

Principles of Environmental Compliance and Enforcement Handbook

Chapter 8: Enforcement

International Network for
Environmental Compliance and Enforcement

April 2009

The full text of the Principles Handbook is available online at <http://www.inece.org/principles>.

8. ENFORCEMENT

8.1 Introduction

Enforcement is the backbone to any compliance program. Strategies involving education and assistance, monitoring and inspections, and incentives are only effective if backed by a credible threat of enforcement sanctions.

Effective enforcement programs deter illegal conduct by creating negative consequences for those who violate the law. A single enforcement action can have a cascading effect on potential wrongdoers, encouraging them to change their behavior to comply with the law. For deterrence to be effective there must be: 1) a high likelihood that the violation will be detected; 2) swift and predictable responses to violations; 3) responses that include appropriate sanctions; and 4) a perception among violators that all of these elements are present.

This section discusses the enforcement process, designing an enforcement response policy, types of enforcement responses, choosing between enforcement responses, negotiations and settlements of disputes, and citizen enforcement.

8.2 The Enforcement Process

8.2.1 Protecting Basic Rights

Every nation has its own unique legal system, laws, and culture. However, most democratic institutions have processes to balance the rights of individuals with the government's need to act, often quickly, on behalf of the public. Processes that may be used to ensure fairness of enforcement responses include:

- **Notice.** Some enforcement programs require that a notice of violation be issued before any formal enforcement action is pursued. The violator may be offered an opportunity to: 1) contest the finding of violation; or 2) correct the violation within a specified time frame to avoid further government action.
- **Appeals.** There are often several points in the enforcement process when a violator can appeal the finding that there is a violation, the remedial action required by the enforcement program, or the severity of the proposed sanction.
- **Dispute Resolution.** Most enforcement responses are bound to create disputes between program officials and facility representatives. In such cases, programs often use special procedures designed to resolve disputes.

In general, the more an enforcement action would restrict individual rights, the more protection the enforcement process provides, and the longer the process may take before final action is initiated.

8.2.2 Supporting the Enforcement Case

In typical enforcement actions, targeted parties will challenge findings, and officials will have to defend them in administrative proceedings or court. Therefore, enforcement officials should always be prepared to:

- Prove that a violation has occurred.
- Establish that the procedures and policies were fairly and equitably followed and that the violator is not being unduly “picked on.”
- Demonstrate the underlying environmental or public health need for the requirement being violated. This need is often met when the requirement is developed. However, it may be necessary to reiterate the importance of compliance with the requirement to justify and support an enforcement case. This is particularly true when a case is in a jurisdiction where the rule of law is well developed and it is being argued in front of an independent decision-maker who is not familiar with the requirement or its environmental or public health basis.
- Demonstrate that a remedy for the violation is available (*e.g.*, pollution control equipment, stopping a particular activity). Even though this is not usually the responsibility of the government, this information can be important to negotiations.
- Justify the proposed penalty.

8.2.3 Public Comment

In some types of cases and countries, such as in the United States, the public has a right to comment on enforcement agreements, orders, and decrees before they are final. All final agreements, orders, and decrees become publicly available. Public involvement is one way to ensure that violators are treated fairly and consistently. Indeed, it is the violators themselves who are most likely to review other previous enforcement actions that have been taken and attempt to use them during negotiations as precedents if they are favorable or distinguish them if they are not.

8.3 Designing an Enforcement Response Policy

Enforcement response policies describe how various enforcement authorities will be used to respond to the many different types of violations and violation situations. Such policies are important to ensure fairness. Fairness is particularly important when assessing monetary and criminal penalties. Fairness, and the perception of fairness, is critical to the credibility of an enforcement program. Key issues to consider when drafting an enforcement response policy are discussed below.

8.3.1 Criteria for Non-compliance

Whether a facility is in compliance is not always obvious. Specific guidelines and criteria are needed to distinguish compliance from non-compliance. These standards help ensure that all members of the regulated community are treated consistently and that enforcement is perceived as fair.

8.3.2 Authorities

To provide effective enforcement, the environmental management program needs the authority to act. In most countries, the range and type of response mechanisms available ultimately depend on the number and type of authorities provided to the enforcement program by environmental laws and related laws defining the enforcement processes. These authorities provide the legal basis for enforcement that is essential to the power and credibility of an enforcement program. Box 8-1 summarizes a range of authorities that may be useful for an enforcement program.

BOX 8-1: TYPES OF ENFORCEMENT AUTHORITIES ⁴⁸

Authorities Related to Remedial Actions

- Enter a facility.
- Take samples.
- Take documents.
- Question personnel.
- Impose a schedule for compliance.
- Permanently shut down certain parts of operations or practices.
- Temporarily shut down certain parts of operations or practices.
- Permanently shut down an entire facility.
- Temporarily shut down an entire facility.
- Deny a permit.
- Revoke a permit.

- Require a facility to clean up part of the environment.
- Emergency powers to enter and correct immediate dangers to the local population or environment.
- Seek compensation for damage caused by the violation.

