

PENALTIES AND OTHER REMEDIES FOR ENVIRONMENTAL VIOLATIONS: AN OVERVIEW

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SUMMARY

This article provides an overview of the functions and unique features of penalties and other remedies available to legislators, administrators and judges who seek to enforce existing environmental laws and regulations and/or to deter, both generally and specifically, future non-compliance.

1 INTRODUCTION

The article begins by surveying variations on the traditional remedy of money damages. It then discusses the appropriateness of alternatives such as restitution, injunction and declaratory remedies. This discussion is followed by an overview of the penalty options available to policy makers for harms to the environment and/or persons and for non-compliance with environmental laws and regulations. The article provides a background analysis of the critical formulation of civil penalties, with the aim of ensuring that the economic benefit of non-compliance is outweighed by the punishment facing regulated entities for non-compliance. Mitigating and aggravating factors in individual cases are also considered. This analysis is followed by a discussion of the differences between criminal and civil penalties and the appropriateness and underlying bases of each form of penalty. Finally, the article offers a brief discussion of alternative penalties available to policy makers, in addition to the traditional criminal and civil penalties available, by surveying environmental enforcement alternatives in use by environmental administrators in the United States and Canada.

2 TYPES OF REMEDIES

2.1 Damages

Damages are a financial remedy administered with the aim of providing the plaintiff with monetary compensation equivalent to his or her losses resulting from the actions of the defendant.¹ Types of damages include:

- General Damages: The market value of the damage to the plaintiff caused by the defendant (e.g., the difference between the market value of a property immediately before a harm and its market value after the harm²).
- Consequential Damages: Those damages incurred after the initial loss as a direct consequence of the initial harm. These damages are usually used when the full value of the loss cannot be calculated by market mechanisms or when the full value of the loss is not represented in the calculation of market loss.³
- Substitution Cost: Used when there is a large difference between the replacement value and market value of a property to the plaintiff (e.g., when a particular piece of property has an unquantifiable sentimental value to its owner⁴).
- Punitive or Exemplary Damages: Intended to punish the defendant, in

addition to compensating the plaintiff, and deter future wrongs by the defendant and others.

- Standardized Damages: Damages generally provided under a statutory framework, but calculated for the particular plaintiff.⁵
- Litigation Costs: These damages allow a party to recover reasonable attorney's fees accrued in the course of litigation. They are frequently provided for under civil rights, employment discrimination and environmental statutes.
- Adjustments for Time Differentials: When interest and present value are used to calculate compensation payments made to the plaintiff for injuries occurring long after the initial harm has occurred or for future harm.
- Adjustments for Benefits Reaped or Harms Avoided by the Plaintiff: Plaintiff usually has a responsibility to take reasonable measures to avoid damages.

2.2 Alternative Remedies

2.2.1 Restitutive Remedies

Restitutive remedies are a form of damages used to prevent unjust enrichment by making defendants give up what they wrongly obtained from plaintiffs.⁶ Restitution can take on a punitive element when the restitution exceeds both the plaintiff's losses and the defendant's gains.

- Restitution in Specie: Where restitution is in-kind rather than money damages.
- Measurement of Defendant's Benefits: Measures the increased assets in the hands of the defendant from the receipt of property.⁷
- Market Value: Measures the market value of services provided to defendant regardless of their value to the defendant.
- Use Value: Measures the value of any benefits received by the defendant as measured by market indicators or actual

gains to the defendant.

- Gains Realized: Measures the actual gains realized by the defendant upon the sale or transfer of an asset received from the plaintiff.
- Savings or Profits: Measures the value of savings or profits earned by the defendant in the use of assets received from the plaintiff. This is an extraordinary remedy because of the difficulty in separating the defendant's efforts from the plaintiff's assets.

