

7. ENFORCEMENT RESPONSES TO VIOLATIONS

INTRODUCTION

Experience with environmental programs in many countries has shown that *enforcement is essential to compliance*. This is because, in any society, many people will not comply with the law unless there are clear consequences for noncompliance.

Enforcement by government programs seeks to correct violations and create an atmosphere in which the regulated community is stimulated to comply because the government has demonstrated a willingness to act when noncompliance is detected. This atmosphere also helps stimulate members of the regulated community to prevent pollution and minimize waste so that they are no longer subject to requirements. If authorized, a government enforcement program may also seek to correct and redress actual or potential harm caused by environmental pollution, whether or not the pollution violates a specific requirement.

Government programs are but one means of enforcement. In some countries, private citizens and groups are empowered by law to bring enforcement actions against violators. Insurance companies and financial institutions may require facilities to comply to be eligible for insurance or a loan. Finally, social norms can be an effective method of ensuring compliance in societies where there is strong social sanction for noncompliance with environmental requirements. For example, the public may choose to boycott certain products if they believe the manufacturer is harming the environment. All these nongovernmental forms of enforcement can greatly enhance a government program. Policymakers can strengthen government enforcement efforts by considering these other forces for enforcement when designing government programs. For example, government officials may benefit by working closely with concerned nongovernment groups on enforcement. Policymakers may also wish to focus government enforcement activities on areas not adequately covered by the private sector.

Government enforcement capabilities will generally be most effective if they are in place and used when requirements become effective. Delaying enforcement can undermine the credibility of the program and make it difficult to create an atmosphere of deterrence. Enforcement is often needed throughout the life of a regulatory program, to achieve initial compliance and to ensure that those who have achieved compliance maintain it.

Enforcement can be controversial because so much is at stake environmentally and economically. To be successful, enforcement requires support at all government levels and within all sections of the program. Governments can demonstrate their commitment to enforcement by enacting enforceable requirements and by providing clear and consistent support. Program personnel can demonstrate their commitment by taking violations seriously because of their threat to the environment and to the integrity of the legal system.

This chapter describes a range of authorities and response mechanisms for enforcement. Most countries with enforcement programs have some but not all of these authorities and mechanisms. Each program must work within the possibilities offered by the legal system or systems under which the program operates. This chapter describes issues to consider when doing this, and suggests new possibilities that may be appropriate to consider when the legal system is being changed.

THE RANGE OF RESPONSE MECHANISMS AND AUTHORITIES

All enforcement programs benefit from a range of authorities and response mechanisms so that program officials can appropriately respond to the many different types of violations and circumstances that will arise.

Authorities

In most countries, the range and type of response mechanisms available will ultimately depend on the number and type of authorities provided to the enforcement program by environmental and related laws. These authorities provide the legal basis for enforcement which is essential to the power and credibility of an enforcement program. Table 7-1 summarizes a range of authorities that may be useful for an enforcement

TABLE 7-1. TYPES OF ENFORCEMENT AUTHORITIES¹

Remedial Actions

- Authority to impose a schedule for compliance
- Authority to permanently shut down part of an operation
- Authority to temporarily shut down certain parts of operations or practices
- Authority to permanently shut down an entire facility
- Authority to temporarily shut down an entire facility
- Authority to deny a permit
- Authority to revoke a permit
- Authority to require a facility to clean up part of the environment
- Emergency powers to enter and correct immediate dangers to the local population or environment
- Authority to seek compensation for damage caused by the violation

Other

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

Sanctions

- Authority to impose a monetary penalty with specified amounts per day per violation
- Authority to seek imprisonment (a jail term)
- Authority to seek punitive damages or fines within specified limits
- Authority to seize property
- Authority to seek reimbursement for government clean-up expenses
- Authority to bar a facility or company from government loans, guarantees, or contracts
- Authority to require service or community work to benefit the environment
- Limitations on financial assistance

¹This list of enforcement authorities is a hybrid and does not appear in any one law or country. It is an example of the types of authorities that may be made available to enforcement officials through environment laws. These authorities may be either direct authorities or the authority to seek a court order to impose the sanction.

program. This list is an amalgam of the authorities of several different enforcement programs in the United States and other nations.