Other Authorities

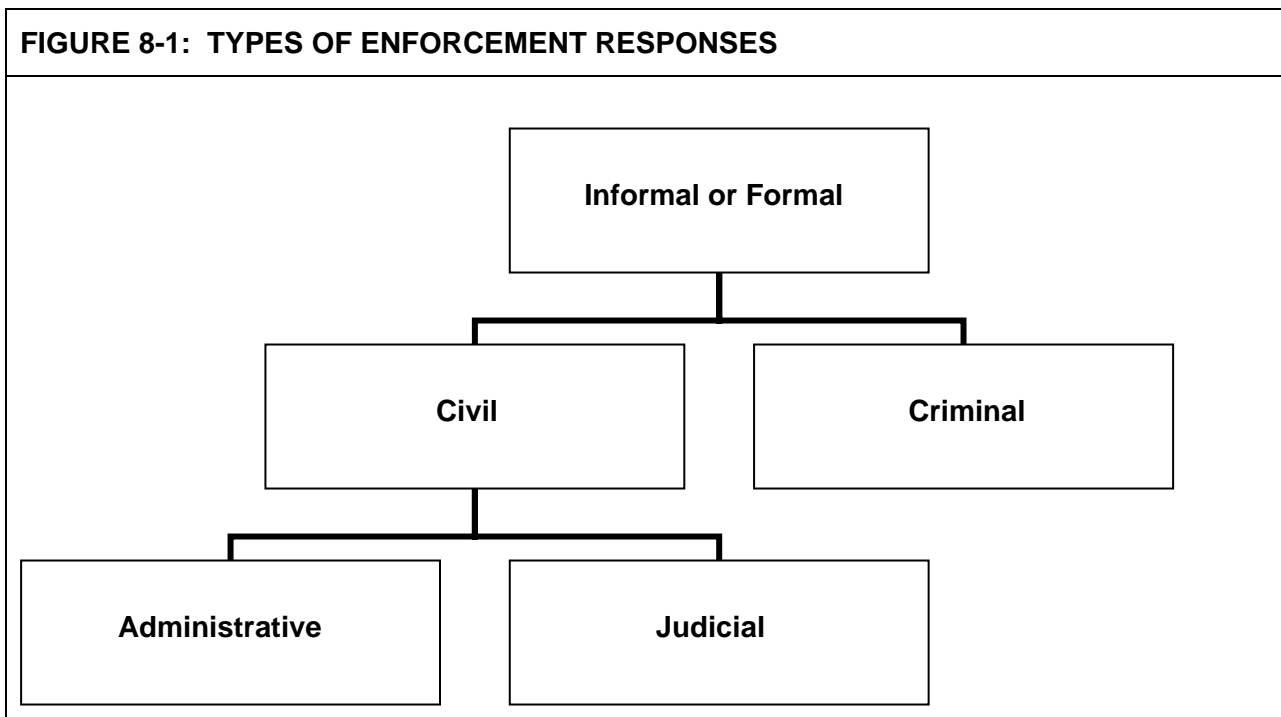
- Require specific testing and reporting.
- Impose specific labeling requirements.
- Require monitoring and reporting.
- Request information on industrial processes.
- Require specialized training (e.g., in emergency response to spills) for facility employees.
- Require a facility to undergo an environmental audit.

Authorities Related to Sanctions

- Impose a monetary penalty with specified amounts per day per violation.
- Seek imprisonment.
- Seek punitive damages or fines within specified limits.
- Seize property.
- Seek reimbursement for government clean-up expenses.
- Bar a facility or company from government loans, guarantees, or contracts.
- Require service or community work to benefit the environment.
- Place limitations on financial assistance.

8.4 Types of Enforcement Responses

Enforcement responses generally fall into the following categories (Figure 8-1):



8.4.1 Informal Mechanisms

Informal responses include phone calls, site visits, warning letters, and notices of violations. (See Box 8-2). Informal responses advise the facility manager what violation was found, what should be done to correct it, and when. The goal of informal action is to bring the violator into compliance. Many environment ministries prefer using informal, cooperative methods to gain compliance. Informal responses themselves do not penalize and cannot be enforced, but often lead to more severe response if they are ignored.⁴⁹

BOX 8-2: TYPES OF INFORMAL RESPONSES

Telephone Call

This is the easiest way to notify or remind a source that a violation has occurred and must be corrected. The caller may also request that the violator follow up with a letter that describes what action was taken to correct the violation.

Inspection

An inspector can make facility managers aware of a problem and provide assistance in correcting the problem. At the same time, an inspector can gather data about the problem. This better prepares the program for taking further action, if necessary, and displays the program's seriousness about following up if compliance is not achieved.

Warning Letters

Warning letters let facility managers know that they are violating the law and must correct the situation or face adverse legal action and other consequences. A warning letter may describe the potential sanctions for continued non-compliance, require a response from the violator detailing the corrective action taken, and suggest that the violator meet with compliance officials to discuss a plan for compliance. Other responses are considered if the violator fails to take advantage of this opportunity within a reasonable time.

Notice of Violation

Notices are more formal than warning letters. They notify a source that a violation has been detected and often give a deadline for taking corrective action. Notices of violation also warn about legal action and consequences that will follow if the violator does not take action by the deadline.

8.4.2 Formal Mechanisms

Formal enforcement mechanisms are backed by the force of law and are accompanied by procedural requirements to protect the rights of the individual. Formal mechanisms may be either civil or criminal as described below. Many countries have both civil and criminal remedies, while some have only criminal and administrative options. As indicated in Figure 8-1,

civil actions may be either administrative (*i.e.*, directly imposed by the enforcement program) or judicial (*i.e.*, imposed by a court or other judicial authority). Law must provide authority enabling the enforcement program to use formal enforcement mechanisms.

8.4.3 Civil Administrative Enforcement

There are two major types of civil administrative enforcement actions: orders and field citations.

Civil administrative orders are legal, independently enforceable orders issued directly by enforcement program officials. The order defines the violation, provides evidence of the violation, and requires the recipient to take corrective action within a specified time period. If the recipient violates the order, program managers usually can take further legal action using additional orders (or a court system) to force compliance with the order directly. What distinguishes administrative response from judicial response, defined below, is that the legal action is handled by an administrative system within the organization responsible for implementing the enforcement program. The administrative processes may be similar to those provided by the court system.

In the United States, administrative enforcement has two advantages. First, it does not require coordination with a separate prosecutorial agency. The other is that the administrative organization's own administrative law judges are specialized and usually more familiar with environmental requirements than judges in the general court system may be. Therefore, administrative actions usually are resolved more quickly and require less time and expense than judicial actions. This benefit may not exist, however, in countries where administrative law judges preside over cases from various administrative agencies, not just environmental agencies.

In the United States, as in most countries, administrative orders are not self-enforcing. If there is not compliance with the order, further enforcement action must be pursued through the judicial system.

Field citations are administrative orders issued by inspectors on-site in the regulated facility or "field." Typically, they require the violator to correct a clear-cut violation and pay a small monetary fine. Field citations are much like motor-vehicle traffic tickets. Depending on the procedural steps defined by the program, the violator can appeal the citation, pay it, or do nothing and risk more formal enforcement action. Recipients of field citations are often given opportunities to be heard and present evidence, but they usually do not have access to the full procedural protections provided by other enforcement actions.

