H B
409

HOUSE COMMITTEE REPORT

(9)
Date Referred: January 10, 1990 FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 2/7/90

The RESOURCES Committee considered: HB 409

HOUSE BILL NO. 409 DEC ADMINISTRATIVE PENALTIES

"An Act relating to the reform of certain environmental conservation laws and the penalties for their violation."

RECOMMENDATIONS:
[X] be replaced with CS HB 409 (RES) [ ] the same title [X] a new title
[ ] have attached amendment(s)
[ ] do pass
[ ] do not pass
[ ] no recommendation
[X] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[X] fiscal impact DEC
[ ] zero fiscal note
[ ] zero with analysis

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) _____
[ ] zero fiscal note(s) _____
[ ] zero fn/analysis _____

SIGNING DO PASS:

Mike Navarre w/Amendments

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Cliff Davidson		↘	
[illegible]	✓		
Bert Thomas	✓		
Richard [illegible]	X		
[illegible]		X	
[illegible]	X		without Amendment

Cliff Davidson
Chairman's Signature

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHB 409 (Resources)
PUBLISH DATE: 1/30/90

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to Environmental Law Reform
Sponsor: Representative Mike Davis
Requestor: House Resources

Agency Affected: Environmental Conservation
BRU: Environmental Quality
Administrative Services
Components: Administrative Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	112.0	112.0	112.0	112.0	112.0	112.0
TRAVEL	5.0	5.0	5.0	5.0	5.0	5.0
CONTRACTUAL	20.0	20.0	20.0	20.0	20.0	20.0
SUPPLIES	2.0	2.0	2.0	2.0	2.0	2.0
EQUIPMENT	10.0	10.0	10.0	10.0	10.0	10.0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	149.0	149.0	149.0	149.0	149.0	149.0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	149.0	149.0	149.0	149.0	149.0	149.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	149.0	149.0	149.0	149.0	149.0	149.0

POSITIONS:

FULL-TIME	2	2	2	2	2	2
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

The fiscal impact for FY 90 would be zero. Analysis is attached.

Prepared by: Gail Gatton
Phone: 465-2600
Division: Administrative Services
Date: 1/30/90

Approved by Commissioner: A D Kyle
Date: 30 Jan 90
Agency: Environmental Conservation

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

House Bill 409
1/29/90 Version

Section 3 of this bill gives the Department new authority to assess administrative penalties for violations of laws and regulations designed to protect the environment. Due process, under this bill, allows for a hearing to be held prior to the assessment of penalties. Since DEC does not currently have this authority, we do not have any positions capable of performing these functions. Therefore, the Department would need one hearing officer and a paralegal to conduct the hearings required before assessment of administrative penalties.

Contractual($12.0) includes court reporter, transcripts, and professional contracts.

Position	100	200	300	400	500	Total
Attorney III	68.0	5.0	8.0	1.0	5.0	$87.0
Paralegal Assistant II	44.0			1.0	5.0	$50.0
(Contractual)			12.0			$12.0
TOTALS	112.0	5.0	20.0	2.0	10.0	$149.0

Position Title	No.of Positions	Range/Step	Barg. Unit
Attorney III	1	12A	N/A

Time Status	Staff Months	Location	Election District
PFT	12	Juneau	04

Type of Expenditure		Amount
1	2	3
Salary	52.3	
Benefits	15.7	
Premium Pay	0	
Other	0	
Total Personal Services		68.0 $
Travel		5.0
Contractual		8.0
Commodities		1.0
Equipment		5.0
Other		-
Total Cost		87.0 $
Funding Source for Total Cost		
Federal Receipts 1002		0
G. F. Match 1003		0
General Fund 1004		87.0
GF Program Receipts 1005		0
Other		0

Justification

This position will be necessary to perform the functions required in this legislation. The administrative penalty process allows for a hearing to be held prior to the assessment of penalties, if review is sought, within 30 days. This position will review these proposed penalties, do legal research, conduct hearings, evaluate the case, and make an assessment as to the appropriateness of penalties. We do not currently have anyone on staff qualified to perform this function.

Request For New Position

Agency: Environmental Conservation
BRU: Administrative Services
Component: Administrative Services

FY 91

Position Title	No of Positions	Range/Step	Barg. Unit
Paralegal Assistant II	1	16A	GGU

Time Status	Staff Months	Location	Election District
PFT	12	Juneau	04

Type of Expenditure		Amount
1	2	3
Salary	32.0	
Benefits	12.0	
Premium Pay	0	
Other	0	
Total Personal Services		44.0
Travel		0
Contractual		0
Commodities		1.0
Equipment		5.0
Other		0
Total Cost		50.0
Funding Source for Total Cost		
Federal Receipts 1002		0
G. F. Match 1003		0
General Fund 1004		50.0
GF Program Receipts 1005		0
Other		0

Justification

This position will assist the hearing officer to determine administrative penalties. Will perform research, help review cases, organize hearings and otherwise ensure that the hearing process is carried out in an appropriate and timely manner.

Request For New Position

Agency Environmental Conservation

BRU Administrative Services

Component Administrative Services

Revised Date

FY 91

Alaska State Legislature

HOUSE RESOURCES COMMITTEE

P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3715

CHANGES FROM HB 409 TO CSHB 409

Section 1 - Adds a new section to allow DEC to do reasonable inspections of a regulated facility without first obtaining a warrant or without first receiving permission from the owner.

Section 3 - Provides language changes to clarify the procedures for administrative penalties.

Section 4 - Adds a provision to provide DEC with express authority to require environmental audits.

Deletes old section 4 which revised the criminal penalty provisions for oil and hazardous substances releases.

Alaska State Legislature

Representative Mike Davis District 19

P.O. Box V
Juneau, Alaska 99811
(907) 465-4930

Interim Office:
P.O. Box 81435
Fairbanks, Alaska 99708
(907) 456-8161

TO: House Resources Committee

FROM: Rep. Mike Davis

DATE: January 30, 1990

RE: CS for HB 409

HB 409 addresses the critical need for a stronger regulatory presence when it comes to pollution violations. In recent years the state has been plagued by hundreds of oil, chemical and hazardous waste spills, many of which the state has been forced to clean up at its own expense. During my visits to cleanup sites on the North Slope, in the Interior and in Prince William Sound, it became clear to me that tougher rules are desperately needed if we are going to keep polluters to their obligation to clean up pollution.

After listening to the Oil Spill Commissions presentation to this committe I have proposed several changes which, compliment recomendation #13 of the Commissions Executive Summary. As revised in the proposed Committee substitute HB 409 would accomplish the following:

1) Allow the DEC access to inspect facilities without consent of the operator. DEC officials have expressed frustration at being barred or delayed from entering sites in order to make routine and specific investigations. This provision allows immediate entry at all reasonable times.

2) Allow the Commissioner of Environmental Conservation to levy administration penalties of up to $25,000 per day for pollution violations, provide for an apeal process. This is similar to federal law and may soon be required by the EPA.

3) Allow the Commissioner to require environmental audits, so that the state and industry can "Trouble shoot" pollution problems before they become unmanageable.

4) Eliminate "pre-enforcement review" of compliance orders. Today, industry is allowed to challenge Compliance orders before they go into effect, tying the hands of regulators and delaying timely solution of pollution problems. Under this change, stopping the pollution will get the top priority, leaving assignment of blame

to be ironed out later.

Special Note:

Criminal penalties included in the original HB 409 have been removed in the proposed CS. Negotiations are underway to include them in HB 315.

I thank you for you consideration of this legislation.

Sectional Analysis

Section #1.

Relates to Access to facilities to investigate suspected sources of pollution. Although access to facilities is required under most permits issued by the state, agencies have wound up in court over that particulars of when and where officials can go. These court delays have had the effect of limiting the states ability to enforce pollution laws. Section #1 help clear these matters up by delineating those conditions and removes the requirement of consent.

Section #2.

Is a housekeeping measure that relates to a section on Compliance orders found later in the bill.

Section #3.

Establishes a new section creating an Administrative penalties procedure for violation of the states pollution laws. Current procedures for addressing violators are long, cumbersome and expensive process that hamper the state's ability to deal with pollution problems. This section establishes an administrative review process, separate from the courts, that streamlines the process of adjudicating these claims. Many states already have administrative penalties procedures. The EPA has for sometime been considering requiring states to have a similar process in place.

Section #4.

Allows the Commissioner to require environmental audits conducted by in independent contractor. An environmental audit is an objective and systematic analysis of a facility's operations to insure compliance with state environmental laws and to spot pollution problems before they become unmanageable. The EPA uses a similar process that has been very successful.

Section #5.

Allows for a compliance order to become effective immediately to start cleanup up of a contaminated site or to stop an ongoing pollution incident. Presently, industry can challenge compliance orders before implementation, causing substantial delays, to the detriment of the environment and public health.

Section 6.

Is a housekeeping measure.

