Federal Enforcement of the Clean Air Act: Past, Present, and Future

Daniel J. Brown[1]

A central theme of this edition of the Newsletter is the Trump Administration's (the "Administration's") impact on EPA's implementation of the Clean Air Act (CAA). Other articles in this edition have focused on the Administration's impact on specific aspects of the CAA. In contrast, this article will focus more generally on the Administration's impact on EPA's use of its enforcement authority under the CAA. The general structure of EPA's enforcement authority, as well as the Agency's practical application of such authority, is reviewed before discussing how EPA's approach to enforcement might be impacted by the change of administration. Finally, this article discusses options for mitigation of penalties in federal enforcement actions under the CAA.

EPA's Enforcement Authority Under the CAA

EPA's main source of authority to pursue civil penalties against stationary sources is found in § 113 of the CAA. CAA § 113 provides two avenues by which EPA can pursue civil penalties. The first avenue is civil judicial enforcement. Under CAA § 113(b), EPA can pursue civil penalties of up to $97,229 *per day, per violation* in federal district court.[2] If EPA chooses this avenue, it will refer the matter to the Department of Justice ("DOJ").

Rather than refer an enforcement matter to DOJ, EPA may instead choose to pursue administrative enforcement. EPA's maximum penalty authority when pursuing administrative enforcement is $46,192.[3] Under CAA § 113(d)(3), EPA may pursue such administrative enforcement if the following two criteria are met:

(1) The total penalty sought does not exceed $369,532[4]; and
(2) The first alleged date of violation occurred no more than 12 months before the initiation of the administrative action.

Either of these limitations may be waived if EPA and DOJ jointly determine that administrative enforcement is appropriate despite the larger penalty amount or longer period since first occurrence of a violation.

[1] Daniel J. Brown is an attorney in Atlanta, Georgia who has been practicing environmental law for 25 years and has a degree in chemical engineering.
[2] Emphasis added. 40 C.F.R. § 19.4, Table 2; 83 Fed. Reg. 1193 (Jan. 10, 2018)(current statutory maximum after accounting for inflation).
[3] 40 C.F.R. § 19.4, Table 2.
[4] 40 C.F.R. § 19.4, Table 2.

Practical Enforcement of the CAA: EPA's Civil Penalty Policies

Given EPA's maximum statutory penalty authority, EPA could easily assess a 7-figure or even 8-figure penalty for a handful of violations without breaking a sweat. However, EPA only pursues such maximum amounts in the most egregious or the most vigorously litigated cases. Typically, EPA assesses penalties that are considerably less than the statutory maximum.

To achieve fair, consistent, and expeditious resolution of enforcement matters, EPA has developed a series of civil penalty policies. While these policies may differ in the details, they all incorporate the following fundamental elements: [5]

1.) A method for determining the economic benefit of noncompliance (the "EBN");
2.) A method for calculating the "Gravity Component" of a penalty. This component reflects the seriousness of the violation;
3.) A Base Penalty, which is the sum of the Gravity Component and the EBN;
4.) Guidance for making upward adjustments to the Base Penalty ("Upward Adjustments") such as size of the violator or severity of an accident; and
5.) Guidance for making downward adjustments to the Base Penalty ("Downward Adjustments") to account for factors such as cooperation and good faith efforts to comply.

There are two civil penalty policies that apply to stationary sources under the CAA: The *Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68* (Oct. 25, 1991)(the "CEP"), and the *Clean Air Act Stationary Source Civil Penalty Policy* (June 2012)(the "Stationary Source CPP"). The CEP guides EPA's assessment of penalties for violations under the specific provisions, as well as the general duty clause ("GDC"), of EPA's Chemical Accident Prevention Program (the "CAPP"). The Stationary Source CPP guides EPA's assessment of penalties for most other violations of the stationary source provisions of the CAA.

Under the CEP, the Upward Adjustments can cause even a modest Base Penalty to quickly spiral into a high 6-digit total penalty. To take just one example, the Upward Adjustment accounting for severity of an accident can easily end up doubling or tripling the Base Penalty, even where an accident results in no serious injuries. For catastrophic events, this Upward Adjustment can increase the Base Penalty by a factor of five or more. [6]

Alternatives to Civil Penalties: Supplemental Environmental Projects

While the assessment of penalties is EPA's main tool for civil enforcement of the CAA, the Agency does have other tools at its disposal, particularly in the context of settlement. One of the Agency's favorite tools is the supplemental environmental project ("SEP"). EPA has been using SEPs to settle enforcement actions for many years, and most recently updated its policy for SEPs

[5] The fundamental elements for a civil penalty policy were originally presented in *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* (Feb. 16, 1984).
[6] CEP, p. 14 & App. B.

in 2015.[7] EPA likes SEPs because they allow EPA to achieve environmental protection goals that it could not otherwise achieve by simply enforcing the law. Correspondingly, many regulated entities like SEPs because they can be used to mitigate a civil penalty. Moreover, regulated entities gain the added satisfaction of knowing that a portion of the money paid in settlement will result in tangible benefits to the environment.