Field citations can be a relatively efficient means to address certain violations that are clear and do not pose a major threat to the environment. To issue field citations, inspectors need training to identify the particular violations for which citations can be written.

8.4.4 Civil Judicial Enforcement

Civil judicial enforcement actions are formal lawsuits before the courts. Some nations with civil environmental enforcement authority rely exclusively on civil judicial actions to enforce environmental laws. Other nations have adopted both administrative and judicial mechanisms to carry out civil enforcement actions. Where available, administrative enforcement generally is preferred as a first response (with some exceptions), because judicial lawsuits are far more expensive, require more staff time (and often more sophistication), and may take several years to complete.

However, judicial enforcement has several advantages. It is often perceived as having greater significance than administrative enforcement and therefore more power to deter potential violations and set legal precedents. Also, the courts are often uniquely empowered to require immediate action to reduce more severe threats to public health or the environment. In particular, courts can usually grant preliminary injunctions, which order the suspension of activities that could cause irreversible harm pending trial. Thus, judicial enforcement can be essential in emergency situations. The courts also play an important role in enforcing administrative orders that have been violated and in making final decisions regarding orders that have been appealed. Therefore, when both administrative and judicial enforcement mechanisms are available, civil judicial responses are generally reserved for more serious or recalcitrant violators, cases where precedents are needed, or situations where prompt action is important to shut down an operation or to stop an activity.

8.4.5 Criminal Enforcement

Criminal judicial response is generally considered appropriate when a person or facility has knowingly violated the law, or has otherwise committed a violation for which society has chosen to impose the most serious legal sanctions available. Criminal sanctions may include imprisonment of culpable individuals in addition to monetary penalties. Criminal environmental sentences now may include supplementary requirements such as community service, environmental audits, restitution or remediation so that a criminal case may achieve environmental benefits in addition to punishing the wrongdoer.

Criminal cases require intensive investigation and case development. They require proof that a violation has occurred and may require proof that an individual or business (through

its employees) was knowingly responsible for the violation. Compare this to a civil or administrative case where a sanction can be imposed if the government simply proves the existence of a violation without regard to level of care or intention of the violator. Criminal cases typically provide more powerful information-gathering authority than the civil case. Therefore, specially trained criminal investigators may be necessary to develop criminal cases.

While a criminal response can be the most difficult and expensive type of enforcement, it can create the most significant deterrence and normative impact, since it personally affects the lives of those who are prosecuted, and carries with it a significant social stigma. Criminal sanctions can also help educate or shape preferences of potential violators in the regulated community. (See Box 8-3). The criminalization of environmental violations raises the norm of environmental protection to a higher level. When the public sees people going to jail for non-compliance, it adds credibility to the norm and thereby promotes compliance.

The ability to apply criminal enforcement to environmental cases depends on a country's legal system and on whether appropriate authority is provided in environmental or other laws. Non-environmental laws can often support environmental compliance. For example, in many jurisdictions there are generic statutes that make it a crime to report false information to the government or to defraud the public. In addition, an actor may be guilty of homicide if its environmental non-compliance caused fatalities.

Where a corporation is guilty of violating criminal law, the company can be placed on probation or strict judicial supervision. The loss of corporate autonomy serves as a powerful deterrent to other potential violators. Criminal convictions often also carry different consequences from those carried by civil judgments. A criminal conviction may result in the corporation being barred from being awarded government contracts, grants, or loans, or open the corporation to shareholder derivative suits or charges of securities fraud. In some cases, a criminal conviction may be admissible against the defendant in subsequent civil cases (whereas admission of a civil judgment may be barred by a rule of evidence). Under tax and bankruptcy laws, criminal fines may have treatments different from civil monetary penalties.

BOX 8-3: BRAZIL'S ENVIRONMENTAL CRIMES LAW⁵⁰

The Brazilian Environmental Crimes Law was passed in March of 1998 and is considered to be one of the most modern and comprehensive legal texts focusing on environmental crime. Some of the specific articles that give this law force are highlighted and explained below.

Broad Culpability

Article 2 is important because it establishes culpability, not only for the person who actually breaks a law, but notably also for any person in a position of authority who knew about the illegal activity and failed to stop it or inform the appropriate authorities.

Assignment of Penalties

Article 6 outlines three general criteria that should be considered in the assignment of penalties for an environmental law violation. They are:

- The seriousness of the act and the intent of the person who committed the act and additionally the seriousness of the repercussions of the act on the environment and human health.
- Whether the person who committed the act has a history of environmental law violations.
- The financial situation of the person who violated the environmental law.

Aggravating and Mitigating Circumstances

“Aggravating circumstances” are factors that can make a penalty more severe. The law requires that these factors be considered when assessing the seriousness of a crime:

- Frequency of the environmental crimes.
- Whether the offender was motivated by monetary gains, coercing another to commit the crime, or serious endangerment of public health.

“Mitigating circumstances” are factors that can make a penalty less severe. The law requires that these factors be considered when assessing the seriousness of a crime:

- Low educational level of the offender.
- The offender's remorse, exhibited by spontaneous reparation of the environmental damage or limitation of the harm caused.

Crimes Against Fauna

Section I of the law contains a detailed list of actions that are considered to be crimes against fauna, or animal life. A person who commits one of these acts has automatically violated the law and is subject to the prescribed penalty, imprisonment for six months to one year and a fine.

The law also includes the aggravating and mitigating circumstances that should be considered when determining the penalties. For example, the penalty is increased by half, if the crime is committed:

- Against rare species or species considered endangered, even if only at the site of violation.

- In the period in which hunting is prohibited.
- During the night.
- By abusing the license.
- Within a protected area.
- Using method or instruments capable of provoking mass destruction.

Crime Against Flora

Section II of the law contains a detailed list of actions that are considered to be crimes against flora, or plant life. A person who commits one of these acts has automatically violated the law and is subject to the prescribed penalty, which varies according to the crime. The law also includes the aggravating and mitigating circumstances that should be considered when determining the penalties. Thus, for the examples given here, the penalty is to be increased by one-sixth to one-third if:

A result of the act is the decrease of natural waters, soil erosion, or modification of climatic regime.

