negative precedent, equity issues, or evidentiary problems).

Although it may be difficult in theory to challenge an economic benefit calculation, it is important to probe the assumptions EPA makes in determining the cost of projects and the potential benefits of delaying or avoiding compliance. The information EPA uses to calculate environmental benefits may be derived from material obtained from the defendant through an information request, or it may be based on the Agency's own experience with pollution control and monitoring projects. In some cases, EPA may make incorrect assumptions about the costs of labor or the materials used in a project or may wrongly conclude, based on incomplete information, that there was a benefit derived from a delay or noncompliance, when, in fact, there was no benefit realized.[27] Although the BEN model helps provide some consistency across cases in calculating economic benefit, EPA or its experts may still take incorrect positions in calculating interest rates, tax benefits, or the time value of money. In one such case, the Third Circuit faulted the Agency's attempt to use an interest rate of 12.73% per year in determining economic benefit and concluded the Agency was going far beyond "leveling the economic playing field."[28] If a case proceeds to trial, defendants should

19. EPA Penalty Policy, *supra* note 17, at 3-5.
20. *Id.* at 6.
21. *See* Tull v. United States, 481 U.S. 412, 427, 17 ELR 20667 (1987):
> Since Congress itself may fix the civil penalties, it may delegate that determination to trial judges. In this case, highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by judges.

United States v. DiPaolo, 466 F. Supp. 2d 476, 486 (S.D.N.Y. 2006) ("The actual amount of the fine, within the statutory framework, is left to this court's sound discretion.").
22. EPA Framework Policy, *supra* note 17, at 6-10.
23. U.S. EPA, Office of Enforcement, BEN User's Manual (1993) (available online with installation of computer model). EPA uses a separate model to calculate violations of CAA §120. *Id.* at 1.
24. U.S. EPA, BEN User's Manual 1-2; Robert H. Fuhrman, *The Role of EPA's BEN Model in Establishing Civil Penalties*, 21 ELR 10246 (May 1991).
25. United States v. Union Twp., 150 F.3d 259 (3d Cir. 1998).
26. Fuhrman, *supra* note 24, at 10246 n.5 (citing as an example CAA §113, 42 U.S.C. §7413(3)).
27. Jonathan Libber, Making the Polluter Pay: EPA's Experience in Recapturing a Violator's Economic Benefit From Noncompliance, 5th Annual Conf. on Environmental Compliance & Enforcement (1998), at 468 n.13 ("In some violations, there are virtually no delayed or avoided costs. Neither is there any benefit from an illegal competitive advantage. These are typically paperwork types of violations (e.g., failure to label a PCB transformer under TSCA).").
28. United States v. Allegheny Ludlum Corp., 366 F.3d 164, 194 (3d Cir. 2004); *see also* United States v. Smithfield Foods, Inc., 191 F.3d 516, 531, 30 ELR 20076 (4th Cir. 1999) (remanding district court penalty decision in which EPA expert admitted to minor errors in calculating economic benefit).

consider hiring an economist as an expert to investigate and potentially challenge an economic benefit calculation by EPA that appears grossly disproportionate to the economic realities of the alleged noncompliance.

B. Gravity

The gravity component of a penalty is intended to respond to the seriousness of the environmental violation. Each environmental program is charged with developing a system for identifying the seriousness of a statutory or regulatory violation that ensures similar outcomes for similar violations. Among other factors programs use in considering the size of the gravity component of the penalty, EPA considers the actual or potential harm of the activity to the environment and human health and whether it was likely to result in a discharge or exposure. In assessing the potential for harm, the Agency looks specifically at the amount of the pollutant released, its toxicity, the sensitivity of the environment to the pollutant, and the length of the violation.[29] The Agency also considers the importance of achieving the environmental goal of the statute or regulation, for example whether the statute or regulation achieves a modest goal (like a technical requirement), or directly impacts human health or the environment. EPA also considers whether the violation involves data not otherwise available to the Agency and that, in essence, masks other violations that could pose serious threats to human health or the environment.[30] Importantly, the potential for harm component of a civil penalty evaluates just that—the *potential* for harm; thus, substantial penalties may ensue even when there has been no evidence of *actual* harm to human health or the environment.[31]

As an example of a gravity calculation, under the RCRA penalty policy, EPA categorizes violations into major, moderate, and minor categories, depending on the potential for harm from the violations and the alleged violator's degree of noncompliance.[32] The violations with the most significant threat to human health and the environment and the most significant level of noncompliance fall into the highest penalty range in the matrix (shown below). Failure to complete the correct paperwork to ensure that adequate funds are available for treatment of hazardous waste following the closure of a RCRA facility under 40 C.F.R. §265.143 is cited in the RCRA penalty policy as an example of a violation that creates "major" potential for harm. If absolutely no paperwork was submitted to EPA regarding the planned closure, that would also be a "major" deviation from the RCRA requirement, and the facility would be subject to the maximum penalty range of $28,330 to $37,500 under the RCRA penalty policy, with further adjustments based on the days of violation, number of violations, and other flexibility-adjustment factors.[33]