2.2.2 Coercive Remedies

Typified by an injunction, this type of remedy coerces the defendant to act or not act under threat of being found in contempt, which subsequently results in fines or imprisonment.⁸

- Specific Performance: Compels defendant to perform or not to perform a specific action ordered by the court.
- Structural Injunction: Used to restore public institutions such as schools or prisons and to force compliance with constitutional or statutory requirements.
- Provisional Injunctions: Temporary restraining orders and preliminary injunctions issued before a trial begins to prevent some irreparable harm or alleviate the threat of an imminent emergency.

2.2.3 Declaratory Remedies

An authoritative and reliable statement of the parties' rights with no award of damages, restitution or injunction. This remedy is often useful in contract cases when the parties need to know their rights and duties under the contract or when a citizen is confronted with regulation that may be unconstitutional and seeks to clarify the validity of the regulation without first breaching that regulation.⁹

3 PENALTIES

3.1 Civil Penalties

Civil penalties are fines, payable to

the government, following a breach of the relevant governing statute. The underlying policy consideration when applying civil penalties requires the administrator to calculate the economic benefit of non-compliance and ensure that the penalty burden is at least as great as the benefit of the violation, so that there is a compelling motivation for compliance.¹⁰ Considerations include the benefit that the violator receives from delayed compliance and other benefits of non-compliance.¹¹ In calculating the appropriate severity of civil penalties, administrators should address circumstances in which benefits arise in factors other than cost savings.¹² There are very few circumstances where the economic benefit of noncompliance will be mitigated.¹³

3.1.1 The Gravity Component:

While the economic benefit component ensures that a company cannot profit from its violations, the gravity component reflects the seriousness of the violation. The following components are considered when calculating the gravity factor:

- Actual or Possible Harm: This factor contains within it a number of sub-factors that attempt to determine the likelihood that the activity of the defendant actually resulted or was likely to result in a violation.
- Toxicity of the Pollutant.
- Sensitivity of the Environment.
- Overall Severity of the Environmental Harm.
- Length of Time of the violation: A penalty is assessed for each separate violation as well as the length of time that the violations occurred.

3.1.2 Adjusting the Gravity Component

Establishing consistency and reasonable expectations with respect to the treatment of the regulated community is a policy goal of the civil penalty system. But there must also be flexibility within the penalty assessment process to account for

particular circumstances of a given situation. The following factors promote flexibility among the regulated community by adjusting the gravity factor for such circumstances as:

- Degree of willfulness or negligence: This factor can only increase the severity of the penalty. It considers the following:
 - The degree of control the violator had over the events constituting the violation.
 - The foreseeability of the events constituting the violation.
 - The level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology-forcing nature of the statute, where applicable.
 - The extent to which the violator in fact knew of the legal requirement that was violated.
- Degree of Cooperation: This factor can aggravate or mitigate the penalty and will be based on the following sub-factors:
 - Prompt reporting of noncompliance.
 - Prompt correction of environmental problems.
 - Cooperation during pre-filing investigation.
- History of noncompliance: This factor may only be used to raise a penalty. It considers the following factors:
 - Similarity of the violation in question to prior violations.
 - Time elapsed since the prior violations.
 - The number of prior violations.
 - Violators' response to prior violations with regard to correcting the previous problem and attempts to avoid future violations.

- The extent to which the gravity component has already been increased due to repeat violations.
- Environmental damage: Used where the environmental damage is so severe that it is not sufficiently covered by the gravity component.
- Ability to Pay: Generally, administrators will not assess fines that are beyond a company's means to pay, and may adjust penalties accordingly. The burden of proving the inability to pay is on the violator.
- Strict Liability: For some regulated pollutants that pose grave threats to the environment and human populations (e.g., toxic and hazardous pollutants), administrators enforce penalties under a theory of strict liability. Under this theory, any party who contributes to a hazardous waste site (generates, transports, stores or disposes), can be held liable for the entire cost of the cleanup, regardless of the magnitude of that party's contribution. However, in situations where there are multiple potentially responsible parties, the administrator will attempt to identify and resolve the liability of the smaller contributing parties early in the process. The harshness of the enforcement scheme can be mitigated by implementing a de minimis exemption to the settlement policy, which exempts the smallest contributors from liability subject to certain conditions.¹⁴