Section 7.

Repeals section 46.03.820 because it partially redundant with Section #5.

Comments of Exxon Company, U.S.A.
on CSHB 409
January 31, 1990

Exxon Company, U.S.A. was presented with a copy of CSHB 409 late yesterday afternoon and asked to provide comments by today. The following comments have been prepared within the very limited time available; however substantial further review and public comment is needed. We urge the Committee to not act hastily regarding this legislation, since it will seriously impact all Alaskans.

In general, we believe that existing law provides the Department of Environmental Conservation with ample authority to enforce the State's environmental laws in both emergency and non-emergency situations. Any problems that may be perceived to have existed in the past have been a function of the application of the existing statutes, not the statutes themselves. Therefore, the proposals incorporated in CSHB 409 are not needed.

Addressing more specifically the sections of the bill, the unrestricted search and seizure authority proposed in Section 1 is unnecessary. In addition it is far too broad and violates the constitutional rights of Alaskan citizens and businesses. Existing law gives the Department the authority to obtain search warrants to investigate suspected environmental violations. This bill would dispense with the warrant process altogether, and allow agency staff to enter and search any private home, business, vehicle, or facility and seize information without a search warrant, or even a showing of probable cause. There is simply no factual or legal basis for such unprecedented administrative invasions of privacy. The existing system is adequate to meet the agency's needs, while it protects the constitutional rights of Alaska's citizens.

Concerning Section 3, the existing statutes already provide comprehensive civil penalties and damages, with the superior court assessing the appropriate punishment. Given the strength of existing statutes, we see no need for the administrative proceeding contemplated in Section 3.

An additional comment about Section 3 is appropriate. First, the proposed sub-section (b) would relieve the DEC from the responsibility of complying with the Administrative Procedures Act in administrative penalty proceedings. This is not justified. The APA was passed to guarantee all Alaska citizens and businesses

due process of law in administrative proceedings. The existing statutes expressly apply the APA to DEC hearings. No justification exists to change that sound legislative policy.

It is very difficult to comment upon the "environmental audit" provision proposed in Section 4. No explanation has been given as to what such a procedure would entail, or under what circumstances it would be required. Substantial further work is needed on this item before it is ready for legislative consideration.

Finally, we are concerned with the proposed changes to the compliance order procedures. Exxon strongly believes that this bill would effectively deny fundamental due process rights to Alaskan citizens and businesses.

We recognize the need for quick, effective agency action in environmental emergencies. However, the arbitrary compliance order proceeding proposed in Section 5 is not needed to provide that authority; to the contrary, the existing statutes provide more than ample remedies. DEC already has wide ranging power to issue immediate orders in emergency situations. Similarly, the statutes authorize immediate court injunctions. Thus, this bill does not change or enhance the remedies available in environmental emergencies.

What the bill would do is drastically alter the procedures and protections afforded in non-emergency situations. The existing compliance order statute creates a three-step process for non-emergency situations. First, the DEC notifies the citizen or business that it may have violated an environmental law. Next, the citizen is given an opportunity to remedy the alleged defect. If the DEC staff believes that the citizen's response has not sufficiently remedied the problem, a compliance order hearing is held at which both the citizen and DEC staff are allowed to participate. At that hearing the commissioner determines if any environmental violations still exist, and if so, what type of compliance order would be reasonable and appropriate under the circumstances.

By contrast, the arbitrary compliance order procedure proposed in the bill would deprive citizens and businesses of the most basic due process protections. Compliance orders could be issued effective immediately without any prior notice or opportunity for the citizen to be heard. The citizen would be faced with a virtually impossible situation. He must either comply immediately with whatever order the DEC staff had unilaterally issued, or face civil and criminal prosecution for failure to comply with a compliance order. This is not only grossly unfair and inequitable - it is totally unjustified in non-emergency situations. We feel that the bill denies citizens the due process of law guarantees afforded under both the Alaska and federal constitutions.

In closing, we would like to emphasize that it would be a grave error to characterize CSHB 409 as a bill designed to provide the DEC with new powers in emergency situations. To the contrary, the primary focus of the bill is to drastically change the DEC procedures in effect in non-emergency situations as they apply to all Alaskan citizens and businesses - not just oil companies. To date this bill has received little public attention, yet it will affect all businesses and industries, including timber, mining, fishing, tourism, retail enterprises and ordinary citizens. We firmly believe that the existing statutes afford a fairer way to address these situations, and therefore recommend that this bill not be enacted into law.

Thank you.

Report of the Alaska Oil Spill Commission
Executive Summary

SPILL

The Wreck of the Exxon Valdez
Implications for Safe Marine Transportation

January 1990

"Wh[illegible]ds to happen is DEC will get dragged into a septic tank argument and it will drain away as many resources as fighting, for instance, the Alyeska ballast water treatment plant. There's a real problem with priorities within DEC."

Sue Liberman, Executive Director
Alaska Center for the Environment
Alaska Oil Spill Commission hearing, 9/21/89

- Identify unmet needs and recommend priorities, strategies and obstacles to achieving them;
- Encourage coordination of spill prevention and response programs currently spread among several agencies that cumulatively deserve high priority;
- Make budget and resource allocation recommendations;
- Evaluate programs and recommend elimination of marginal activities;
- Recommend changes based on new technologies and scientific impacts;
- Designate advisory panels, if deemed necessary, including appropriate representation, ex-officio, of appropriate departments of the state and municipalities, regional oil spill authorities, representatives of fishing and environmental groups, and shippers, owners and residential groups on the pipeline route; and
- Issue an annual report and safety assessment. Reports to the governor should include regular statistical and special reports on accidents and near-misses, the status of major risks, the performance of state and federal agencies, and long-term options for improving safety.

Recommendation 13
Enhanced regulatory strength

The state should expand and exercise its regulatory authority over environmental safety. Measures voluntarily adopted by industry should be backed up by state regulation. Federal technical standards and safety requirements should not preclude more stringent state standards.

The State of Alaska currently does not exercise its full power under the U.S. Constitution to regulate environmental safety. Recent congressional enactments and judicial decisions make it clear that Congress does not intend that states should hesitate to protect local environments with greater stringency than the minimums established under federal law. The state should have the power, for example, to prohibit vessels from entering or departing Alaska ports and waters under unsafe circumstances.

Regulatory effectiveness also should be improved through assessment of administrative and civil penalties to encourage prevention, no preen-

forcement review of compliance orders, environmental audits, stronger criminal penalties, and statutory provision for citizen lawsuits. Private voluntary prevention measures, though commendable, are often ignored as memories fade unless backed up by state regulations.

Recommendation 14
Strengthened state inspections

The state should renew and strengthen its authority to conduct inspections and spill response drills on vessels calling at Alaska ports and marine terminals.

The Valdez tanker fleet, built in the 1970s is approaching obsolescence. Structural weaknesses, technical malfunctions and other equipment problems can be expected to increase in frequency and seriousness.

Inspections and reports, done in cooperation with the Coast Guard or alone, should include examinations for structural integrity and environmental hazards. Inspection duties may be allocated between the harbor administration office proposed in this report and the Department of Environmental Conservation. State authority should include the power to levy substantial summary civil fines for interfering with inspections or failing to cooperate with response drills.

The lack of any quality control or assurance program on tanker operations from Prince William Sound or Cook Inlet allows serious hazards to arise. Coast Guard authorities already perform inspections on tankers calling at Valdez, but state inspection would provide an added measure of safety. In the past, when the state and the Coast Guard both inspected vessels, the two agencies reenforced each other's effectiveness. When the state was stopped from making inspections on the grounds that the activity was exclusively federal, the quality of Coast Guard inspections declined. Inspection by two governments is not needless duplication but needed redundancy, providing a greater measure of safety.

The "two-tier" system of quality control was adopted during construction of the trans-Alaska pipeline. The value of the two-tier system has been reenforced by the National Aeronautics and Space Administration experience with space disasters. The official inquiry into the 1986 Challenger space shuttle explosion found that system capabilities had been stretched to the limit in the winter of 1985-86 to support the flight schedule of the shuttle program. System capabilities for shipping oil from Valdez were similarly stretched to accommodate increasing throughput of the trans-Alaska pipeline to 2.2 million barrels per day without increasing other elements of the system, such as tank storage capacity.

"We are obligated to provide systems which enhance marine transportation safety, and we do it economically."

Jerry Aspland, President, ARCO Marine, Inc.

Alaska Oil Spill Commission hearing, 9/1/89

6-1741Ha
Bradley

A M E N D M E N T

OFFERED IN THE HOUSE BY REP. M.DAVIS

TO:: CSHB 409( ) (2/5/90)

Page 1, line 8, after "violation":

Insert "; and providing for an effective date"

Page 3, line 28:

Delete "AS 46.03.760"

Insert "AS 46.03.758, 46.03.759, or 46.03.760(a)"

Page 6, after line 27:

Insert a new bill section to read:

"* Sec. 7. This Act takes effect immediately under AS 01.10.070(c)."