According to the SEP Policy, a SEP is:

> [A]n [e]nvironmentally beneficial project… which a settling party agrees to undertake in settlement of an enforcement action, but which the settlement party is not otherwise legally required to perform."[8]

The SEP Policy establishes the criteria that a proposed project must meet to be included as part of the settlement. Chief among these is the criterion that there be a nexus between the scope of the project and the subject matter of the enforcement action. For example, for non- compliance with the CAA's General Duty Clause, EPA has accepted the settling regulated entity's acquisition for the local government of emergency vehicles and emergency communications systems that would tend to reduce the effects of hazardous conditions. Settling regulated entities should be aware, though, that they usually cannot obtain "dollar-for-dollar" credit for SEPs against civil penalties. Settling regulated entities also cannot completely avoid a civil penalty in exchange for agreeing to perform a SEP.[9]

The Shifting Landscape of Federal Enforcement of the CAA

Administrative agencies tend to adapt to changes in administration at a rather deliberate pace. EPA is no exception to this tendency. Nonetheless, since the change of administration in 2017, at least two distinctly different approaches to enforcement by EPA appear to be emerging. These are:

(i) A shift towards allowing delegated states to assume the lead role in a greater share of enforcement actions; and

(ii) Greater use of existing self-disclosure policies as a tool for assuring compliance.

Perhaps the clearest shift in the enforcement priorities of the Administration is a shift towards allowing the states to assume a more significant role in the enforcement of most environmental laws and regulations. In its *FY 2018-2022 Strategic Plan* (Feb. 12, 2018)(the "Strategic Plan"), EPA expressed a preference for shifting more of the burden for routine enforcement of the nation's environmental laws, including the CAA, to states with delegated enforcement authority.[10] This preference was re-emphasized by EPA in a recent memorandum.[11]

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[7] *U.S. Environmental Protection Agency Supplemental Environmental Projects Policy – 2015 Update* (Mar. 11, 2015)(the "SEP Policy").

[8] SEP Policy, p. 6.

[9] SEP Policy, pp. 7-8, 21-24.

[10] Strategic Plan, pp. 1, 4, 21-22.

[11] EPA Memorandum: *Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States* (Jan. 22, 2018).

EPA has also signaled a desire to increase its reliance on the use of existing self-disclosure policies as a means of assuring compliance. Under EPA's Audit Policy, a regulated entity that discovers evidence of noncompliance may be able to mitigate penalties by voluntary disclosing such noncompliance to EPA. Up to 100 percent of the gravity component of a penalty may be achieved if all of the conditions of the Audit Policy are met.[12]

The Audit Policy has been in existence since 2000. In a formal announcement issued on May 15, 2018, EPA stated that it intends to "[e]nhance and promote … opportunities to increase compliance through the use of existing self-disclosure policies…." It is not yet clear how EPA plans to carry out its stated intention. However, EPA did indicate that it plans in the future to supplement Agency guidance interpreting the Audit Policy. [13]

Mitigating Liability in Federal Enforcement Actions Under the CAA

The best protection from exposure to large penalties for noncompliance with the CAA is a robust and rigorous compliance program and culture. Nonetheless, if a regulated entity finds itself at risk of exposure to large penalties due to noncompliance with the CAA, there are still measures the regulated entity can take to protect its interests and mitigate its liability. These include the following:

- If the regulated entity discovers evidence of noncompliance prior to an enforcement, it may choose to voluntarily disclose such noncompliance to EPA under the Audit Policy.

- If the Agency is already considering enforcement action under the CAA, the regulated entity should consider cooperating and communicating with the Agency as early as, and to the extent, possible. The potential benefits of such cooperation are two-fold. First, the Agency may apply Downward Adjustments to reward the regulated entity's cooperation. Second, once EPA has calculated the Base Penalty, it is difficult to persuade EPA to change its calculation, or any of the underlying assumptions.

- While it is not easy to persuade EPA to alter the Base Penalty, it is certainly not impossible. The regulated entity should scrutinize the Agency's penalty calculation, and advance any reasonable argument for reducing it. As previously discussed, even small changes in the Gravity Component or the Base Penalty can have a significant impact on the total amount.

- The regulated entity should consider proposing SEPs as a means of mitigating the penalty in a potential settlement.

[12] 65 Fed. Reg. 19618 (Apr. 11, 2000).
[13] *EPA Announces Renewed Emphasis on Self-Disclosed Violation Policies* (May 15, 2018)(the "May 15, 2018 Announcement").