	Extent of Deviation From RCRA Requirement		
Potential for Harm From RCRA Violation	**MAJOR**	**MODERATE**	**MINOR**
MAJOR	$37,500 to $28,330	$28,330 to $21,250	$21,250 to $15,580
MODERATE	$15,580 to $11,330	$11,330 to $7,090	$7,090 to $4,250
MINOR	$4,250 to $2,130	$2,130 to $710	$710 to $150

Alleged violators of RCRA, or any other environmental law, should always investigate EPA's assumptions and methodological approaches in determining the alleged seriousness of violations. During settlement negotiations, violators should consider providing the Agency with countervailing evidence regarding the amount of pollution released; the methodology used for calculating emissions, releases, or discharges; and any mitigating information regarding the alleged noncompliance and the potential for harm of the pollution to human health and the environment.

Finally, the size of the violator may impact the gravity component of a penalty because EPA may need to adjust penalties to ensure that the penalty amount has a sufficient deterrent effect on the violator. The Agency takes into account that any penalty is understood to have a much more significant impact on a small family-owned business than a major multinational corporation. Under the CAA Stationary Source Civil Penalty Policy, EPA assesses this component of the penalty by determining the net worth of the corporation or the net current assets of a partnership or sole proprietorship.[34] The size of violator penalty enhancement ranges from $2,000 for entities with less than $100,000 in assets to over $70,000 for entities with

29. EPA Framework Policy, *supra* note 17, at 15-16.
30. For example, under the RCRA penalty policy, a larger penalty is presumptively appropriate where the violation significantly impairs the ability of the hazardous waste management system to prevent and detect releases. *See* U.S. EPA, RCRA Enforcement Div., Civil Penalty Policy (2003) [hereinafter RCRA Penalty Policy], at 13, *available at* http://www2.epa.gov/enforcement/resource-conservation-and-recovery-act-rcra-civil-penalty-policy.
31. *See* U.S. EPA, Office of Enforcement and Compliance Assurance, Civil Penalty Policy for CWA §§311(b)(3) and 311(j) (1998), at 12 (explaining that although the environmental impact of a spill can be greatly reduced by intervening factors that are not attributable to the discharger, such as wind, tides, and weather, these factors should not affect the penalty amount), *available at* http://www2.epa.gov/enforcement/civil-penalty-policy-section-311b3-and-section-311j-clean-water-act-cwa-august-1998; Newell Recycling Co. v. EPA, 231 F.3d 204, 208, 31 ELR 20271 (5th Cir. 2000) (stating in an appeal of a penalty under TSCA for violating the disposal requirements for polychlorinated biphenyls (PCBs) that "although the [$1.345 million] penalty here strikes us as severe since there was no actual harm, we cannot disturb it.").
32. RCRA Penalty Policy, *supra* note 30, at 15-17.
33. Rosemarie A. Kelley, U.S. EPA, Revision to Adjusted Penalty Provision Matrices Package (2009), Attachment B (updating penalty matrix for inflation); RCRA Penalty Policy, *supra* note 30, at 15-19.
34. U.S. EPA, Office of Air and Radiation, Office of Enforcement and Compliance Assurance, Clean Air Act: Stationary Source Civil Penalty Policy 14 (1991) [hereinafter CAA Stationary Source Penalty Policy], *available at* http://www2.epa.gov/sites/production/files/documents/penpol.pdf.

more than $100 million in assets.[35] Importantly, this penalty amount should only take into account the net worth or assets of the entity accused of committing the violation. The assets of parent entities should not be considered unless the parent is involved in the violation.[36] If the size of violator component of the penalty is grossly disproportionate to the rest of the penalty (more than 50% of the total economic benefit and gravity amounts), defendants should seek a discretionary reduction from the EPA case team.[37]

C. Flexibility-Adjustment Factors

In addition to the economic benefit and gravity components of penalties, EPA may also apply a number of case-specific factors to adjust penalties upward or downward. The Agency leaves an adjustment up or down of 0-20% of the gravity component of the penalty to the discretion of the case development team (requiring no EPA management approval). A second adjustment of 21-30% is permitted only in unusual circumstances, and adjustments larger than 30% are only permitted in extraordinary circumstances.[38] Among the factors that EPA reviews in determining whether an adjustment is warranted are:

- degree of willfulness or negligence.
- degree of cooperation or noncooperation.
- history of noncompliance.
- ability to pay.
- other unique case-specific factors.[39]

