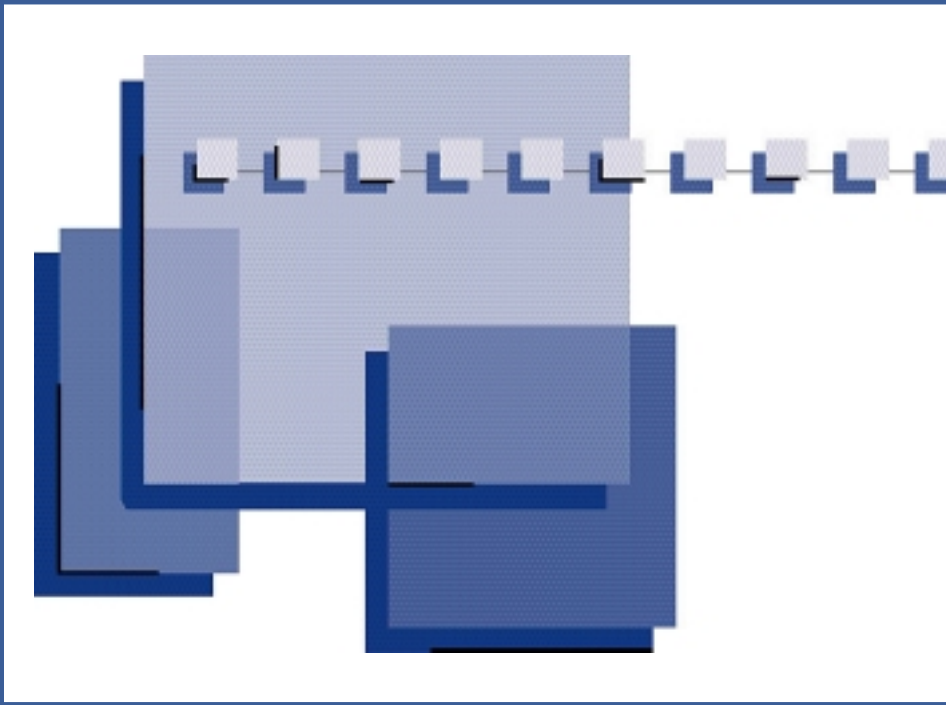
United States
Environmental
Protection Agency

Office of Enforcement
and Compliance Assurance
(2248A)

EPA 300-F-00-002
May 2000
http://www.epa.gov/
oeca/ore/med/

LEVELING THE PLAYING FIELD

Eliminating the Economic Benefit of Violating Environmental Laws



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Leveling the Playing Field:
Eliminating the Economic Benefit of Violating Environmental Laws

The federal courts and the United States Environmental Protection Agency Administrator are explicitly required to consider the economic benefit violators gain from noncompliance when imposing civil penalties under the Clean Water Act, Safe Drinking Water Act, Clean Air Act and the Emergency Planning and Community Right to Know Act. Although economic benefit is not a specific factor in other statutes—the Resource Conservation and Recovery Act, Toxic Substances Control Act, Comprehensive Environmental Response, Compensation and Liability Act and the Federal Insecticide, Fungicide and Rodenticide Act—the courts are keenly aware of its critical role in deterring future violations. Penalties serve to "level the playing field" and ensure that noncompliers do not enjoy or gain a competitive advantage over competitors who have invested time and money to achieve compliance.

The civil penalty that federal judges and EPA's administrative law judges impose on a violator has two components: the **economic benefit** being recovered, which ensures that the violator does not profit from his illegal action, and a **dollar penalty** that accounts for the degree of seriousness of the violation.

CIVIL PENALTIES ARE NECESSARY TO THE ENFORCEMENT OF ENVIRONMENTAL LAWS

Civil penalties play a vital role in environmental protection—their assessment is a central feature of EPA's enforcement actions. Penalties promote compliance and protect public health and the environment by deterring future violations by the same or some other members of the regulated community. Although most regulated entities want to comply with environmental laws—even when compliance requires significant amounts of staff time and money—a small percentage of regulated entities choose not to comply. Penalties remove a major incentive for these regulated entities to delay compliance. Penalties also function to keep the economic playing field level for the vast majority of honest firms that have already complied.

WHAT IS MEANT BY 'ECONOMIC BENEFIT'?

EPA commonly defines "economic benefit" in two ways:

Avoided and delayed pollution control expenditures. A violator can obtain economic savings from its failure to install and operate pollution control equipment on-time (*i.e.*, in compliance with the law).

Illegal competitive advantage. A violator can obtain an illegal competitive advantage in several ways, such as obtaining illegal profits by selling a product before he or she obtains necessary approvals, or by selling a product after the product has been banned. A violator also could gain a greater share of the market by selling his or her goods at a reduced price due to the cost savings from avoided environmental protection expenditures. Further, if a violator initiates construction or operation of a facility before he or she obtains the necessary approvals, an increase in market share may be gained.

DETERMINING ECONOMIC BENEFIT BY USING THE 'BEN' COMPUTER MODEL

The majority of cases have involved only the economic benefit that a violator derived from delaying and avoiding necessary pollution control expenditures. In settling an enforcement action, EPA uses a computer model called "BEN" to determine the amount that a violator saved by investing its money in profit-making activities instead of complying with the law, and it is now playing a crucial enforcement role.

Recovery of economic benefit, plus a penalty that reflects the "gravity" or seriousness of the violation, is the foundation of the EPA penalty policy across all environmental statutes. Statute-specific programs have developed individual policies implementing this generic penalty policy (*e.g.*, "Civil Penalty Policy For Section 311(b)(3) And Section 311(j) of The Clean Water Act," found at http://www.epa.gov/oeca/ore/water/311pen.html.)