3.2 Criminal Penalties

Punitive by nature, criminal remedies tend to utilize fines or imprisonment rather than damages or restitution. Criminal laws focus on immorality and state of mind, while tort laws focus on compensation. A further distinction is that criminal remedies tend to be imbued with moral culpability. The justifications for tort and criminal law differ in that tort law focuses on compensating a victim for damages that have occurred or likely will occur, while criminal law focuses on protecting the public from

harm by punishing harmful results that will or probably will occur from defendant's conduct.

3.2.1 Appropriateness of Civil or Criminal Penalties

Criminal law punishes a broad range of activities. A threshold question in determining whether criminal or civil penalties are appropriate focuses on which form of punishment provides the most practical and effective means of coercing the desired behavior.

Function of Criminal Penalties: Criminal penalties can seek retribution, social condemnation, specific deterrence, general deterrence, protection of third parties, and payment of compensation or reparation. Thus it serves a much broader range of functions than civil damages.¹⁵

Standard of Proof: Generally at common law, the burden of proof in civil cases need only balance the probabilities in favor of the defendant's guilt. Criminal cases however, usually require prosecutors to prove the defendant's guilt beyond a reasonable doubt.

3.2.2 Underlying Bases of Criminal Punishment

There are two possible routes to a criminal sanction for environmental violations. One is through the conventional criminal codes. Another consists of acts that are specifically made punishable through the various environmental statutes.¹⁶

- Severity of Punishment: The severity of criminal offenses are not solely defined by the resulting punishment, but are frequently classified as felonies or misdemeanors prior to the administering of punishment.
- Felonies: Felony offenses usually require the defendant to "purposely," "knowingly," or "recklessly" violate the law and generally carry more severe sentences and fines.
- Misdemeanors: Misdemeanor offenses often require less culpability on the part of the defendant and can be prosecuted

when the defendant “negligently” commits an act or omission. Alternatively, misdemeanors can also be prosecuted where a defendant “purposefully,” “knowingly,” or “recklessly” commits an act or omission which has less deleterious effects than a felony offense.

3.3 Alternatives to Civil & Criminal Penalties – U.S. & Canadian Models

3.3.1 Supplemental Environmental Projects in the United States

The purpose of Supplemental Environmental Projects is to encourage and obtain environmental and public health protection and improvements that may not otherwise have occurred without the settlement incentives provided by the policy.¹⁷

In evaluating a proposed Supplemental Environmental Project, administrators may follow an evaluation process similar to that of the U.S. Environmental Protection Agency (EPA), which follows the following four-step process:¹⁸

- Ensure the Project Meets the Basic Definition of a Supplemental Environmental Project. This means it must improve, protect or reduce risks to public health, or the environment at large. The primary benefit of the project must be to the public health or the environment, rather than benefits accrued by the regulated violator. Further, Supplemental Environmental Projects cannot include actions that the defendant is likely to be required to perform as injunctive relief in the instant case, as injunctive relief in another legal action that EPA or another regulatory agency could bring, as part of an existing settlement or order in another legal action, or by a state or local requirement.
- Ensure that All Legal Guidelines are Satisfied:¹⁹ The project cannot be inconsistent with any provision of the underlying statutes and must either: advance an objective of the environ-

mental statutes that form the basis of the action; by design, reduce the likelihood of similar violations; reduce the adverse impact that the violation contributes to; or reduce overall risk potentially affected by the violation.