The crime is committed: during the period of seed dispersion; during the period of vegetation formation; against rare or endangered species, even if only endangered at the site of the crime; during times of flooding or drought; during the night, on Sundays, or holidays.

Pollution and Other Environmental Crimes

Section III of the law contains a detailed list of actions that are considered pollution and other environmental crimes. A person who commits one of these acts has automatically violated the law and is subject to the prescribed penalty. The law also includes the aggravating and mitigating circumstances that should be considered when determining the penalties.

Crimes Against Environmental Administration

The section on crimes against environmental administration generally includes violations committed by civil servants that harm the environment in some way. For example, making false statements or issuing environmental permits illegally. The penalties for each of these types of violations are prescribed in the law, as well as the aggravating and mitigating circumstances.

8.5 Choosing Between Enforcement Responses

Selecting an appropriate enforcement response raises several difficult issues, discussed below, which often need to be addressed in an enforcement response policy. These issues sometimes may be addressed in the wording of the authority provided by the environmental laws.

8.5.1 When Should Civil or Criminal Responses Be Used?

In many jurisdictions, administrative, civil, and criminal charges can be brought for violations of environmental laws. Serious violations are usually met with criminal charges. Many authorities believe that criminal charges should be imposed the second time a company is found to be out of compliance. Administrative sanctions include shutting down all or part of a company's operations and fining the company for each day it remains out of compliance.

Criminal sanctions include prison sentences, fines, forfeiture of property, and publicizing the court's verdict.

This issue is relevant only to countries that have or are considering implementing both civil and criminal authorities. In some jurisdictions, criminal enforcement actions are generally reserved for actions that deserve punishment, rather than correction (*e.g.*, where the violation is intentional). Criminal actions are also used to ensure the integrity of the regulatory scheme, (*e.g.*, to prevent facilities from operating without a permit or license). Factors that many jurisdictions consider when deciding whether to initiate a criminal enforcement action include actions that involve:

- Falsifying documents.
- Operating without a permit.
- Tampering with monitoring or control equipment.
- Repeated violations.
- Intentional violations (*e.g.*, decisions to violate based on greed).

In addition to these considerations, environmental management programs must weigh the following when choosing the type of enforcement:

- **Cost.** Civil proceedings are generally less taxing on program resources (*e.g.*, time, money, and personnel). Administrative proceedings tend to be the least costly of the three.
- **Resistance.** Criminal cases evoke stronger resistance from the targeted actor than civil litigation, and administrative action receives less resistance.
- **Control.** Regional program personnel typically have more control over administrative proceedings. Civil cases usually involve more "headquarters" personnel. Criminal cases are often litigated by a separate entity (*e.g.*, the Department of Justice in the United States). Administrative actions also avoid use of external judges and juries. (See Box 8-4).

8.5.2 When Should a Sanction Be Imposed?

For certain types of enforcement responses, it may be sufficient to negotiate a compliance schedule where the violator agrees to return to compliance and clean up a pollution situation by a certain date. But for other types of enforcement responses, sanctions may be needed in addition to other remedies. When deterrence is important to a program's compliance strategy, maximum impact will be achieved if each enforcement action is used to send a deterrence message to the regulated community. Sanctions help send this message.

Sanctions range from issuance of formal administrative orders, formal notices of non-compliance, and administrative consent orders, to fines, property seizures, facility closures, and imprisonment. However, sanctions may not be appropriate for violations that are not preventable, or that are too minor to focus government resources on imposition of a sanction. These considerations need to be balanced in deciding when to impose a sanction.

BOX 8-4: GUIDELINES FOR PROSECUTING ENVIRONMENTAL CASES IN THE UNITED STATES⁵¹

In 2007, the U.S. Environmental Protection Agency (EPA) released guidance to help determine which criminal enforcement actions to pursue under its “high impact policy.” This policy is intended to focus EPA enforcement actions on those cases with the greatest potential to protect human health and the environment. The policy is a response to criticism that the EPA has pursued fewer case referrals for civil and criminal violations of environmental laws in recent years. In selecting environmental violations against which to bring enforcement actions, the guidance considers whether a violation carries significant harm or risk of harm, what cases are likely to promote deterrence, and what cases would promote agency and national enforcement priorities.

8.5.3 Should a First Enforcement Response Include a Sanction?

There are two basic approaches to this issue. One approach does not seek a sanction for a first violation but imposes a stiff sanction if non-compliance continues. This approach is based on the belief that every facility should be given at least one opportunity to correct its problems before it receives a sanction. This first approach is most successful when violations are easy to detect, and when the enforcement program has an excellent track record of detecting violations, diligently following up on violators to verify compliance, and imposing stiff sanctions for continued non-compliance.

The second approach is to impose sanctions for first violations. This is based on a belief that lack of a penalty may encourage facilities to postpone compliance activities until the violation has been detected. This approach is essential for violations that are difficult to detect. Without the threat of a sanction, a facility might be willing to play the odds that it will not be detected, with the thought that it will only fix the problem if detection occurs.

8.5.4 What Type of Sanction Should Be Used?

Depending on the authorities provided in environmental laws (see Box 8-1), enforcement officials often have a choice among several types of sanctions. As mentioned above, sanctions

range from issuance of formal administrative orders, formal notices of non-compliance, and administrative consent orders to fines, property seizures, facility closures, and imprisonment. The enforcement policy will need to provide guidance on when these various types of sanctions are appropriate.

8.5.4.1 Monetary Penalties

Monetary penalties are the most common sanction used in enforcement responses. Environmental management programs may choose from numerous kinds of monetary penalties including fines specified per day per violation; punitive damages, including treble damages for violation for the failure to comply with a government order; reimbursement for government clean-up expenses; and even disqualification of the violating firms from government loans, guarantees, contracts, or financial assistance.

An enforcement policy needs to provide guidance on how to calculate an appropriate penalty for various types of violations. There are two significant constraints on the amount of a fine. First, while theory and empirical evidence suggest that high fines are effective deterrents, the political will to apply them is sometimes lacking. Second, if the fine is too large (*i.e.*, the target cannot afford to pay) then it will be perceived as unfair and will undermine both its normative and deterrent effect. Therefore, an appropriate fine is one that balances the economic factors listed in Box 8-5.