In assessing degree of willfulness, EPA looks at how much control the violator had over the events resulting in the violation, the foreseeability of the violation, the level of sophistication of the violator, whether the violator knew or should have known about the hazards of its conduct, whether the violator in fact knew of the legal requirement that was violated, and whether it took reasonable precautions to prevent the events resulting in the violation.[40] Under the CAA penalty policy, and under other strict liability environmental statutes, this is a factor that is only used to enhance penalties when the conduct of the violator is less than criminal, but still negligent or willful.[41]

In determining whether cooperation or noncooperation should be used to adjust a penalty, EPA looks to whether noncompliance was promptly reported to EPA and promptly corrected by the violator. To obtain a reduction under this factor, the violation must be corrected prior to litigation: "In general, the earlier the violator instituted corrective action after discovery of the violation and the more complete the corrective action instituted, the larger the penalty reduction EPA will consider."[42] EPA attempts to use this factor to strongly discourage parties from litigating prior to correcting environmental violations.

In addition to these adjustments, EPA may adjust penalties based on a violator's history of noncompliance. In assessing prior noncompliance, the Agency reviews the similarity, number, recency, as well as the response of the violator to previous violations.[43] In assessing the similarity of violations, EPA focuses on whether the party violated the same permit, statute, or regulatory provision, whether the violation involved the same substance or process points, or whether there was a similar act or omission. The case team has discretion to adjust the gravity component upwards between 35-70% for repeat violations.[44] If a violator does not have the ability to pay a penalty, a case team can agree to a delayed payment schedule or alternative penalties.[45] EPA uses various computer models to determine how much small companies and partnerships (ABEL), individuals (INDIPAY), and municipalities (MUNIPAY) can afford to pay in penalties.[46] Finally, the case team has the absolute discretion to adjust the gravity component of a penalty up or down by 10% for any other program-specific reason, including public policy concerns or because of the strengths or equities (including litigation risks) in any particular case.

D. Supplemental Environmental Projects

Supplemental environmental projects (SEPs) are one well-established avenue defendants in environmental enforcement cases use to directly benefit the environment, avoid the stigma of large civil penalties, and reduce penalty amounts paid to the United States. A SEP is a voluntary environmentally beneficial project that is performed by the defendant in exchange for mitigation of a civil penalty. SEPs must satisfy a number of requirements including: (1) they must be related to the defendant's violations (also known as the "nexus" requirement); (2) they must improve, protect, or reduce risk to public health or the environment; and (3) the project must be a project that the violator is

35. *Id.* Again, these penalty numbers should be adjusted for inflation. Granta Y. Nakayama, U.S. EPA, Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule 5 (2008), *available at* http://www2.epa.gov/sites/production/files/documents/amendmentstopenaltypolicies-implementpenaltyinflationrule08.pdf.
36. CAA Stationary Source Penalty Policy, *supra* note 34, at 15.
37. *Id.*
38. EPA Framework Policy, *supra* note 17, at 17.
39. *Id.* at 17-24.
40. *Id.* at 17-18.
41. CAA Stationary Source Penalty Policy, *supra* note 34, at 16.
42. EPA Framework Policy, *supra* note 17, at 20.
43. *Id.* at 21-22.
44. *Id.* at 22.
45. *See, e.g.*, In re Lu Vern G. Kienast, Initial Decision, No. CAA-5-2001-007 (Aug. 7, 2003) (reducing EPA's suggested penalty of $113,600 to $35,000 due in part to the size of the violator's business and the perceived impact of the penalty on the business), *available at* http://www.epa.gov/oalj/orders/kienast-id.pdf; *decision declared final*, In re Lu Vern G. Kienast, Appeal No. CAA 03-(03) (Sept. 16, 2004), *available at* http://www.epa.gov/eab/orders/kienast.pdf.
46. U.S. EPA, Penalty and Financial Models (last visited July 9, 2014), *available at* http://www2.epa.gov/enforcement/penalty-and-financial-models. *See also* Thomas L. Adams Jr., U.S. EPA, Guidance on Determining a Violator's Ability to Pay a Civil Penalty (1986), *available at* http://www2.epa.gov/sites/production/files/documents/civilpenalty-violators.pdf.

not otherwise required to perform.[47] SEP funds cannot be controlled by EPA, and SEP projects cannot be related to projects funded by the U.S. government.[48] Although a SEP can significantly reduce the amount owed in civil penalties, it cannot completely eliminate penalties.[49] And, with few exceptions, the cost of the SEP must always exceed the amount of mitigated penalties.[50] In many cases, EPA or DOJ may request that the project costs be double the amount of mitigated penalties, but a defendant may be able to negotiate mitigation closer to a dollar-for-dollar offset if it is a small business, government entity, or nonprofit organization or if the SEP implements a "pollution prevention" project.[51]