Response Mechanisms

Enforcement mechanisms may be designed to perform one or more functions:

- Return violators to compliance.
- Impose a sanction.
- Remove the economic benefit of noncompliance.
- Require that specific actions be taken to test, monitor, or provide information.
- Correct environmental damages.
- Correct internal company management problems.

Response mechanisms generally fall into the following categories, described below:

INFORMAL or FORMAL

CIVIL or CRIMINAL

ADMINISTRATIVE or JUDICIAL

INFORMAL MECHANISMS

Informal responses include phone calls, site visits, warning letters, and notices of violations (see Table 7-2). Informal responses advise the facility manager what violation was found, what should be done to correct it, and by what date. The goal of informal action is simply to bring the violator into compliance or to initiate formal legal process. Informal responses themselves do not penalize and cannot be enforced, but can lead to more severe response if they are ignored.

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 are either civil or criminal as described below. As indicated by the diagram, above, 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). Authorities to use formal enforcement mechanisms must be provided in environmental laws.

Civil Administrative Enforcement

Civil administrative orders are legal, independently enforceable orders issued directly by enforcement program officials that define the violation, provide evidence of the violation, and require the recipient to take corrective action within a specified time period. If the recipient violates the order, program managers can usually take further legal action using additional orders or a court system to directly force compliance with the order. 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. Two advantages of administrative enforcement are that it does not require coordination with a separate judicial agency and the administrative organization's own administrative law judges are usually more knowledgeable because they are dedicated to addressing environmental problems. Therefore, administrative actions are usually resolved more quickly and require less time and expense than judicial actions. Administrative orders are not self-enforcing, however. If the order is not complied with, further enforcement action will need to be pursued through the judicial system.

TABLE 7-2. TYPES OF INFORMAL RESPONSE

- **Telephone Call.** This is perhaps the simplest 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.

- **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 source managers know that they are violating the law and must correct the situation or face adverse legal action and consequences. A warning letter may also describe the potential sanctions of continued noncompliance; require a response from the violator detailing the corrective action taken; and/or suggest that the violator meet with compliance officials to discuss 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 may follow if the violator does not take action by the deadline.

Field citations are administrative orders issued by inspectors in the field. Typically, they require the violator to correct a clear-cut violation and pay a small monetary fine. Field citations are much like traffic tickets. Depending on the procedural steps defined by the program, the violator can either appeal the citation, pay it, or risk more formal enforcement action. Field citations are generally used at the provincial and/or local levels to handle more routine types of violations. They can be a relatively efficient means to enforce 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.

Civil Judicial Enforcement

Civil judicial enforcement actions are formal lawsuits before the courts. Some nations with civil enforcement authorities rely exclusively on civil judicial actions to enforce environmental laws. Other nations have adopted both administrative and judicial mechanisms to carry out civil enforcement authorities. Where available, administrative enforcement is generally preferred as a first response (with some exceptions), because judicial lawsuits are far more expensive, require more staff time, and may take several years to complete. However, judicial enforcement has several advantages. It is often perceived as having greater significance and therefore has more power to deter potential violations and to set legal precedents. Also, the courts are often uniquely empowered to require action to reduce immediate threats to public health or the environment. 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 administrative enforcement mechanisms are available, civil judicial responses are generally used against more serious or recalcitrant violators, where precedents are needed, or where prompt action is important to shut down an operation or to stop an activity.