8.5.4.2 Denial or Revocation of Permits or Licenses

Program officials can deny an application for a permit or license or revoke an existing permit or license. This would require a facility either to cease (at least part of) its operation or operate in clear and direct violation of the law.

8.5.4.3 Shutdown of Operations

Program officials may be able to shut down operations. The threat of a shutdown can be an effective deterrent by directly and immediately affecting a company's profits.

8.5.4.4 Forced Shifts to New Technologies and Processes

Firms found in violation can be forced to re-evaluate their technologies and processes. This option has the advantage of addressing the environmental impact at issue, while improving the firm's environmental management to address future impacts. Such "innovation offsets" cannot only improve product quality and value but also may lower the total cost by allowing

companies to use a range of inputs more efficiently. Ultimately, this enhanced resource productivity can make companies—and countries—more competitive.⁵²

BOX 8-5: FACTORS THAT MAY BE USED TO CALCULATE A MONETARY PENALTY

Gravity of the Actual or Potential Harm to the Environment and Human Health.

Gravity-based penalties are graduated to reflect the seriousness of the violation. This sends a deterrence signal to the regulated community: the more serious the violation, the greater the penalty will be. Gravity may be calculated based on factors such as:

- Volume of release.
- Toxicity of release.
- History of non-compliance.
- Environmental and public health risk or impact.
- Importance to maintaining the integrity of the enforcement program.

Economic Benefit

Penalties can remove the economic advantage of non-compliance by recovering the economic benefit a violator may have gained by not complying. This type of penalty is important to maintaining fairness by ensuring that compliant facilities are not economically disadvantaged relative to non-compliant ones. These penalties remove the economic benefits of non-compliance, which include both avoided costs and profits from postponed expenditures. Avoided costs include operation and maintenance expenses that cannot be spent later, while benefits from postponed costs capture the time value of money or the interest earned when infrastructure or equipment is not installed when required. Penalties must be calculated to cancel out both benefits.

Ability to Pay

Enforcement officials must often consider a violator's ability to pay when calculating a monetary penalty. Penalties that are large compared to the facility's resources could force a facility to shut down, which can harm the overall community. Facilities that are given a severe monetary penalty may also threaten to move to another area where environmental regulation and enforcement are more lax. In such cases, enforcement officials may want to consider the deterrence benefits of severe penalties against the cost and hardship that the resulting unemployment would cause in the local community. Public pressure may have substantial impact on the monetary penalty level when jobs are threatened. Asking for substantial penalties also raises a risk that violators may choose to contest the penalty in court rather than pay it. A series of payments can be arranged in situations where a violator may have difficulty paying the full penalty at one time.

Other Factors

Other factors may include:

- Degree of cooperation by facility personnel with environmental officials.
- Whether the violation was self-reported by the facility.
- Degree of remorse by the responsible parties.
- The strength of the case—a weak case is less likely to withstand appeals on the part of the violator. In such cases, enforcement officials may lower the penalty to avoid making it worthwhile for the violator to try to appeal the penalty.

8.5.4.5 Prison Sentences

Criminal sanctions for managers or employees of violating facilities can be an extremely effective deterrent. Criminal sanctions can be imposed only where allowed by the legal system. For example, criminal sanctions can be sought if someone knowingly violates an environmental requirement or fraudulently reports data. Under U.S. Sentencing Guidelines, sentences for environmental crimes committed by corporations can be reduced if the corporation can demonstrate a comprehensive and committed corporate compliance program. This set of conditions in the United States seems to be improving corporate concern for compliance.

Criminal sanctions may be a difficult tool to utilize due to the extreme stigma associated with prison and/or the amount of resources often necessary to operate environmental crimes programs capable of routinely winning criminal convictions. In societies that place great emphasis on economic development, corporate or industry management officials may command large amounts of esteem and stature. This can make regulators hesitant to request enforcement measures as harsh as jail terms, and difficult for judges to impose criminal sanctions. It could also pressure regulators to discriminate when applying such measures. Both such results would tend to undermine respect for the regulation and would therefore impede compliance.⁵³

8.5.4.6 Denial of Government Funding

When violators are denied government funding, they are placed on a list of firms from which government agencies will not purchase goods or services and to which the government will not provide loans or guarantees. The lists are shared among all government agencies, and the firm's name is not removed until the firm returns to compliance. This is a valuable tactic when an industry depends on government purchases, loans, or grants but obviously not applicable to all firms.

8.5.4.7 Negative Publicity

As part of a sanction, violators may be required to publicize information about the violation. For example, a company may be required to pay for a full-page advertisement in local or national newspapers to proclaim its guilt. Company executives may be ordered to speak in public about their wrongdoing. In countries with strong public concern for environmental quality and a free market economy, negative publicity can have substantial economic implications for a facility. Negative publicity can also cause a corporation to lose prestige. Research indicates that potential loss of prestige can be a powerful deterrent factor.

8.5.5 Compensation for Environmental Damages

Environmental damage compensation can take two basic forms, monetary payments or restoration actions. Both require measurement of the environmental harm that was caused, sometimes a difficult task as intrinsic environmental benefits may be hard to put into economic terms. In addition to determining the amount of lost resources a monetary damage assessment also requires an estimate of the cost of restoring the resource and economic estimates of the value of the resources lost.

Damages are not the same as penalties. Both damages and penalties may be sought for the same action or event, for example, the release of a hazardous substance. Penalties are punitive and are paid to the government for violating the law. Damages are not punitive; they are compensation paid, or actions taken, to restore the environment and people injured by the event. The government acts in the public interest in seeking restoration damages in the same way that a company would seek damages for harm done to their property.

8.5.6 Penalty Calculation

Penalties must be administered with great care and balance. Too light a penalty will not compel the regulated community to comply. If the penalty is too severe, the regulated community will perceive the regulation as unfair, and may expend resources fighting the regulation rather than complying with it.