Alaska State Legislature

Representative Mike Davis District 19

P.O. Box V
Juneau, Alaska 99811
(907) 465-4930

Interim Office:
P.O. Box 81435
Fairbanks, Alaska 99708
(907) 456-3161

TO: All Members
House Resources Committee

FROM: Rep. Mike Davis

DATE: February 6, 1990

RE: CS for HB 409

HB 409 addresses the critical need for a stronger regulatory presence when it comes to pollution violations. In recent years the state has been plagued by hundreds of oil, chemical and hazardous waste spills, many of which the state has been forced to clean up at its own expense. During my visits to cleanup sites on the North Slope, in the Interior and in Prince William Sound, it became clear to me that tougher rules are desperately needed if we are going to keep industry to its obligation to clean up pollution.

After listening to the Oil Spill Commission's presentation to the House Resources Committee, I have proposed several changes which compliment recommendation #13 of the Commission's Executive Summary. HB 409 would accomplish the following:

1) Allow the DEC access to inspect regulated facilities without consent of the operator. DEC officials have expressed frustration at being barred or delayed from entering sites in order to make routine and specific investigations. This provision allows immediate entry at all reasonable times.

2) Allow the Commissioner of Environmental Conservation to levy administration penalties of up to $25,000 per day for pollution violations and provide for an appeal process. Administrative penalties will provide for an economical, efficient and consistent system to deal with pollution matters. This is similar to federal law and may soon be required by the EPA.

3) Allow the Commissioner to require environmental audits, so that the state and industry can "Trouble shoot" pollution problems before they become unmanageable.

4) Eliminate "pre-enforcement review" of compliance orders. Today, industry is allowed to challenge the orders before they go into effect, tying the hands of regulators and delaying timely solution of pollution problems. Under this change, stopping the pollution will get top priority. Challenges to the orders would get a hearing after correction has begun.

Special Note:

Criminal penalties included in the original HB 409 have been removed in the CS. Negotiations are underway to include them in HB 315.

I thank you for your consideration of this legislation.

Sectional Analysis - CS to HB 409

Section #1.

This section revises the DEC's present general access authority to include the right to copy records. This section also clarifies the present access provisions' scope. Note that it continues the present sections requirement that the DEC obtain consent for access from the owner of occupier of the premises.

Section #2.

Allows the DEC access to "pervasively regulated facilities" to investigate suspected sources of pollution without the owners consent. Although access to facilities is required under most permits issued by the state, agencies have wound up in court over the particulars of when and where officials can investigate. These court delays have had the effect of limiting the states ability to enforce pollution laws. Constitutional law provides that a lessened expectation of privacy exists for pervasively regulated facilities and activities. A "pervasively regulated facility" is defined as a facility where the operations affect a significant public interest and are comprehensively regulated by the DEC.

Section #3.

Are housekeeping measures.

Section #4.

Establishes a new section creating an administrative penalties procedure for violation of DEC's statutes, regulations orders or permits. The amount may not exceed $25,000 per day for each violation. Current procedures for addressing violators are long, cumbersome and expensive process that hamper the state's ability to deal with pollution problems. This section establishes an administrative review process, separate from the courts, that streamlines the process of adjudicating these claims. Many states already have administrative penalties procedures. The EPA may soon require states to have a similar process in place. Section #4 also provides for an administrative hearing and judicial review of the penalties ordered.

Section #5.

Allows for a compliance order to become effective immediately to start cleanup up of a contaminated site or to stop an ongoing pollution incident. Presently, industry can challenge compliance orders before implementation, causing substantial delays, to the detriment of the environment and public health. This section also provides for an administrative hearing and for judicial review of the hearing decision.

Section #6.

Allows the Commissioner to require environmental audits conducted by in independent contractor. An environmental audit is an objective and systematic analysis of a facility's operations to insure compliance with state environmental laws and to spot pollution problems before they become unmanageable. The EPA uses a similar process that has been very successful.

Alaska State Legislature

Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
Fax: (907) 465-3351

February 6, 1990

MEMORANDUM

TO: Representative Mike Davis

ATTN: Barnaby Dow

FROM: Leola Weimer LW
Legislative Analyst

RE: Administrative Penalties
Research Request 90.156

You asked which Alaska state agencies have the authority to assess penalties for violations of their regulations and statutes. You also wanted to know if agencies in other state governments have this authority. Specifically, you asked how authority for imposing an administrative penalty has been granted to agencies similar to the Alaska Department of Environmental Conservation (DEC); if the Environmental Protection Agency (EPA) requires administrative penalty authority for Resource Conservation and Recovery Act (RCRA) certification; and what the fiscal impact of such programs might be.

Summary

In Alaska, the authority to assess administrative penalties is granted to certain state agencies under Article 8 of the Administrative Procedure Act (AS 44.62.30-44.62.630). Under this section, the DEC has limited powers of administrative adjudication but does not have the general authority to assess administrative penalties.

Twenty-eight states and the federal government have administrative penalty systems for enforcing RCRA standards. States which have adopted administrative penalty systems have found them to save time and money; to be a more effective means of enforcement; and to be a more equitable means of punishment.

The Environmental Protection Agency (EPA) and the General Accounting Office (GAO) recommend that all states adopt administrative penalty systems to manage and enforce regulations concerning the environment.

Administrative Penalty Authority

In Alaska, the authority to assess administrative penalties is granted to certain state agencies under Article 8 of the Administrative Procedure Act (AS 44.62.300-

44.62.630). The power of administrative adjudication is limited to the named functions of the agencies listed under AS 44.62.330(a) (see Attachment A).

Further restrictions are outlined in AS 44.62.330(d). According to the Attorney General, "The policy of § 44.62.330(d) is to limit the adjudication procedure set forth in the Act to procedural matters, and matters regarding which the agency must make substantial determinations of fact."[1] The purpose of this act is to prescribe a fair procedure for determinations of fact. The powers of administrative adjudication do not extend to situations where facts have been determined by the courts.

Administrative penalty authority is a power commonly assigned to both state and federal agencies. The Department of Public Safety's ability to issue traffic citations is a typical example of a state-level administrative penalty authority. The Environmental Protection Agency's ability to assess fines for pollution and hazardous waste violations is an example of federal administrative penalty authority. Some states have administrative law judges who determine the penalties for a variety of violations; others rely upon hearing officers assigned to specific agencies to assess penalties.

In general, the system of administrative law judges and hearing officers is preferred to civil or criminal court systems because less time and cost are involved. Administrative law judges and hearing officers are able to solve a greater number of cases in a shorter period of time. They are also able to correct a greater number of violations. Strict administrative procedures and penalty matrixes make enforcement procedures less arbitrary and more consistent. Like a person who intentionally parks in a no parking zone, companies know in advance what the penalties and procedure will be if they are found in violation of certain regulations.

Relying upon administrative law judges and hearing officers may foster a more cooperative atmosphere between industry and administrators than is found in a court room. However, if an agreement cannot be reached by the administrative process, the right of appeal to the higher courts is always available under administrative penalty procedures.

Department of Environmental Conservation (DEC)

The Alaska DEC has been given the powers of administrative adjudication under AS 44.62.330(a) sections (27), (30) and (44) with reference to AS 17.20 (Alaska Food, Drug, and Cosmetic Act), AS 18.35.010-18.35.090 (regulation of tourist and trailer camps, motor courts, and motels), and AS 46.03 respectively.

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[1] 1963 Opinions of the Attorney General No. 10, pp. 2-3.

DEC procedure for determining violations and assessing penalties is outlined in AS 46.03. If an investigation or inspection uncovers a violation, the usual procedure is to first issue a notice of violation which spells out the statute or regulation violated and describes what needs to be done to come back into compliance. If this does not resolve the situation, or if a situation is more serious and complex, a compliance order is issued.

Compliance orders may be issued either with the consent of the violator or unilaterally by DEC. Compliance orders by consent are a binding contract where the violator agrees to meet a specified compliance schedule. An agreed amount of penalty may be levied as part of the compliance order or as punishment for not meeting the compliance schedule. Unilateral compliance orders, on the other hand, are not contractual in nature and do not include fines or penalties.

If a violator fails to follow either a consent or unilateral compliance order, DEC may then file civil or criminal charges. The commissioner of DEC also has the authority to put an immediate stop to a violation by issuing an Emergency Order. Emergency Orders are typically issued only once or twice a year and involve violations which have a high potential of causing a public health hazard (e.g., broken sewage line). If the violation is not grievous but nonetheless a relatively major problem (e.g. the discharge of muddy water into a spawning stream), the commissioner may seek an injunction from the court.

Other States

Twenty-eight states have adopted administrative penalty systems for the enforcement of their environmental protection statutes. The systems in three of these states is described below.