Criminal Enforcement

Criminal judicial response is generally considered appropriate when a person or facility has knowingly and willfully violated the law, or has otherwise committed a violation for which society has chosen to impose the most serious legal sanctions available. These responses seek criminal sanctions, which may include monetary penalties and imprisonment. Nations such as Canada that now rely exclusively on criminal law for environmental enforcement have also developed creative sentencing provisions to introduce other remedies and sanctions (such as community service and required environmental audits) designed to "punish" the wrongdoing (see Table 7-1). While criminal response can be the most difficult type of enforcement, it can also create the most significant deterrence since it personally affects the lives of those who are prosecuted and carries with it a significant social stigma. 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 and willfully responsible for the violation. Specially trained criminal investigators may be necessary to develop criminal cases.

The ability to apply criminal enforcement in environmental cases depends on a country's legal system and on whether appropriate authority is provided in environmental or other laws. For example, in the United States there are generic statutes that make it a crime to report false information. Conversely, in Hungary only a "natural person" can be criminally liable, and a facility or business is not considered to be a "natural person." Under these circumstances, criminal enforcement is difficult because the facility itself is not answerable for the "crime" and it is often difficult to identify which individuals within the facility were responsible.

THE ENFORCEMENT PROCESS

Protecting Basic Rights

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

- **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 and/or (2) to 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 either the finding that there is a violation, the remedial action required by the enforcement program, or the severity of the proposed sanction.
- Dispute Resolutions. 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 (see Table 7-3).

In general, the more an enforcement action may deny an individual his or her rights, the more protections the enforcement process provides and the longer the process may take before final action is initiated.

Supporting the Enforcement Case

Many issues may be raised and disputed in typical enforcement actions. 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 being argued in front of an independent decisionmaker 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., affordable pollution control equipment). (Even though this is not usually the responsibility of the government, this information can be important to negotiations.)
- Demonstrate the ability of the violator to pay, e.g., showing that a "poor" facility is owned by a wealthy parent company.

TABLE 7-3. TYPICAL DISPUTE RESOLUTION PROCEDURES

- ***Face-to-face negotiations between program officials and the violator either:***
 - *Before formal enforcement response is pursued.* At this point in the process, the discussion usually focuses on whether there has been a violation. If agreement is reached, there may also 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 discussions. The resulting agreement, e.g., an administrative order or a settlement, is placed before a final decisionmaker, e.g., a judge, for approval.
- ***Presentations before a decisionmaker*** (often a judge or hearing examiner) who 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 upon by enforcement 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 would be unlikely to fully understand.

The Role of Negotiation

Negotiation is an integral part of enforcement. In the United States, most enforcement cases are settled through negotiation rather than by unilateral decision. Negotiation enables both the facility and the concerned party or parties to consider the correctness of the facts, the circumstances of the case, and the variety of alternative responses. Negotiation provides an opportunity to obtain additional information and correct misinterpretations before pursuing legal action. Negotiation also provides an opportunity to reach a solution that satisfies all parties. Enforcement actions create a stimulus and context for discussion and resolution. Enforcement provides the framework in which solutions can be negotiated. Negotiation can enhance compliance by sending a signal to the regulated community that, while pursuing 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.

Negotiations will generally be most effective if there remains a real possibility of litigation. In some cultures or situations it may be very important to keep this threat real so that facilities do not use negotiations as a means of delaying compliance. Program officials can keep this threat real by maintaining a strict schedule for negotiations 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, nongovernment organizations). In some negotiations (e.g., an impasse), an experienced third party may be used to change the dynamics, provide new perspectives, and propose possible solutions that had not previously been considered. Table 7-3 describes some typical dispute resolution procedures.

The result of negotiations is a *settlement* — a documented official resolution to the situation, e.g., an "administrative consent order" or a "judicial consent decree" in the United States. In the U.S. system, negotiation is most often used within the context of legal enforcement proceedings. This results in a legally binding agreement between the violator and the enforcement program or a negotiated agreement that must be submitted to a court for consideration and final approval.

Two types of enforcement responses are usually not negotiated. One is a request by enforcement officials for information from the violator. This is usually 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 this case, there is no time to negotiate.