FEDERAL COURTS RECOGNIZE THE IMPORTANCE OF RECAPTURING THE ECONOMIC BENEFIT OF NONCOMPLIANCE

Federal courts have almost unanimously recognized the importance of economic benefit in establishing appropriate penalties that deter future violations. For example, in United States v. Municipal Authority of Union Township; and Dean Dairy Products Company, Inc., 929 F.Supp. 800 (M.D. Pa., 1996), aff'd 150 F.3d 259 (3rd Cir. 1998), the Court specifically recognized that the goal of deterrence requires that a penalty have both an economic benefit component to ensure that the violator does not profit from its violation of the law, as well as a punitive component to account for the degree of seriousness and/or willfulness of the violations.

WHAT THE FEDERAL COURTS HAVE SAID:

The court in United States v. Smithfield Foods, Inc., 972 F.Supp. 338 (E.D. Va. 1997) followed the same logic in imposing a penalty of $12.6 million, the largest environmental civil penalty in history. The economic benefit portion alone was $4.2 million. The Fourth Circuit Court of Appeals upheld the District Court's approach in calculating the economic benefit component. That Court stated, "The rationale for including this measure as part of the violators' fine is to remove or neutralize the economic incentive to violate environmental regulations." No. 97-2709, slip op. at 20 (4th Cir. Sept. 14, 1999), citing United States v. Municipal Authority of Union Township; and Dean Dairy Products Company, 150 F.3d 259, 264 (3d Cir. 1998).

State courts have also embraced the concept of economic benefit. "First, [a penalty] should include the 'economic benefit of non-compliance'; otherwise, the violator and potential violators would perceive that it pays to violate the law, creating an obvious disincentive for compliance." Keeney v. Durable Wire, Inc., 1995 Conn. Super. LEXIS 2541 (1995).

CASES INVOLVING THE RECAPTURE OF ECONOMIC BENEFIT

1999—Ashland Oil Company: On October 1, 1998, EPA and the Justice Department announced that the company agreed to a $32.5 million settlement to resolve charges that the company violated the Clean Air Act (CAA), the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), the Emergency Planning and Community Right to Know Act (EPCRA), and the Toxic Substances Control Act (TSCA) at its refineries in Catlettsburg, Kentucky, St. Paul Park, Minnesota, and Canton, Ohio. The claims against Ashland included the release of excess sulfur dioxide and other pollutants at its Catlettsburg and Canton facilities in violation of the CAA; unreported accidental

RECENT CASES...

releases of toxic chemicals at the Catlettsburg facility in violation of EPCRA; unauthorized wastewater discharges at each of the three refineries in violation of the CWA; and improper management of hazardous waste in violation of RCRA.

The company's total penalty was $5.9 million, including $4 million in illegal savings.

1998—Hudson Foods: On May 8, 1998, Hudson Foods, a subsidiary of the Arkansas-based food processing company Tyson Foods Inc., agreed to a $6 million settlement to resolve allegations it polluted Maryland waters that flow into Chincoteague Bay. According to the United States, Hudson's Berlin plant discharged wastewater with illegal amounts of fecal coliform, phosphorus, nitrogen, ammonia and other pollutants into Kitts Branch. Kitts Branch flows into Trappe Creek, Newport Bay and Chincoteague Bay. The United State's lawsuit also alleged that Hudson violated pollution monitoring, sampling and notification requirements of its Clean Water Act permit.

Under the settlement, the company paid a $4 million civil penalty —virtually all of that amount was for illegal economic savings. The company also committed to spending $2 million to stem the flow of water-polluting agricultural run-off from Hudson's and Tyson's processing plants and farms in Maryland, Virginia, Delaware and Pennsylvania.

AVAILABLE RESOURCES

The BEN computer model and the User Manual for estimating the avoided and delayed cost of noncompliance are available in electronic and diskette forms.

Printed copies: Printed copies are available for purchase from the National Technical Information Service (NTIS). Call (800) 553-6847 and request publication PB 99-501587. Federal, state and local government enforcement staff can obtain hard copies from EPA's new Helpline for Financial Issues that Impact Litigation at **(888) ECONSPT (326-6778)** or from the Helpline's E-mail address: benabel@indecon.com.

Guidance on BEN economic issues is available for federal, state and local government enforcement staff through the above Helpline. For guidance on the legal and policy issues regarding benefit recapture, federal, state and local government enforcement staff should continue to contact Jonathan Libber in United States EPA's Office of Enforcement and Compliance Assurance at (202) 564-6102 or E-mail: libber.jonathan@epa.gov.

EPA Offers Training on using 'BEN' Model

EPA periodically conducts training workshops to EPA Regional, state and local enforcement staff on the use of the BEN model. Individuals interested in the training course should contact the Helpline at (888) ECONSPT (326-6778).

EPA can arrange BEN computer training workshops for your staff.

OTHER EPA ENFORCEMENT COMPUTER MODELS

The following computer models are available for use by local, state and government employees for analyzing financial issues that impact enforcement actions. These models can be found at http://www.epa.gov/oeca/datasys/dsm2.html.

ABEL Model: Evaluates a corporation's claim that it cannot afford compliance costs, clean-up costs or civil penalties.

CASHOUT Model: Calculates the present value of cleanup costs for a given Superfund site.

PROJECT Model: Calculates the real cost to a defendant of a proposed supplemental environmental project.

INDIPAY Model: Evaluates an individual taxpayer's claim that he or she cannot afford compliance and clean-up costs or civil penalties.

MUNIPAY Model: Evaluates a municipality's claim that it cannot afford compliance and clean-up costs or civil penalties.

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