It is important to keep in mind the difference between theoretical legal principles and practical application of these principles. Generally speaking, a low level of monitoring success (which is the result for monitoring systems) requires high penalties for deterrence. However, many courts will not deem high penalty levels proportionate to the offenses, and therefore it is unlikely that high penalties will be upheld or imposed by a court. Regardless, it is valuable for regulators to think through the different factors for calculating an appropriate monetary penalty. (See sample worksheet in Box 8-6; Box 8-7 provides a case example of a fixed monetary penalty).

8.5.7 Escalation of Sanctions

When an initial inspection reveals a facility to be in non-compliance, and a later inspection finds continuing violation, additional deterrence may be required. For this reason, it may be desirable to have a sliding scale of sanctions, which escalates with each new violation. At the top of the scale may be criminal penalties, both for the companies and for individual managers.

BOX 8-6: SAMPLE WORKSHEET TO CALCULATE A MONETARY PENALTY⁵⁴

Facility Name: XYZ, Inc.

Money the Facility Saved by Not Complying with Regulations

Costs avoided \$10,000
 Costs postponed \$ 5,000
 Total **(a)** \$15,000

Seriousness of the Violation

PAYMENT CALCULATION MATRIX

Potential for Harm (vertical)

Extent of Deviation from Requirement(s) (horizontal)

	High	Medium	Low
High	\$5000 to \$4000	\$3999 to \$3000	\$2999 to \$2200
Medium	\$2199 to \$1600	\$1599 to \$1000	\$999 to \$600
Low	\$599 to \$300	\$299 to \$100	\$99 to \$20

Penalty required based on potential for harm and extent of deviation from requirement (use the above matrix and personal judgment to determine the appropriate amount):

(b) \$3,000

Adjustment for the Duration of the Violation

Number of days of non-compliance

(c) 50

Total = [(b) x (20%)] x (c)

(d) \$30,000

SUBTOTAL

Subtotal = (a) + (d)

(e) \$45,000

Penalty Adjustment Factors⁵⁵

1. Degree of cooperation (+/-)

(f) +5%

2. History of compliance (+/-)

(g) -5%

3. Supplemental environmental projects⁵⁶ (+/-)

(h) -10%

4. Ability to pay (-)

(i) -5%

Total = [(f) + (g) + (h) + (i)] x (e)

(j) -\$6,750

TOTAL PENALTY

Total penalty = (e) + (j)

\$38,250

8.6 Negotiations and Settlements of Disputes

8.6.1 The Role of Negotiation

Enforcement actions create a stimulus and context for discussion and resolution. Negotiation is an integral part of enforcement. It is often used within the context of legal enforcement proceedings, and it enables both the facility and the concerned party or parties to consider the accuracy of facts, circumstances of the case, and variety of alternative responses. Negotiation provides an opportunity to obtain additional information and correct misinterpretations before pursuing legal action. It also provides an opportunity to reach a solution that satisfies all parties. Compliance can be enhanced when a signal is sent to the regulated community that, while pursuing an enforcement response, the government is willing to be responsive to the concerns and difficulties faced by the regulated community in achieving compliance and to work cooperatively to develop a satisfactory solution.

BOX 8-7: ASSESSING AND VALUING DAMAGE UNDER THE COASTAL ZONE MANAGEMENT ACT OF BARBADOS⁵⁷

The Coastal Zone Management Act, Law No. 1998-39, stipulates that any person damaging coral is guilty of an offense and is liable on summary conviction to a fine of \$300.00 BBD (approximately \$148.50 US) for every square meter of coral reef damaged, imprisonment for five years, or both. There is a standard procedure to determine the extent of damage to the coral reef area; the extent is usually spatial (length by width), but in some cases the depth of damage is also considered. This is mainly focused on anchor damage from dragging or chain sweeps. Fines are set forth in the Act. This method of valuing coral reef damage informs all processes of assessing compensation (including out-of-court settlements).

The Act also provides that any person who breaks off a piece of coral from a reef is guilty of an offense and is liable on summary conviction to a fine of \$5,000.00 BBD (approximately \$2,475 US), imprisonment for two years, or both. This fine is applied to persons caught "picking" corals for sale. As a practical matter, these cases can be difficult, as it is necessary to capture the individual with the corals in their boat while in the process of harvesting.

Negotiation is generally most effective when supported by a continuing threat of civil enforcement. If the threat abates, some facilities might attempt to use negotiation as a means of delaying compliance. Program officials can keep the threat real by maintaining a strict schedule for negotiation and a parallel preparation for legal action.

The negotiation process will vary from one culture and program to another. Some negotiations may be face-to-face between enforcement officials and the violator. Others may involve a variety of concerned parties (e.g., representatives of the local community, workers, and non-governmental organizations). In some negotiations, particularly where an impasse is reached, an experienced third party may be used to change the dynamics, provide new perspectives, and propose possible solutions that had not previously been considered. Box 8-8 describes some typical dispute resolution procedures.

The result of negotiations is a *settlement*—a documented official resolution to the situation, referred to as an “administrative consent order” or a “judicial consent decree” in the United States. The settlement is a legally binding agreement between the violator and the enforcement program (administrative) or a negotiated agreement that must be submitted to a court for consideration and final approval (judicial).

Two types of enforcement response usually are not negotiated. One is a request by enforcement officials for information from the violator. This usually is not controversial and therefore does not require negotiation. The other is the exercise by the enforcement program of emergency powers to protect public health and the environment. In an emergency, there is no time to negotiate.

BOX 8-8: TYPICAL DISPUTE RESOLUTION PROCEDURES

Face-to-face negotiations between program officials and the violator

These occur either:

- *Before formal enforcement response is pursued.* At this point in the process, the negotiation usually focuses on whether there has been a violation. If agreement is reached, there also may be a discussion of the required response and schedule for response.
- *After formal administrative or civil judicial enforcement action is initiated but before it is final.* These negotiations are carried out during settlement negotiations. The resulting agreement, or an administrative order, is placed before a final decision-maker, such as a judge, for approval.

Presentations before a decision-maker

In dispute resolution, often a judge or hearing examiner makes a decision about a fact or legal point after hearing both sides of the issue.

Use of third parties

Third parties (e.g., mediators, arbitrators, and facilitators) may be called for by program officials or by agreement of the parties to break an impasse. An experienced third party can change the dynamics, provide new perspectives, and propose possible solutions. Specialized third parties are particularly useful for resolving highly complex technical issues that a lawyer or judge may be unlikely to understand fully.