State of Washington

Washington State's Department of Ecology has authority to levy penalties of up to $10,000 per day for violations of the state's environmental protection statutes. Once a violation is discovered, the commissioner issues a notice of violation describing the regulations violated and amount of penalty assessed. Accompanying the notice of violation is an order for corrective action to be taken. Refusal or failure to comply is considered a separate violation and allows for additional penalties. The violator has ten days to appeal his or her case to the Pollution Control Hearing Board. This board is appointed by the governor and is under the jurisdiction of the Department of Ecology. The Pollution Control Hearing Board then conducts a formal hearing and passes judgment as to the appropriateness and amount of penalty assessed. This decision may be appealed to the Washington Superior Court.

According to Jerry Ackerman, Assistant Attorney General for the Department of Ecology, most notices of violation and compliance orders are not appealed. The few cases that do go before the Pollution Control Hearing Board take an average of ten to twelve weeks to resolve (as compared to the previous judicial system that took an average of one and one half years to complete). Of those cases that receive hearings, approximately one quarter are appealed to superior court.

State of California

When a violation of the environmental laws of California is discovered, the Department of Health Services may issue simultaneously a corrective action order and an administrative complaint. The corrective action order is like a compliance order and outlines the specific steps that must be taken to come back into compliance. An administrative complaint is like a civil penalty with a maximum of $25,000 per day. Upon receiving an order, a violator has ten days to request a hearing. Independent hearing officers are appointed from the Office of Administrative Hearings, Department of General Services. After receiving the hearing officer's decision, either party has thirty days within which to appeal for judicial review. Penalties and corrective action, however, are not postponed by either the hearing or appeals process.

California has three classes of penalties: 1) the "Toxic Ticket" is similar to a traffic ticket. For minor violations, inspectors may issue corrective action orders and administrative complaints of up to $500 on site; 2) moderate violations are handled under the newly developed "Desk Order." After completing an inspection an investigator may fill out a more detailed report and issue a penalty of greater than $500; and 3) "Correction Orders" are reserved for the major violations. They require greater documentation and carry heavier fines.

According to Bill Soo Hoo, Legal Council for California's Department of Health Services, in the past two years only four cases have received administrative hearings and one corrective action has been appealed to the courts. In FY 89 the department collected a total of $1,147,000 from judicial penalties and $2,926,500 from administrative penalties.

State of Oregon

Oregon has had a system of administrative penalties since the early 1970s. The Department of Environmental Quality (DEQ) has the power to issue a five-day warning letter and order of compliance and penalty. Five-day warning letters may be waived in cases where the public health is endangered. After receiving notice, a violator has twenty days to appeal its case to the Environmental Quality Commission. Members of this commission are appointed by the governor. Typically one hearing officer reviews the case and holds an informal trial with presentation of evidence and cross examination of witnesses. The hearing officer then has a maximum of 90 days in which to decide the final order. This decision

may be appealed within 30 days to the five-member board under the Environmental Quality Commission. Their decision may in turn be appealed to the Oregon State Court of Appeals.

According to Van Skollias, Director of Enforcement for the DEQ, only a few of the Environmental Quality Commission's decisions have been appealed to the state court. In an effort to make this system more efficient and equitable, a formal penalty matrix was adopted in March 1989 (see attachment B). The matrix classifies the severity of violation and takes into consideration such things as prior violations, economic gain, cooperation and economic conditions. Since the adoption of the matrix, both the number and amount of penalties collected has drastically increased. In 1988, Oregon DEQ recovered $78,000 in penalties. After the adoption of the matrix, they collected $392,000. The largest fine collected was $80,000 in an asbestos case with multiple violations. The average fine was under $10,000.

New Federal Requirement

Additional support for the adoption of administrative penalty systems has come from the Environmental Protection Agency (EPA) and the General Accounting Office (GAO).

Currently states may have either administrative or judicial penalty systems to qualify for Resource Conservation and Recovery Act (RCRA) authorization. According to Betty Wise, Director of Region Ten RCRA Programs, the EPA has decided to change this policy and make both administrative and judicial penalties a requirement. An announcement is expected to appear in the Federal Register in March or April of this year.

Last year the EPA held two conferences on the proposed RCRA rule changes. At both the East Coast Conference and West Coast Conference, administrative penalty systems were the major topic of discussion. In 1988 the GAO conducted an audit of EPA RCRA enforcement programs and found the lack of administrative penalty systems to be a major obstacle to implementing EPA's standards of "timely and appropriate."

According to Jeffery Mach, Chief of Solid & Hazardous Waste Management Program for DEC, Alaska intents to apply for RCRA authorization in early 1992. If these expected rule changes go into effect, Alaska will be required to adopt an administrative penalty system before it can receive RCRA authorization.

I hope this information answers your questions. If you would like additional information, please contact this agency.

Attachments

ATTACHMENT A

Alaska Statute 44.62.330
Article 8. Administrative Adjudication

laims art. II of the state constitution. State v. A L I V E Voluntary, 606 P.2d 769 (Alaska 1980).

No implied general power to veto agency regulations by informal legislative action exists. State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

Cited in Wickersham v. State, Com. Fisheries Entry Comm'n, 680 P.2d 1136 (Alaska 1984).

Article 3. Administrative Adjudication.

NOTES TO DECISIONS

Applied in Schnabel v. State, 663 P.2d 960 (Alaska Ct. App. 1983).

Sec. 44.62.330. Application of AS 44.62.330 — 44.62.630. (a) The procedure of the state boards, commissions, and officers listed in this subsection or of their successors by reorganization under the constitution shall be conducted under AS 44.62.330 — 44.62.630. This procedure, including, but not limited to, accusations and statements of issues, service, notice and time and place of hearing, subpoenas, depositions, matters concerning evidence and decisions, conduct of hearing, judicial review and scope of judicial review, continuances, reconsideration, reinstatement or reduction of penalty, contempt, mail vote, oaths, impartiality, and similar matters shall be governed by this chapter, notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed. Where indicated, the procedure that shall be conducted under AS 44.62.330 — 44.62.630 is limited to named functions of the agency.

(1) *[Repealed, § 5 ch 159 SLA 1980.]*

(2) Board of Chiropractic Examiners;

(3) Board of Dental Examiners;

(4) State Board of Registration for Architects, Engineers and Land Surveyors;

(5) *[Repealed, § 13 ch 218 SLA 1976.]*

(6) Board of Examiners in Optometry;

(7) *[Repealed, § 5 ch 159 SLA 1980.]*

(8) State Medical Board;

(9) Division of Lands under Alaska Land Act where applicable;

(10) Board of Nursing;

(11) Board of Pharmacy;

(12) Board of Public Accountancy;

(13) Department of Labor as to functions relating to employment security only as provided in (c) of this section;

(14) Real Estate Commission;

(15) Alaska Workers' Compensation Board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act;

(16) Department of Transportation and Public Facilities, as to functions relating to aeronautics and communications;

(17) *[Repealed, § 12 ch 131 SLA 1980.]*

(18) *[Repealed, § 49 ch 94 SLA 1980.]*

(19) *[Repealed, § 54 ch 169 SLA 1978.]*

(20) *[Repealed, § 16 ch 82 SLA 1982.]*

(21) *[Repealed, § 64 ch 169 SLA 1978.]*

(22) *[Repealed, § 11 ch 181 SLA 1976.]*

(23) Department of Public Safety, as to suspension or revocation of a security guard's license under AS 18.65.400 — 18.65.490;

(24) Department of Health and Social Services, under AS 47.35, relating to boarding and foster homes for children;

(25) *[Repealed, § 60 ch 98 SLA 1966.]*

(26) *[Repealed, § 4 ch 120 SLA 1971.]*

(27) Department of Health and Social Services and Department of Environmental Conservation under AS 17.20 (Alaska Food, Drug, and Cosmetic Act), and Department of Commerce and Economic Development in connection with the licensing of embalmers and funeral directors under AS 08.42;

(28) Department of Health and Social Services and the Hospital Advisory Council, under AS 18.20.010 — 18.20.130;

(29) *[Repealed, § 4 ch 120 SLA 1971.]*

(30) Department of Environmental Conservation, under AS 18.35.010 — 18.35.090, concerning the regulation of tourist and trailer camps, motor courts, and motels;

(31) *[Repealed, § 40 ch 206 SLA 1975.]*

(32) *[Repealed, § 4 ch 106 SLA 1970.]*

(33) Board of Marine Pilots;

(34) Alaska Police Standards Council;

(35) Big Game Commercial Services Board;

(36) Board of Dispensing Opticians;

(37) *[Repealed, § 20 ch 110 SLA 1981.]*

(38) *[Expired pursuant to § 3 ch 128 SLA 1974; am § 7 ch 108 SLA 1975.]*

(39) Alaska Public Offices Commission;

(40) Board of Fisheries;

(41) Board of Game;

(42) the Department of Education and the Professional Teaching Practices Commission with regard to proceedings to revoke or suspend a teacher's certificate under AS 14.20.030 — 14.20.040 and AS 14.20.470(a)(4);

(43) Alaska Commission on Postsecondary Education under AS 14.48 as to denial of applications and revocation of authorizations and permits;

(44) Department of Environmental Conservation, except to the extent that AS 44.62.360 — 44.62.400 are inconsistent with the manner in which proceedings are initiated under the provisions of AS 46.03;

(45) University of Alaska, except to the extent that its inclusion is inconsistent with the provisions of AS 14.40;

(46) *[Repealed, § 77 ch 14 SLA 1987.]*

(47) Board of Psychologist and Psychological Associate Examiners;

(48) the Department of Fish and Game as to functions relating to the protection of fish and game under AS 16.05.870;

(49) Board of Veterinary Examiners;

(50) Board of Nursing Home Administrators;

(51) Board of Barbers and Hairdressers;

(52) Department of Natural Resources concerning the Alaska grain reserve program under former AS 03.12;

(53) Department of Commerce and Economic Development concerning the licensing and regulation of audiologists under AS 08.11;

(54) Department of Commerce and Economic Development concerning the licensing and regulation of hearing aid dealers under AS 08.55.