Role of the Public To Ensure Accountability

In some countries (e.g., the United States), the public has a right to comment on enforcement agreements, orders, and decrees before they are final. The public may also be allowed to gain access to final enforcement actions. 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 a precedent if they are favorable.

CREATIVE SETTLEMENTS: LEVERAGING ENFORCEMENT FOR BROADER RESULTS

Agreements 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 to solving environmental problems. 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 are often linked to some limited reduction in monetary penalty or an agreement to extend compliance schedules. Creative settlements may also be sought for violators with limited ability to pay or violators that demonstrate a strong level of cooperation with the government. U.S. policy limits the amount of penalty reduction allowed in creative settlements because of need to maintain some level of penalty to preserve deterrence and recover the economic benefit of noncompliance.

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 prevented when the volume and/or the toxicity of pollutants is reduced. In manufacturing, for example, pollution prevention includes activities such as substituting chemicals, reformulating products, modifying processes, improving housekeeping, and recycling on site.

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

Pollution Reductions Beyond Compliance

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

Environmental Auditing

Environmental auditing is a periodic, systematic, documented and objective review at a regulated facility of its compliance status, management systems and/or overall environmental risk. Auditing has been encouraged by many nations and by the International Chamber of Commerce as an essential tool for regulated facilities to ensure compliance and to effectively manage their environmental risks (see Chapter 5).

Environmental audits have been required in several enforcement actions in the United States for one of two purposes. 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 pay 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 operations owned by the same company, a settlement may include an agreement (1) that the company or a third-party auditor will audit for that violation at the other facilities owned by the company, and (2) that any violations will be reported and corrected.

Environmental Restoration

Environmental restoration settlements not only repair the damage done to the environment because of the violation, but also further enhance the environment around the facility. If the environmental damage caused cannot be restored, the settlement may require the facility to restore a comparable environment in another location.

Publicity

In public awareness settlements, the violator agrees to undertake some activity to increase the awareness by the regulated community of the need for compliance and/or ways to achieve compliance. For example, the violator could sponsor a series of seminars to provide information to a specific industry group about how to correct violations common to that industry. The violator could also sponsor public announcements on television and radio to discourage violations or to describe how new technologies can be used to correct violations. In the United States, 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 a lawsuit brought by the government.

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.

Escrow or Bond for Sources Unable to Pay Penalties

This type of settlement is useful for facilities that cannot afford to pay the monetary penalty normally imposed for the particular type of violation. In such cases, the facility agrees to put some money into an escrow or bond account which will be used to fund remediation or other activities to improve environmental quality.

ENFORCEMENT RESPONSE POLICIES

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 penalties. The perception and fact of fairness is critical to the credibility of an enforcement program, and also helps otherwise reluctant staff make what are often difficult decisions to demonstrate government will and resolve to enforce environmental laws. Key issues to consider when drafting an enforcement policy are discussed below.

Criteria for Noncompliance

Whether a facility is in compliance is not always obvious. Specific guidelines and criteria are often needed for determining compliance from noncompliance. These standard criteria help ensure that all members of the regulated community are treated equally and fairly.

SELECTION OF APPROPRIATE ENFORCEMENT RESPONSE

Selecting an appropriate enforcement response raises several difficult issues, discussed below, which often need to be addressed in an enforcement response policy. (These issues may already have been addressed in the wording of the authorities provided by the environmental laws.)

When Should Civil or Criminal Responses Be Used?

This issue is relevant only to countries that have or are considering implementing both civil and criminal authorities. In the United States, criminal enforcement actions are generally reserved for actions that deserve punishment, rather than correction, e.g., where the violation is intentional and willful. Criminal actions are also used to ensure the integrity of the regulatory scheme, e.g., for facilities that operate without a permit or license. Cases reserved for criminal enforcement typically include:

- Falsifying documents.
- Operating without a permit.

- Tampering with monitoring or control equipment.
- Repeated violations.
- Intentional and deliberate violations (e.g. decisions to violate based on greed).