8.6.2 Creative Settlements: Leveraging Enforcement for Broader Results

Settlements can include any provisions that the enforcement program is authorized to impose on a violator. Depending on their legal authority, environmental officials may have some latitude to develop creative approaches for solving environmental problems through settlements. Creative settlements can also be used to leverage a single case to gain either greater environmental benefit or greater deterrence than would have occurred with a conventional settlement. Examples of creative settlements are described below.

Creative settlements often are linked to some limited reduction in monetary penalty or to an agreement to extend compliance schedules. Creative settlements also may be sought for violators with limited ability to pay or who demonstrate a strong level of cooperation with the government/enforcement program. In order to be effective, creative settlements should at the very least seek to capture the economic benefits of non-compliance.

8.6.2.1 Pollution Prevention

Pollution prevention settlements involve an agreement by the facility to convert to practices or processes that reduce or eliminate the generation of pollutants and wastes at the source. Pollution is abated when the volume or the toxicity of pollutants is reduced. In manufacturing, for example, pollution prevention includes activities such as substituting chemicals, reformulating products, modifying processes, improving house-keeping, and recycling on site.

Pollution prevention projects may correct the violation directly or may reduce pollution unrelated to the original violation. Pollution prevention settlements help to ensure that violations will not recur, and they reduce the total risk that a facility's operation poses to public health and the environment.

8.6.2.2 Pollution Reductions Beyond the Level Required for Compliance

Settlements can be negotiated in which the violator agrees to reduce pollution beyond the level required for compliance with the requirements.⁵⁸ For example, a violator may agree to install more effective control technologies that reduce the overall discharge of pollutants.

8.6.2.3 Environmental Auditing

Environmental auditing is a periodic, systematic, documented, and objective review of a regulated facility's compliance status, management systems, and overall environmental risk. Many nations, as well as the International Chamber of Commerce, have encouraged the use of

auditing as an essential tool for regulated facilities to ensure compliance and effectively manage their environmental risks.

Environmental audits are sometimes required as part of settlements in two situations. First, they have been used where a source shows a clear pattern of violations that suggests a management problem. In such cases, a settlement may include an agreement that the source pays for an environmental audit to identify and correct the internal management problems that led to the repeated violations. Second, if a violation is likely to be repeated at other facilities owned by the same company, a settlement may include an agreement that: 1) the company or a third-party auditor will audit for that violation at the other facilities owned by the company; and 2) any violation will be reported and corrected.

8.6.2.4 Environmental Restoration

As a result of an environmental restoration settlement, a facility not only repairs the damage done to the environment because of the violation, but also agrees to provide further enhancement of the local environment. If the environmental damage caused cannot be restored, the settlement may require the facility to restore a comparable environment in another location.

8.6.2.5 Publicity

In public awareness settlements, the violator agrees to undertake some activity to increase the awareness in the regulated community of the need for compliance and ways to achieve it. For example, the violator could sponsor a series of seminars to provide information to a specific industry group on how to correct violations common to that industry. The violator could also sponsor public announcements on television and radio to discourage violations or describe how new technologies can be used to correct violations. Violators who sponsor public awareness projects must also agree to clearly state to the public that the project was undertaken as part of the settlement of an enforcement action brought by the government.

8.6.2.6 Training

Training settlements can be used to correct internal compliance problems within a company or organization. Violators that are industry leaders may be required to design and conduct compliance training for others within the same industry group.

8.6.2.7 *Alternatives for Sources Unable to Pay Penalties*

Some violators cannot afford to pay the monetary penalty normally imposed for the particular type of violation. If the authorities decide they should continue to operate, they may agree to alternatives that do not present an undue financial burden that would force the company to close. In such cases, they may reduce the penalty, allow for payment over time, or look for alternatives to monetary payment such as donation of their time and effort for voluntary improvements to environmental quality.

8.7 Citizen Enforcement

8.7.1 Citizen Suits

Some jurisdictions give private parties the right to bring enforcement actions before agencies or the courts. There are numerous benefits to providing opportunities for citizen enforcement. First, local citizens, directly affected by the behavior in question, are oftentimes better situated to detect and evaluate the impact of that behavior on the environment and their community. (See Box 8-9). Second, citizen enforcement saves the environmental management program money. Finally, private enforcement offers political cover to the environmental management program when the violator is a wealthy and powerful influence in the jurisdiction.

BOX 8-9: COMMUNITY ENFORCEMENT ALONG THE PHILIPPINE COAST⁵⁹

The Philippines, which consists of more than 7,000 islands, is characterized by great marine biodiversity. However, coastal resources are being severely degraded, in large part due to over-fishing and destructive fishing practices. One important aspect of efficient fisheries management is the enforcement of fishery regulations. Against this background, the “Bantay Dagat” is one strategy for protecting marine resources and environments. The Bantay Dagat is a unique participatory approach designed for coastal law enforcement, which has existed in the Philippines since the 1970s. “Bantay Dagat” literally means “safeguarding the sea.” A Bantay Dagat consists of a group of fishing community members who are usually trained and deputized as fish wardens and who cooperate with government law enforcement agencies in the local enforcement of fishery laws. It is a well-recognized participatory approach at local levels, and is generally comprised of volunteers. Successful Bantay Dagat groups contribute to a decreased use of illegal fishing methods, such as the use of dynamite or poisonous substances in fishing, and aim at raising the level of community awareness with regard to environmental protection and fisheries management. This, in turn, contributes to increased daily fish catches and greater municipal revenues from fisheries.

Typically, it is the government's role to enforce environmental laws in court. However, in many countries, citizens are given the right to assume or share this function through citizen suit provisions in the law. Citizen enforcement suits generally take one of two forms. Members of the public or environmental associations can bring an action against industrial facilities directly for violating applicable laws or rights.

Alternatively, members of the public can bring an action against the government for failure to perform nondiscretionary enforcement duties, with the aim of obtaining a court order requiring the appropriate agency to enforce the law. In either case, citizen enforcement suits are designed to protect the public interest by allowing citizens to help ensure that environmental laws and rights are properly upheld. To achieve this purpose, different countries have established mechanisms for authorizing citizen enforcement suits. (See Box 8-10).