(b) The procedure of an agency not listed in (a) of this section shall be conducted under AS 44.62.330 — 44.62.630 only as to those functions to which AS 44.62.330 — 44.62.630 are made applicable by the statutes relating to that agency.

(c) Judicial review and scope of judicial review of all final decisions of the commissioner of labor on an appeal relating to employment security shall be in accord with this chapter notwithstanding anything to the contrary in AS 23.20 (Alaska Employment Security Act). All other procedures of the Department of Labor relating to employment security shall be as provided in AS 23.20 and the regulations under AS 23.20.

(d) Except in a case of reinstatement or reduction of penalty, the provisions of this chapter do not affect statutory provisions concerning

(1) civil or criminal penalties;

(2) additional relief by injunction or restraining order;

(3) penalty provisions relating to suspension, revocation, reissuance, and other similar matters of licenses, permits, leases, concessions, and other similar matters;

(4) related matters that in their context do not relate to procedure. (§ 2 (ch 2) ch 143 SLA 1959; am § 14 ch 2 SLA 1961; am § 60 ch 98 SLA 1966; am § 2 ch 120 SLA 1966; am § 1 ch 58 SLA 1967; am § 18 ch 143 SLA 1968; am § 2 ch 83 SLA 1969; am § 2 ch 118 SLA 1969; am §§ 3, 4 ch 106 SLA 1970; am § 6 ch 104 SLA 1971; am § 4 ch 120 SLA 1971; am § 2 ch 178 SLA 1972; am § 5 ch 179 SLA 1972; am § 2 ch 17 SLA 1973; am § 3 ch 45 SLA 1973; am § 2 ch 82 SLA 1973; am § 2 ch 7 FSSLA 1973; am § 5 ch 76 SLA 1974; am § 2 ch 128 SLA 1974; am § 6 ch 9 SLA 1975; am § 25 ch 25 SLA 1975; am §§ 39, 40 ch 206 SLA 1975; am § 4 ch 25 SLA 1976; am § 2 ch 59 SLA 1976; am § 11 ch 181 SLA 1976; am §§ 13, 106 ch 218 SLA 1976; am § 18 ch 220 SLA 1976; am § 9 ch 46 SLA 1977; am § 3 ch 140 SLA 1977; am § 54 ch 109 SLA 1978; am § 10 ch 59 SLA 1979; am § 23 ch 58 SLA 1980; am § 3 ch 84 SLA 1980; am §§ 49, 60 ch 94 SLA 1980; am § 15 ch 130 SLA 1980; am § 12 ch 131 SLA 1980; am § 15 ch 141 SLA 1980; am §§ 4, 5 ch 159 SLA 1980; am § 20 ch 110 SLA 1981; am E.O. No. 51, §§ 38, 39 (1981); am § 16 ch 82 SLA 1982; am § 2 ch 100 SLA 1983; am § 124 ch 6 SLA 1984; am § 11 ch 131 SLA 1986; am § 77 ch 14 SLA 1987; am § 12 ch 37 SLA 1989)

Effect of amendments. — The 1986 amendment added paragraphs (53) and (54) of subsection (a).

The 1987 amendment repealed paragraph (a)(46), which read "Department of Commerce and Economic Development concerning the fishery enhancement loan program (AS 16.10.500 — 16.10.620)."

The 1989 amendment, effective May 12, 1989, substituted "Big Game Commercial Services Board" for "Guide Licensing and Control Board" in paragraph (a)(35).

Opinions of attorney general. — The purpose of the adjudication procedure is to prescribe a fair procedure for determinations of fact; this is indicated by paragraph (d)(4), which excepts from the adjudication procedure related matters that in their context do not relate to procedure. 1993 Op. Att'y Gen., No. 10.

The policy of subsection (d) of this section is to limit the adjudication procedure set forth in the Administrative Procedure Act to procedural matters, and matters regarding which the agency must make substantial determinations of fact. 1963 Op. Att'y Gen., No. 10.

The words of subsection (d), "in a case of reinstatement or reduction of penalty," refer to AS 44.62.550, which provides that a person whose license is revoked or suspended may petition the agency for reinstatement or reduction of penalty after one year from the effective date of the decision or from the date of denial of the similar petition. 1963 Op. Att'y Gen., No. 10.

The accusation and hearing procedure set forth in the Administrative Procedure Act was not applicable to the suspension or revocation of liquor licenses by the Alcoholic Beverage Control Board after a conviction of a licensee of certain offenses as set forth in former AS 04.15.080. 1963 Op. Att'y Gen., No. 10.

The exceptions set forth in subsection (d) refer to situations in which there is no need for the agency to make a determination of fact since such facts have been determined by the courts. 1963 Op. Att'y Gen., No. 10.

Where the power to suspend or revoke a license is implied by the statutory authority to issue a license, it is clear that suspension or revocation may be ordered only after formal accusation and hearing as re-

quired by the Administrative Procedure Act, 1963 Op. Att'y Gen., No. 10.

Not all of this chapter, as it relates to workers' compensation proceedings, has been repealed by implication. For example, the Alaska Workers' Compensation Act is silent as to judicial review and the scope of judicial review. This chapter therefore applies, since there is nothing in the Alaska Workers' Compensation Act which covers the same ground or which is inconsistent with provisions in this chapter relating to judicial review and the scope of such review. 1959 Op. Att'y Gen., No. 24.

But this section and AS 44.62.480 were superseded with respect to workers' compensation hearings by AS 23.30.115 and 23.30.135 of the Alaska Workers' Compensation Act. 1959 Op. Att'y Gen., No. 24.

NOTES TO DECISIONS

Board of Governors of Alaska Bar Association. — The legislature expressly included the Board of Governors of the Alaska Bar Association as an agency subject to the adjudicative procedures of the Administrative Procedure Act (AS 44.62) under former paragraph (a)(22). In re Peterson, 499 P.2d 304 (Alaska 1972).

Administrative responsibility of Alaska Bar. — While the supreme court ultimately reserves the authority to determine whether or not an applicant should be admitted to the bar, considerable administrative responsibility has been delegated to the Alaska Bar Association. In re Peterson, 499 P.2d 304 (Alaska 1972).

Applicability to workers' compensation proceedings. — The legislature intended to substitute, upon the effective date of the Administrative Procedure Act, the judicial scope of review as provided therein for the judicial scope of review as provided in the Workers' Compensation Act. Manthey v. Collier, 367 P.2d 884 (Alaska 1962).

The superior court is controlled by the Administrative Procedure Act in proceedings, or in a review of proceedings from the Alaska Workers' Compensation Board. See Manthey v. Collier, 367 P.2d 884 (Alaska 1962). But see Aleutian Homes v. Fischer, 418 P.2d 769 (Alaska 1966).

The Administrative Procedure Act (AS 44.62) is applicable to Workers' Compensation Board hearings except where otherwise expressly provided in the Workers' Compensation Act. Employers Com. Employers Com. Union Ins. Group v. Schoen, 519 P.2d 819 (Alaska 1974).

Act applies to leasing procedures. — The judicial review portions of the Administrative Procedure Act govern leasing procedures conducted by the Division of Lands under the Alaska Land Act. Alyeska Ski Corp. v. Holdsworth, 426 P.2d 1006 (Alaska 1967).

But not to termination of grazing leases. — The adjudicatory provisions of the Alaska Administrative Procedure Act do not apply to the termination of grazing leases by the state Division of Lands. McCarrey v. Commissioner of Natural Resources, 626 P.2d 1353 (Alaska 1974).

Nor to local school boards. — The Administrative Procedure Act by its express terms does not apply to local school boards. Matanuska-Susitna Borough v. Lum, 638 P.2d 994 (Alaska 1978).