Popular examples of SEP projects in CAA cases include converting vehicles to natural gas, energy-efficiency audits and upgrades at schools, and solar retrofit projects at public buildings.[52] Defendants should be wary of agreeing to projects that will be difficult to manage or that may be completed without exhausting all funds allocated to the project. Fulfillment of SEP obligations is an enforceable part of a settlement agreement, and failure to complete projects or spend all project funds can result in stipulated penalties or a new EPA enforcement action.[53]

III. Conclusion

The amount that EPA has recovered in administrative and judicial penalties in environmental enforcement cases has steadily increased over time.[54] This increase first began with the introduction of EPA's BEN model in 1984, and with the corresponding emphasis on recovering economic benefits in environmental cases. Following introduction of the BEN model, civil penalty recoveries in environmental enforcement cases immediately jumped from $6 million to $23 million, and steadily increased to upwards of $100 million by the mid-1990s.[55] More recently, between 2008 and 2012, the amount EPA recovered in administrative actions increased from approximately $38 million to $52 million, and the amount it recovered in civil judicial actions jumped from $88 million to $155.5 million.[56] Although the Agency plans to dramatically reduce environmental inspections and the number of enforcement cases it brings over the next five years as it implements its Next Generation Compliance program,[57] it may be more aggressive in seeking higher penalties in the cases it does pursue.

Following the receipt of a notice of violation or notice of intent to file an administrative suit from EPA that includes a penalty demand, parties should carefully study the alleged violations and EPA's proposed penalty and compare them to the applicable program penalty guidance. EPA's proposed penalty should almost always be construed as the first offer in a penalty negotiation that may require defendants to hire outside environmental counsel and an economic expert and share additional information with EPA that may rebut the Agency's penalty calculations.

47. Steven A. Herman, U.S. EPA, Issuance of Final Supplemental Environmental Projects Policy 5-7 (1998) [hereinafter SEP Policy], *available at* http://water.epa.gov/lawsregs/guidance/sdwa/upload/wsg_105.pdf.
48. *Id*. EPA and DOJ will not approve projects that could potentially violate the Miscellaneous Receipts Act (MRA), 31 U.S.C. §3302. *See* Brian McLean, U.S. EPA, A Toolkit for States: Using Supplemental Environmental Projects (SEPs) to Promote Energy Efficiency (EE) and Renewable Energy (2005) [hereinafter SEP Toolkit], at 9, *available at* http://epa.gov/statelocalclimate/documents/pdf/sep_toolkit.pdf. The MRA prohibits SEPs that involve: (1) donations to third parties; (2) EPA management of SEP funds; (3) supplementing congressional appropriations; (4) EPA's existing statutory obligations to perform a specific activity; or (5) funding projects for which a violator is already receiving federal assistance (including loans or grants).
49. SEP Toolkit, *supra* note 48, at 9 ("In EPA settlements including SEPs, a minimum penalty amount is still required to maintain the deterrent effect of violating environmental laws and regulation.").
50. SEP Policy, *supra* note 47, at 16.
51. Eric V. Schaeffer, U.S. EPA, Appropriate Penalty Mitigation Credit Under the SEP Policy, 1 (2000), *available at* http://www2.epa.gov/enforcement/appropriate-penalty-mitigation-credit-under-supplemental-environmental-projects-sep.
52. SEP Toolkit, *supra* note 48, at 17-23.
53. SEP Policy, *supra* note 47, at 18.
54. With few exceptions, the amounts defendants pay in civil penalties are paid directly into the U.S. Treasury, and do not fund either EPA or DOJ. The CERCLA Superfund is the most notable exception. Penalties paid under Title I of CERCLA are appropriated to the Superfund by statute. 26 U.S.C. §9507(b)(4).
55. Libber, *supra* note 27, at 468.
56. Esworthy, *supra* note 2, at 49. EPA recovered over $1.1 billion in civil penalties in 2013, in large part because of its $1 billion settlement with Transocean Ltd. as a result of the *Deepwater Horizon* oil spill. *See* U.S. EPA, Office of the Chief Financial Officer, Pub. No. EPA-190-S-14-001, FY 2015 Budget in Brief (2014), at 61, *available at* http://www2.epa.gov/sites/production/files/2014-03/documents/fy15_bib.pdf.
57. U.S. EPA, Fiscal Year 2014-2018 Strategic Plan (2014), *available at* http://www2.epa.gov/sites/production/files/2014-04/documents/epa_strategic_plan_fy14-18.pdf. EPA plans to reduce inspections by approximately 25%, the initiation of enforcement cases by approximately 28%, and the conclusion of enforcement cases by approximately 28%. *Id.* at 92-93.