In the Netherlands, both criminal and administrative charges can be brought for violations of environmental laws. Serious violations are usually met with direct criminal charges. Many Public Prosecutors 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, complete or partial shut down of operations, confiscation of property, and publicizing the court's verdict.

When Should a Sanction Be Imposed?

For certain types of enforcement response, it may be sufficient to negotiate a compliance schedule where the violator agrees to return to compliance and/or clean up a pollution situation by a certain date. When deterrence is important to a program's compliance strategy, maximum impact will be gained if each enforcement action is used to send a deterrence message to the regulated community. Sanctions help send this message. However, sanctions may not be appropriate for violations that are not preventable, or that are too minor to focus government resources on the legal process that necessary to impose a sanction. These considerations need to be balanced in deciding when to impose a sanction.

Should a First Enforcement Response Include a Sanction?

There are two basic approaches to this issue. One approach does not seek a sanction for first violations but imposes a stiff sanction if noncompliance 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 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 noncompliance.

The second approach is to impose a sanction 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.

What Type of Sanction Should Be Used?

Depending on the authorities provided in environmental laws (see Table 7-2), enforcement officials often have several types of sanctions they may impose for violations. The enforcement policy will need to provide guidance on when these various types of sanctions are appropriate.

Monetary Penalty. Monetary penalties are the most common sanction used in enforcement response. An enforcement policy will need to provide guidance on how to calculate an appropriate penalty for various types of violations. There are several bases on which to calculate an appropriate monetary penalty (see Table 7-4). In reality, monetary penalties are often a combination of these factors. Table 7-5 provides one example of a penalty calculation using a variety of factors.

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 to cease at least part of its operation or be in clear and direct violation of the law.

Shutdown of Operations. Program officials may be able to shut down operations. The threat of a shutdown can be an effective deterrent, particularly in a free market economy where shutdowns directly affect profits.

Jail Terms. Criminal sanction (e.g., jail terms) for managers or employees of violating facilities can be an extremely effective deterrent. Criminal sanctions can only be imposed where allowed by the legal system. This penalty has substantial public support in the United States. In the United States, for example, criminal sanctions can be sought if someone willfully circumvents a requirement or fraudulently reports data. Some criminal cases can be costly and involve complex procedures. However, in the United States, their deterrent effect has been so great that even a relatively small number of successful cases have caused other companies to change their management ethics. Under U.S. Sentencing Guidelines, sentences for environmental crimes can be

**TABLE 7-4. FACTORS THAT MAY BE USED TO
CALCULATE A MONETARY PENALTY**

Gravity of the Actual or Potential Harm to the Environment and/or 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 noncompliance.
- Environmental and/or public health risk or impact.
- Importance to maintaining the integrity of the enforcement program.

Economic Benefit. Penalties that, at a minimum, recover the economic benefit a violator may have gained by not complying remove the economic advantage for noncompliance. This type of penalty is important to maintain fairness by ensuring that facilities that comply are not economically disadvantaged by doing so. It also removes the economic incentive for noncompliance. At the national level and in some states in the United States, enforcement policies require recovery of economic benefit.

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. Bankruptcies 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/or enforcement is 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. Financial penalties are less likely to deter public agencies since they are not profitmaking ventures.

Other Factors. These 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.

TABLE 7-5. SAMPLE WORKSHEET TO CALCULATE A MONETARY PENALTY¹

Facility Name: _____

Money the Facility Saved by Not Complying with Regulations

Example

Costs avoided	_____	<u>\$10,000</u>
Costs postponed	_____	<u>\$ 5,000</u>
Total	<u>(a) _____</u>	<u>(a) \$15,000</u>

Seriousness of the Violation

PAYMENT CALCULATION MATRIX

	Extent of Deviation from Requirement(s)		
	High	Medium	Low
Potential for Harm			
High	\$5,000 to \$4,000	\$3,999 to \$3,000	\$2,999 to \$2,200
Medium	\$2,199 to \$1,600	\$1,599 to \$1,000	\$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) _____ (b) \$3,000