Nor to boards of adjustment. — Boards of adjustment are not included on the list in subsection (a) of agencies, boards and administrative bodies specifically subject to this chapter. Galt v. Stanton, 591 P.2d 960 (Alaska 1979).

Under subsection (d), a hearing is not required before an alcoholic beverage dispensary license is suspended, although it would be permissible if the Alcoholic Beverage Control Board chose to grant it. Frontier Saloon, Inc. v. ABC Bd., 524 P.2d 657 (Alaska 1974).

Burden of proof. — While the Alaska Administrative Procedure Act, does not specifically state who has the burden of proof in administrative adjudications, it does provide in AS 44.62.460(e) that "Nothing herein shall be construed to alter the ordinary rules of burden of proof of judicial proceedings in Alaska." The foregoing provision coupled with the fact that under the Administrative Procedure Act a hearing to determine whether a license should be granted, issued or renewed shall be initiated by filing a "statement of issues" which must be served upon the person seeking the issuance or renewal of the license as the respondent (AS 44.62.370, AS 44.62.380), and against which the respondent may defend by filing a notice of defense (AS 44.62.390) impelled the supreme court to the conclusion that the burden of proof on the issue raised by the statement of issues was upon the state.

Alaska ABC Bd. v. Malcolm, Inc., 391 P.2d 441 (Alaska 1964).

Applied in Vick v. Board of Elec. Exmrs., 626 P.2d 90 (Alaska 1981).

Quoted in Pan American Petroleum Corp. v. Shell Oil Co., 455 P.2d 12 (Alaska 1969).

Stated in Forth v. Northern Stevedoring & Handling Corp., 385 P.2d 944 (Alaska 1963); Union Oil Co. v. State Dep't of Natural Resources, 626 P.2d 1357 (Alaska 1974); Wien Air Alaska Inc. v. Department of Revenue, 617 P.2d 1087 (Alaska 1980).

Cited in Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974); Sisters of Providence in Wash., Inc. v. Department of Health & Social Servs., 648 P.2d 970 (Alaska 1982); Kenai Peninsula Borough v. State, Dep't of Community & Regional Affairs, 751 P.2d 14 (Alaska 1988).

Collateral references. — 1 Am. Jur. 2d, Administrative Law, § 158 et seq.

73 C.J.S., Public Administrative Law and Procedure, § 115 et seq.

Sec. 44.62.340. Delegation of power by agencies. (a) An agency listed in AS 44.62.330 may delegate the power to act, to hear, and to decide, unless expressly prohibited by law.

(b) In a law enacted after April 29, 1959, where the word "agency" alone is used, the power to act may be delegated by the agency, and where the words "agency itself" are used, the power to act may not be delegated unless a statute relating to that agency authorizes the delegation of its power to hear and decide. (§ 1(1) ch 2 ch 143 SLA 1959)

NOTES TO DECISIONS

Alaska Transportation Commission exempted. — Former AS 42.07.151(8) specifically exempted the Alaska Transportation Commission from the requirements of both this section, forbidding the delegation of the hearing power absent express statutory authorization, and AS 44.62.600, requiring the hearing officer to prepare a proposed decision and forbidding members of the applicable government agency from voting on the decision if they have not heard the evidence. Alaska Transp. Comm'n v. Gandia, 602 P.2d 402 (Alaska 1979).

Cited in In re Peterson, 499 P.2d 304 (Alaska 1972).

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 221 to 226.

73 C.J.S., Public Administrative Law and Procedure, § 56.

Sec. 44.62.350. Appointment of hearing officers. (a) The governor shall assign a qualified, unbiased, and impartial hearing officer, with experience in the general practice of law, to conduct hearings under this chapter. The hearing officer may perform other duties in connection with the administration of this chapter and other laws.

(b) An agency with hearing officers may continue their employment as hearing officers on an unbiased and impartial basis within the particular agency and may hire additional officers and prescribe additional qualifications.

(c) A hearing officer hired after April 29, 1959, except to conduct hearings under AS 23.20 (Alaska Employment Security Act), shall

ATTACHMENT B

State of Oregon
Penalty Matrix for Department of Environmental Quality Violations
Adopted March 1989

The Oregonian

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THURSDAY, DECEMBER 28, 1989

Hammer away on polluters

Polluters, take note: The state Department of Environmental Quality is serious. It no longer is willing to be ignored by you. Its reputation as a regulatory wimp is no longer accurate.

So far this year, DEQ has levied more than $355,000 in fines against polluters — four times the amount it levied against individuals, industries and governments in any other year.

Offenders — as well as the press and others — pay attention to fines. They do not guarantee compliance, but they do assure a response. Warnings without penalties breed contempt.

The Oregon Environmental Quality Commission revised DEQ's enforcement policy last February with these goals in mind:

• Write a consistent and fair but firm enforcement policy that lets violators know that fines will not be used as sparingly as in the past.

• Write a policy that reflects public expectations. The commission lic wants polluters punished.

• Provide DEQ Director Fred Ha sen with a procedure to set consi tent and rational penalties statewid

Prior to adopting these goals, DE directors had broad discretion in se ting penalty amounts. Most of th agency's directors, including Har sen, have been too lenient.

The penalty guide embraces variety of factors, including severit of the environmental damage, inter (whether the violator had received prior warning or had been cooper tive), prior violations, negligence an whether the violator received a economic benefit from the violation.

The agency should continue t refine its enforcement policy in 199 The goal, of course, is to increas compliance, preferably voluntarily rather than to jack up the fine received. But this is a hammer-an nail process: Many of the nails (com pliance) probably won't be ramme home without the hammer (fines).

So, hammer away — especiall when public health and safety ar

(6) The formal enforcement actions described in subsection (1) through (5) of this section in no way limit the Department or Commission from seeking legal or equitable remedies in the proper court as provided by ORS Chapters 454, 459, 466, 467 and 468.
(Statutory Authority: ORS CHS 454, 459, 466, 467 and 468)

CIVIL PENALTY SCHEDULE MATRICES
340-12-042
In addition to any liability, duty, or other penalty provided by law, the Director may assess a civil penalty for any violation pertaining to the Commission's or Department's statutes, regulations, permits or orders by service of a written notice of assessment of civil penalty upon the respondent. The amount of any civil penalty shall be determined through the use of the following matrices in conjunction with the formula contained in OAR 340-12-045:

(1)

$10,000 Matrix

<——— Magnitude of Violation

Class of Violation

	Major	Moderate	Minor
Class I	$5,000	$2,500	$1,000
Class II	$2,000	$1,000	$500
Class III	$500	$250	$100

No civil penalty issued by the Director pursuant to this matrix shall be less than fifty dollars ($50) or more than ten thousand dollars ($10,000) for each day of each violation. This matrix shall apply to the following types of violations:

(a) Any violation related to air quality statutes, rules, permits or orders, except for residential open burning (and field burning);

(b) Any violation related to of ORS 468.875 to 468.899 relating to asbestos abatement projects;

(c) water quality statutes, rules, permits or orders, except for violations of ORS 164.785(1) relating to the placement of offensive substances into waters of the state;

(d) Any violation related to underground storage tanks statutes, rules, permits or orders, except for failure to pay a fee due and owing under ORS 466.785 and 466.795;

(e) Any violation related to hazardous waste management statutes, rules, permits or orders, except for violations of ORS 466.890 related to damage to wildlife;

(f) Any violation related to oil and hazardous material spill and release statutes, rules and orders, except for negligent or intentional oil spills;

(g) Any violation related to polychlorinated biphenyls management and disposal statutes; and

(h) Any violation ORS 466.540 to 466.590 related to <u>environmental cleanup</u> [remedial action] statutes, rules, agreements or orders.

(2) Persons causing oil spills through an intentional or negligent act shall incur a civil penalty of not less then one hundred dollars ($100) or more than twenty thousand dollars ($20,000). The amount of the penalty shall be determined by doubling the values contained in the matrix in subsection (a) of this rule in conjunction with the formula contained in 340-12-045.

(3)

$500 Matrix

← Magnitude of Violation

Class of Violation

	Major	Moderate	Minor
Class I	$400	$300	$200
Class II	$300	$200	$100
Class III	$200	$100	$50

No civil penalty issued by the Director pursuant to this matrix shall be less than fifty dollars ($50) or more than five hundred dollars ($500) for each day of each violation. This matrix shall apply to the following types of violations:

(a) Any violation related to residential open burning;

(b) Any violation related to noise control statutes, rules permits and orders;

(c) Any violation related to on-site sewage disposal statutes, rules, permits, licenses and orders;

(d) Any violation related to solid waste statutes, rules, permits and orders; and

(e) Any violation related to waste tire statutes, rules, permits and orders;

(f) Any violation of ORS 164.785 relating to the placement of offensive substances into the waters of the state or on to land.