BOX 8-10: CITIZEN ENFORCEMENT LAWSUITS IN EASTERN EUROPE⁶⁰

Citizen groups have successfully brought lawsuits to promote environmental enforcement in several Eastern European countries. In Ukraine, the citizen group Environment People Law filed a lawsuit to stop the construction of a chemical fertilizer terminal. Construction had already begun, with local government permission, before the environmental impact assessment had been reviewed by national government authorities, as required under Ukrainian law. The local branch of the Ministry of Environmental Protection and Nuclear Safety ordered an expert examination, or *expertiza*, of the proponents' environmental impact assessment, based on which it rejected the project. More than 10,000 local citizens had also signed a petition opposing the project. The proponents appealed to the national-level Ministry office in Kyiv, which conducted its own *expertiza* and approved the project.

Environment People Law then brought a lawsuit against the national office in the High Arbitration Court. After initial procedural difficulties were overcome, the Court found that the proponents' environmental impact assessment was published two months after the *expertiza*, in violation of the public's rights to be informed and to participate in the *expertiza* process.

The Court ordered the Ministry to require the project proponents to cease work on the project. This was a landmark victory because it was the first time that the Court had stopped a project for failure to comply with an environmental impact assessment requirement.

For instance, some countries grant citizens access to courts for the express purpose of environmental enforcement and institute specific provisions in their environmental statutes authorizing citizen suits for violations of those laws. In the United States, all major federal environmental statutes grant citizens the right to bring suit against "any person" for violation of that statute, with "person" defined broadly to include individuals, corporations, associations, and governments.

In some countries, the right to enforce environmental laws in court is derived from general provisions of the civil code. In Hungary, the civil code allows individuals to sue others for interfering with or endangering the use of land or property by others. While this provision is not specific to environmental law, citizens can use it to address environmental violations.⁶¹

Some countries allow citizens to go to court to enforce environmental laws in the public interest.⁶² For example, in India, citizens are granted broad access to bring public interest law suits to defend their human and social rights. Litigants need not prove a violation of law, as in countries where access to courts is established in environmental statutes, but they must demonstrate a violation of natural rights. Because these suits are filed in the public interest, citizens must base their claims on damages to society—not solely to themselves. Many countries, particularly those in Latin America, authorize citizens or citizen organizations to bring popular actions to enforce environmental laws. In Colombia, citizen groups can bring suit against any public or private entity causing threat of harm.

Similarly, the Brazil constitution allows any citizen to file a popular action (*acao populare*) to nullify a public administrative act that is injurious to the public property or to state property of environmental, cultural, or historical heritage. Except in cases of proven bad faith, the complainant is exempt from judicial costs.⁶³ To undertake this litigation, the constitution also provides for public prosecutors (*the Ministério Público*), who are charged with undertaking public civil actions required to protect the environment and social heritage.⁶⁴

If the law does allow citizen enforcement, it needs to take precautions to minimize the overlap with official enforcement actions. It is advisable to require citizen groups to file a notice of intent to sue, giving the environmental management program the opportunity to bring an action first superseding the citizen complaint. This is to avoid a situation where the same actor risks having an enforcement action brought against them by both the government and a private party, which would be perceived as unfair and thereby undermine the legitimacy of the entire environmental management program.

8.7.2 Negotiations and Settlement of Citizen Suits

It is common in the United States for environmental cases, including citizen enforcement suits, to be settled outside the courtroom through negotiations. To ensure enforceability, settlements are often crafted as court-negotiated consent decrees, with interim deadlines for specific actions and penalties for failure to comply. In many cases, there is a role for citizens in this process. In addition to citizen suit settlements, citizens who are parties to, or have an

interest in, a government enforcement suit often may participate in negotiating the terms of the consent decrees.

In several citizen suit agreements under the U.S. Clean Water Act, the alleged violators have avoided civil penalties by instead paying a sum of money to an environmentally beneficial project. The U.S. government looks upon settlements involving third-party payments with some suspicion and carefully examines consent decrees containing payments to environmental organizations. However, courts have upheld consent decrees containing such payments. For example, in 1995, the National Environmental Law Center negotiated a consent decree in the course of a citizen enforcement suit involving the discharge of pollutants by an oil company into the San Francisco Bay. In addition to obtaining the rights to future monitoring data, the Center negotiated for the oil company's \$2.2 million (US) in punitive damages to be distributed among more than twenty local education, restoration, and research projects in the Bay's watershed.⁶⁵

Another mechanism in the United States for achieving citizen-industry partnerships during the settlement of an enforcement case is the use of Good Neighbor Agreements. Under Good Neighbor Agreements, companies enter into negotiated contracts with workers, local community members and associations to establish a framework for public assessment of industrial environmental conditions. Common elements of these agreements include provisions for public disclosure of relevant company information and stakeholder audits, wherein citizens engage in direct, on-site evaluations of facilities to identify changes that may be needed to ensure environmental compliance, safety, and sustainability. Good Neighbor Agreements can also provide a forum for addressing community recommendations for improvements in environmental protocol.

Each Good Neighbor Agreement is unique, because the parties, conditions, and issues vary significantly among cases. However, the Rhone-Poulenc Community Audit Agreement in Texas serves as a good example for illustrating the fundamental elements of a typical agreement.⁶⁶ The agreement arose in the 1990s after an accident at the Rhone-Poulenc plant released poisonous sulfur dioxide gas into the community. The agreement provided for a safety and environmental audit to be financed by Rhone-Poulenc and integrated into the company's hazardous waste facility permit. Under the agreement, the auditor was to be approved and accompanied by a committee comprised of community group members and facility workers. Citizens were also given permission to conduct additional inspections by appointment. The scope of the audit included regulatory compliance, safety training, accident prevention, emergency response, waste analysis and information systems, monitoring programs, and waste minimization practices. The agreement also provided for public disclosure of company

documents including: a hazard assessment and risk analysis; lists of accidents, upsets, and corrective actions; and waste minimization and reduction plans. In the agreement, Rhone-Poulenc consented to “negotiate in good faith” any recommendations resulting from the audit.⁶⁷