- Other Requirements: A project cannot use funds to satisfy obligations of a federal agency, nor spend money on projects that might circumvent limitations on federal funding.
- Commitment to perform a Supplemental Environmental Project may mitigate the penalty assessed.²⁰ However, the final penalty should meet some minimum amount established by the administrator. In calculating the final settlement penalty, the administrator, within its discretion, may mitigate the penalty in response to the violator undertaking a Supplemental Environmental Project. The U.S. EPA utilizes the following formula:

$$\text{Final Settlement} = \text{Settlement amount} - (\text{Supplemental Environmental Project Cost} \times \text{Mitigation Percentage})$$

The following broad project categories illustrate some of the aims of a Supplemental Environmental Project:

- Public Health: Providing diagnostic, preventative or remedial health care (e.g., community medical treatment, therapy or studies).
- Pollution Prevention: Reduce the amount or toxicity of the pollution produced (e.g., improvements in recycling, treatment and disposal techniques).
- Environmental restoration and protection: Improve the land, air or water at natural or man-made environments affected by the violation (e.g., conservation or remediation of resources not otherwise mandated by law).
- Assessments and audits: Examine internal operations to determine if other pollution problems exist or if operations

could be improved to avoid future violations (e.g., pollution prevention assessments, environmental quality assessments, or environmental compliance audits with requirements to correct any discovered violations).

- Environmental compliance promotion: Help other companies achieve compliance and reduce pollution (e.g., seminars, publications, training or technical support).
- Emergency Planning and Preparedness: Assist state or local emergency response or planning agencies to fulfill their duties under the Emergency Planning and Community Right to Know Act (e.g., non-cash assistance such as training or equipment).

3.3.2 Environmental Protection Alternative Measures in Canada

Environmental Protection Alternative Measures, as provided by the Canadian Environmental Protection Act of 1999, are an alternative to court prosecution. Environmental Protection Alternative Measures under the Act divert the accused – whether a company, individual or government agency – away from the court process after the entity is charged, and into negotiations between the accused and the Attorney General of Canada, in consultation with the Minister of the Environment. The Environmental Protection Alternative Measure will contain measures that the accused must take in order to restore compliance.

Examples of those measures include:

- Development of pollution prevention measures to reduce releases of a toxic substance down to regulated limits;
- Installation of better pollution control technology or monitoring systems;
- Changes to production to ensure compliance with regulatory requirements; and
- Clean-up of environmental damage.

Not every alleged offender is eligi-

ble for an Environmental Protection Alternative Measure.

4 REFERENCES

- ¹ Dobbs, Dan B., *Dobbs Law of Remedies* 3 (1993).
- ² *Id.* at 288.
- ³ *Id.* at 289.
- ⁴ *Id.*
- ⁵ *Id.*
- ⁶ *Id.* at 5.
- ⁷ *Id.* at 566.
- ⁸ *Id.* at 6.
- ⁹ *Id.* at 10.
- ¹⁰ Riesel, Daniel. *Environmental Enforcement: Civil and Criminal* § 4.05 (5th ed. 1999).
- ¹¹ Memorandum from the Kathie A. Stein, EPA Office of Enforcement and Compliance Assurance, to Regional Division Directors 5 (July 23, 2002) available at <http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/penpol.pdf>.
- ¹² *Id.*
- ¹³ *Id.*
- ¹⁴ Memorandum from Barry Green, Officer of Site Remediation enforcement, U.S. EPA and Bruce Gelber, Environmental Enforcement Section, U.S. Dept. of Justice, to Regional Directors, Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-exempt De Micromis parties (Nov. 6, 2002) available at <http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/wv-exmpt-dmicro-mem.pdf>.
- ¹⁵ Woods, Michael and Richard Macrory, *Environmental Civil Penalties: a More Proportional Response to Regulatory Breach*, Faculty of Laws, University College of London, 11 (Nov. 2003) available at <http://www.ucl.ac.uk/laws/environment/civil-penalty/index.html>.

¹⁶ Riesel, Daniel. Environmental Enforcement: Civil and Criminal § 6.02 (5th ed. 1999).

¹⁷ Memorandum from the Steven A. Herman, EPA Office of Enforcement and

Compliance Assurance, to Regional Administrators 1 (May 1, 1998) available at <http://www.epa.gov/Compliance/resources/policies/civil/seps/fnl-sup-hermn-mem.pdf>