(Statutory Authority: ORS Ch. 454, 459, 466, 467 & 468)

CIVIL PENALTY DETERMINATION PROCEDURE

340-12-045

(1) When determining the amount of civil penalty to be assessed for any violation, the Director shall apply the following procedures:

(a) Determine the class of violation and the magnitude of each violation;

(b) Choose the appropriate base penalty established by the matrices of 340-12-042 based upon the above finding;

(c) Starting with the base penalty (BP), determine the amount of penalty through application of the formula BP + [(.1 x BP)(P + H + E + O + R + C)] where:

(A) "P" is whether the respondent has any prior violations of statutes, rules, orders and permits pertaining to environmental quality or pollution control. The values for "P" and the finding which supports each are as follows:

(i) 0 if no prior violations, the prior violation described in subsection (ii) is greater than three years old, or there is insufficient information on which to base a finding;

(ii) 1 if the prior violation is [an unrelated Class Three;] one Class Two or two Class Threes, or the prior violations described in subsection (iii) are greater than three years old;

(iii) 2 if the prior violation(s) is [an unrelated Class Two, two unrelated Class Threes or an identical Class Three;] one Class One or equivalent or the prior violations described in subsection (iv) are greater than three years old;

(iv) 3 if the prior violation[(s)]s [is] are [an unrelated Class One, three unrelated Class Threes or two identical Class Threes;] two Class Ones or equivalents, or the prior violations described in subsection (v) are greater than three years old;

(v) 4 if the prior violations are [two unrelated Class Twos, four unrelated Class Threes, an identical Class Two or three identical Class Threes;] three Class Ones or equivalents, or the prior violations described in subsection (vi) are greater than three years old;

(vi) 5 if the prior violations are [five unrelated Class Threes or four identical Class Threes;] four Class Ones or equivalents, or the prior violations described in subsection (vii) are greater than three years old;

Alaska State Legislature

Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
Fax: (907) 463-3351

February 7, 1990

MEMORANDUM

TO: Representative Mike Davis

ATTN: Barnaby Dow

FROM: Leola Weimer LW
Legislative Analyst

RE: Administrative Penalties
Research Request 90.156 (Supplemental Information)

You asked for additional information regarding federal and state administrative penalty systems. Specifically, you wanted to know if there were any existing programs which utilized 1) administration access to facilities without search warrant; 2) environmental audits; and/or 3) compliance orders without "pre-enforcement review."

Summary

The Environmental Protection Agency (EPA) and most state environmental agencies have the authority to enter a site without a warrant. Inspectors are often required to show proper identification or present a written order from their department to enter premises at "reasonable times." If access is denied, agencies may apply for a search warrant from the courts.

Environmental audits are widely used by the EPA in their monitoring and enforcement programs. Audits may also be conducted voluntarily on the part of the company or as part of an administrative or judicial compliance order issued by the state. Audits have proven to be an effective means of monitoring compliance and trouble-shooting potential problems.

"Pre-enforcement review" of compliance orders delays action and penalties until the appeals process is exhausted. EPA does not condone "pre-enforcement review" provisions and encourages states to seek court-ordered injunctions or implement cease and desist orders to prevent further destruction of the environment and mandate "timely and appropriate" compliance.

A summary of state administrative and judicial penalty structures is attached.

Access Without A Warrant

The EPA and most state environmental agencies have the statutory right to conduct investigations and periodic inspections of facilities under their jurisdiction. In most cases, the right to access at "reasonable times" does not require a search warrant. If access is denied, agencies have the right to seek a search warrant from the courts.

Environmental Protection Agency

Section 307 of the Clean Water Act grants the EPA clear and uncontested authority to inspect facilities and documents at reasonable times. Section 3007 of the Resource Conservation and Recovery Act (RCRA) requires that a state's inspection authority must be at least equal to that granted EPA inspectors. If either federal or state inspectors are barred from a facility or information, they may seek a warrant from the nearest judge.

Washington

Washington statutes grant Department of Ecology inspectors the right to obtain information and enter premises at reasonable times. Washington's clean air statute 70.94.200 states:

> No person shall refuse entry or access to any control officer, the department, or their duly authorized representatives, who requests entry for the purpose of inspection, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with any such inspection.

Section 90.48.355 of Washington's water laws grants similar powers and provides for the maintenance of confidentiality by providing that "no person shall be required to divulge trade secret processes."

California

California state statutes provide for access at reasonable times without a warrant. According to Mike Shepard, council for the California Department of Health and Safety, access has never been denied to Health and Safety inspectors.

Oregon

Oregon has statutory provisions allowing access to information and premises for inspection purposes at reasonable times. According to Larry Schurr, of the Oregon Department of Environment Quality Enforcement Division, in the few

instances that access has been refused, inspectors were able to obtain court-ordered search warrants in a timely manner.

Environmental Audits

Environmental audits have proven to be an effective means of monitoring compliance and trouble-shooting potential environmental problems. Although the EPA does not have any specific regulations requiring the use of environmental audits, they are commonly used by both the EPA and state agencies.

According to Zack Garitoli, from the headquarters of EPA's Office of Waste Program Enforcement, the EPA conducts environmental audits on a regular basis. Companies may voluntarily provide an independent audit of their facilities or the EPA may choose to conduct its own environmental audit. For routine investigations, the EPA usually contracts with independent auditors. In the case of serious violations or complex cases, the EPA will often require EPA officials to conduct an audit of an operation.

Two types of environmental audits are generally used by the EPA: compliance audits and management audits. According to a review of EPA's environmental audit procedure,

> Compliance audits have been used where EPA finds that violations discovered at a facility may be typical of violations at other company facilities, given the company officials apparent lack of familiarity with regulatory requirements. . . [and] Management audits have been negotiated where EPA believed that a pattern of violations resulted in large part from a lack of, or poor functioning of, corporate environmental management or operational controls (emphasis added).[1]

The EPA's *Environmental Auditing Policy Statement* emphasizes that audits are to complement inspections and are not be used as a substitute for regulatory oversight.[2] Audits conducted by EPA may make special considerations for the protection of a business's confidential material and trade secret processes.[3]

Like the EPA, states have not needed explicit regulatory authority to conduct environmental audits as part of their environmental inspections and compliance order enforcement. State officials in Washington, California and Oregon

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[1]Courtney Price and Allen Danzig, "Environmental Auditing: Developing a 'Preventive Medicine' Approach to Environmental Compliance," *Loyola Of Los Angeles Law Review*, Vol. 19:1189, p. 1206.

[2]Ibid., p. 1190.

[3]Ibid., p. 1210.

confirmed that although they do not have a specific program of regulated "environmental audits," audits may be conducted as part of their investigation or enforcement process.

"Pre-Enforcement Review"

According to Zack Garitoli of EPA Headquarters in Washington, D.C., the EPA does not condone "pre-enforcement review" processes. EPA operates under the assumption that their administrative powers give them the right to order corrective action and assess penalties. Delay of action may be issued by a court of appeals but is not considered automatic. Similarly, the EPA recommends that if hearings or appeals processes impose delays in enforcement, states should follow their corrective actions with court-ordered injunctions or emergency cease and desist orders.

Washington

If an order is appealed to the Washington Pollution Control Hearing Board and a stay of penalty or corrective action is granted to the defendant, Washington law requires the hearing board to give priority to the hearing. Emergency orders and injunctive relief may also be sought by the Attorney General for the Washington Department of Ecology.

California

In California, enforcement of an order may not be delayed by an appeal for judicial review. According to Mike Shepard, council for the California Department of Health and Safety, an administrative order is considered final if 1) it is not appealed within ten days, or 2) once an independent hearing officer has issued a decision.[4] The Department of Health and Safety reserves the right to seek court-ordered injunctions and issue emergency orders or additional penalties to bring a violator into compliance.

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[4]Note: this is a correction of information provided by Bill Soo Hoo from the Department of Health and Safety on page 4 of 90.156. "Pre-enforcement review" applies until a final administrative decision has been reached. If a hearing is requested, enforcement may be delayed until the hearing officer issues a decision. "Pre-enforcement review" does not, however, apply when an appeal is made to the court system or in the case of judicial penalties. A defendant may request a stay but it is not granted automatically. In the past two years, only four cases have received administrative hearings and one corrective action has been appealed to the courts.

Oregon

In Oregon, the policy of "pre-enforcement review" prevails. An order is not considered final until the appeals process has been exhausted. This includes appeals taken to the Oregon State Court of Appeals. According to Larry Schurr of the Oregon Department of Environmental Quality, if action or penalty is delayed by an appeals process, the department may either seek a court injunction to prohibit further harm to the environment and/or issue additional penalties for continued violation. Each additional order must be appealed separately. If an order is not appealed within twenty days of issuance, it is considered final.

A summary of administrative and judicial penalties for each of the fifty states is attached.

I hope this information is useful. If you have any questions, or would like additional information, please call.