Adjustment for the Duration of the Violation

Number of days of noncompliance _____ (c) _____ (c) 50
 Total = [(b) x (20%)] x (c) (d) _____ (d) \$30,000

SUBTOTAL

Subtotal = (a) + (d) (e) _____ (e) \$45,000

Penalty Adjustment Factors²

1. Degree of cooperation (+/-) (f) _____ (f) +5%
 2. History of compliance (+/-) (g) _____ (g) -5%
 3. Supplemental environmental projects³ (+/-) (h) _____ (h) -10%
 4. Ability to pay (-) (i) _____ (i) -5%
 Total = [(f) + (g) + (h) + (i)] x (e) (j) _____ (j) -\$6,750

TOTAL PENALTY

Total penalty = (e) + (j) _____ \$38,250

¹Loosely based on a worksheet used for a U.S. environmental program.

²Adjustments may range from -20% to +20% for factors 1, 2, and 3, and from -100% to 0% for factor 4. Selection of appropriate percentages is based on subjective judgment and should be fair relative to adjustments made when calculating penalties for other similar violations.

³Supplemental environmental projects are projects the facility is conducting or will conduct to benefit the environment (see description in this chapter).

reduced if the corporate official 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.

Denial of Government Funding. In this penalty, violators are placed on a list of firms from which government agencies will not purchase goods and services, or provide loans or guarantees. The lists are shared with other government agencies that purchase services or goods from industry. The name is removed once the firm returns to compliance. In the United States, this sanction has been very effective in several difficult compliance cases.

Negative Publicity. As part of a settlement, 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 their 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. In the United States, enforcement officials are increasingly using publicity about violations as an enforcement tool.

Other Sanctions. Other possible sanctions are listed in Table 7-1.

What Enforcement Responses Are Appropriate for Government-Owned and/or -Operated Facilities?

Enforcement by one government organization against another government organization is usually difficult for many reasons. For example, monetary penalties for many government facilities are paid for out of a central budget. The loss of this money generally has little impact on the individual facility's operation. In government systems, it can be difficult to hold managers and operators of facilities accountable for failing to comply with requirements. In some countries or regions, facilities may be receiving conflicting signals — one government organization may require compliance while another may demand high levels of production. It can be politically difficult for one government organization to enforce against another. Also, in many countries government organizations cannot be sued by citizens or other government organizations for failure to comply with environmental requirements. For all these reasons, managers of government facilities may have little incentive to ensure that their facilities are in compliance with environmental requirements.

The United States has some experience in enforcement against government-owned facilities. With a few exceptions, the U.S. federal government has waived its special immunity from prosecution and has given both state governments and citizens the right to take the federal government to court if it does not comply with federal, state, or local environmental requirements. The U.S. Environmental Protection Agency (U.S. EPA — the federal agency responsible for environmental protection) can pursue enforcement against other government agencies, but it generally does not seek penalties nor does it take civil judicial action against sister agencies. The U.S. EPA can develop bilateral administrative compliance orders and agreements with other agencies, and also issues some unilateral administrative orders if these orders are not disputed. The U.S. EPA can also hold government officials criminally responsible for their actions. To resolve disputes, the U.S. EPA uses an internal appeals system within the Executive Branch of the government. The enforcement process is useful to force agencies to budget for environmental problems. Public pressure has also been a powerful force to gain federal government compliance. In the mid-1980s, the U.S. EPA and states also began to aggressively enforce against municipalities. Creative solutions were found to enforcement problems, including creative financing arrangements that enabled municipalities to meet the requirements. The penalties imposed through enforcement also helped induce some local communities to vote to increase their taxes in order to raise money to finance pollution control.

Federal facility operators are criminally liable for environmental crimes, e.g., improper disposal of hazardous waste. In the past several years, the U.S. EPA has been much more aggressive about enforcing against federal facility operators. These cases have generally received a great deal of public attention.