Attachment

TABLE 13

CIVIL PENALTIES UNDER HAZARDOUS WASTE LAWS

State	Administrative Civil Penalties	Judicial Civil Penalties
Alabama	$25,000/day ($250,000 "cap")	$25,000/day (no "cap")
Alaska	None	$100,000 plus $10,000/day
Arizona	None	$10,000/day
Arkansas	$25,000/day	None
California	$10,000/day $1,000-$10,000/day (Porter-Cologne Act)	$10,000/day $25,000/day (intentional or negligent violation or violation of order) $25,000-$20,000-$15,000-$10,000-$5,000/day (Porter-Cologne Act)
Colorado	None	$25,000/day
Connecticut	$25,000/day	$25,000/day
Delaware	"reasonable penalty" (viol. of law, permit, reg.) $25,000/day (viol. of order)	$25,000/day
District of Columbia	None	$25,000/day
Florida	None	$50,000/day
Georgia	$25,000/day	None
Hawaii	$10,000/day	$10,000/day
Idaho	None	$10,000/day

Note: Penalty amount shown is the maximum assessment per violation unless otherwise indicated.

Note: States that lack authority to impose administrative civil penalties absent a violator's consent receive a "None" in the administrative penalties column.

Table 13 (continued)

State	Administrative Civil Penalties	Judicial Civil Penalties
Illinois	$25,000/day	$25,000/day
Indiana	$25,000/day	$25,000/day (plus an additional $500/hour for violating any emergency order)
Iowa	$1,000/day	$10,000/day
Kansas	$10,000/day	$10,000/day
Kentucky	None	$25,000/day
Louisiana	$25,000/day $50,000/day (order violation)	$25,000/day $50,000/day (order violation)
Maine	None	$25,000/day
Maryland	$1,000/day ($50,000 "cap")	$10,000/day
Massachusetts	$1,000/day $25,000/day (for unauthorized release, handling without license, failure to report)	$25,000/day
Michigan	None	$25,000/day
Minnesota	$10,000 per inspection (regardless of # violations or days; waived if corrected within 30 days of receipt of order)	$25,000/day
Mississippi	$25,000/day	None
Missouri	None	$10,000/day
Montana	None	$10,000/day
Nebraska	None	$10,000/day

Table 13 (continued)

State	Administrative Civil Penalties	Judicial Civil Penalties
New Jersey	$25,000 per violation (plus $2,500/day after receipt of order)	$25,000/day $50,000/day (violation of order or failure to pay)
New Mexico	$10,000/day	$10,000/day
New York	$25,000/day $50,000/day (subs. violation)	$25,000/day $50,000/day (subs. violation)
North Carolina	$10,000/day	None (de novo review of admin. penalty)
North Dakota	None	$25,000/day
Ohio	None	$10,000/day
Oklahoma	$10,000/day (but only for viol. of order)	$10,000/day
Oregon	$10,000/day	None
Pennsylvania	$25,000/day	$25,000/day
Rhode Island	$10,000/day	$10,000/day
South Carolina	$25,000/day	$25,000/day
South Dakota	None	$10,000/day
Tennessee	$10,000/day	None
Texas	$10,000/day	$25,000/day
Utah	None	$10,000/day
Vermont	None	$10,000/day
Virginia	None	$10,000/day
Washington	$10,000/day	None
West Virginia	None	$25,000/day
Wisconsin	None	$25,000/day
Wyoming	None	$10,000/day

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March 15 and 16, 1990
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SCHEDULE — *Day One - Thursday, March 15, 1990*

8:30 - 9:00	Registration	
9:00 - 10:00	Overview of Environmental Criminal and Civil Liabilities •What Constitutes Illegal Disposal, Handling, Storage •Criminal Violations Under Federal and State Laws •Civil Penalties •Cleanup and Remediation Requirements	Charles R. Blumenfeld, Esq. Program Co-Chairman *Bogle & Gates* Seattle
10:00 - 10:45	Expanding Liability - Civil and Criminal Liabilities and Penalties •The Trend Toward Strict Liability •Who is Being Charged with Felonies •Federal and State EPA Priorities •Fines, Imprisonment and Other Penalties	Kevin M. Shea, Esq. Program Co-Chairman *Holme Roberts & Owen* Denver
10:45 - 11:00	Break	
11:00 - 11:45	Expanding Liability - Corporate Officers, Directors, Employees and Stockholders •Prosecution of Corporate Officers, Employees •Individual Criminal Liability in the Corporate Setting •Recent Cases •RICO	Paul R. Thomson, Jr., Esq. Deputy Assistant Administrator Office of Criminal Enforcement *U. S. EPA* Washington, D.C.
11:45 - 12:15	Panel Discussion - Questions and Answers	Members of the Faculty
12:15 - 1:30	Lunch	
1:30 - 2:45	Governments' Handling of a Criminal Case •EPA Enforcement Policies •How the Investigation Begins •Hazardous Waste Strike Force •What the Prosecutors Look For	James L. Prange, Director Office of Criminal Investigations *U. S. EPA* George W. Van Cleve, Esq. Land and Natural Resources Division *U. S. Department of Justice* Washington, D.C.
2:45 - 3:00	Break	
3:00 - 4:30	Trial of the Criminal Case - Prosecutor's Approach and Defense Point of View •Tactical and Strategic Considerations •Qualification and Effective Use of Expert Witnesses •Experts' Reports and Opinions •Demonstrative Evidence •Sentencing Issues	Charles A. De Monaco, Esq. Assistant Chief, Environmental Crimes Section *U. S. Department of Justice* Washington, D.C. Robert T. McAllister, Esq. *Martin, McAllister & Murphy* Denver
4:30 - 5:00	Panel Discussion - Questions and Answers	Members of the Faculty

REGISTRATION/ORDER FORM

Please register the following for the National Environmental Enforcement Conference to be held March 15 and 16, 1990, at the Hyatt Regency Tech Center in Denver:

Name:_____
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Please obtain CLE Accreditation in the following State(s):_____

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Mail and Make Checks Payable to *CLE INTERNATIONAL*, 2001 Federal Boulevard, Denver, CO 80211

SCHEDULE — *Day Two - Friday, March 16, 1990*

9:00 - 10:00	How to Protect Yourself And Your Business From Criminal and Civil Liability •Commitment to Proper Waste Management Practices •Due Diligence and Risk Avoidance •The Need for an Effective Environmental Audit	Michele Beigel Corash, Esq. *Morrison & Foerster* San Francisco
10:00 - 10:15	Break	
10:15 - 11:45	Your Rights and Obligations When Confronted by Government Investigators •Need for In-House Inspection Protocol •Administrative and Judicial Subpoenas •Search Warrant Issues •Advising Employees of Their Rights	Stephen J. Owens, Esq. *Stinson, Mag & Fizzell* Kansas City William T. Christian, Esq., Sr. Attorney *Arco Alaska, Inc.* Anchorage
11:45 - 12:15	Protecting Your Public Corporate Image •Use of Public Relations Experts •Effective Communication Strategies •Government and Media Relations	Tom Hoog, Senior VP and Mark Gibson *Hill and Knowlton* Denver
12:15 - 12:30	Panel Discussion - Questions and Answers	Members of the Faculty
12:30 - 1:30	Lunch (On Your Own)	
1:30 - 2:30	Role of the Environmental Consultant •Assisting in In-House Compliance Program •The Role and Importance of Environmental Audits •Expert Testimony at Trial	Kenneth L. Waesche, Principal *ERM-Rocky Mountain, Inc.* Denver
2:30 - 3:30	The Lawyer's Role •Preventing or Minimizing Liability •Selection of Experts, Evaluating Reports •Creating and Maintaining Privilege for Reports and Audits •When to Fight and When to Settle	Charles E. Merrill, Esq. *Husch Eppenberger Donohue* *Cornfeld & Jenkins* St. Louis
3:30 - 3:45	Break	
3:45 - 4:45	Panel Discussion: The Future Direction of the Prosecution of Environmental Crimes	Members of the Faculty Moderator: David V. Marshall, Esq. *Davis Wright Tremaine* Seattle

INFORMATION

PROGRAM: This topical and practical Seminar is designed to familiarize corporate executives, lawyers and lenders with the latest trends and developments in the criminal and civil enforcement of today's ever more stringent environmental laws and regulations. It will discuss how governmental environmental investigations and enforcement actions are conducted, focus on trial tactics and strategies, and offer suggestions on how to protect yourself and your business from criminal and civil liability.

A distinguished faculty of lawyers, prosecutors, investigators and environmental experts with extensive experience in environmental enforcement issues will provide concise and current information.

WHO SHOULD ATTEND: This program will be helpful to all corporate directors, officers, employees and stockholders, business and real estate owners and managers, and lawyers and consultants who deal with environmental, land use, and waste management matters.

REGISTRATION: Advance registration is recommended. Full payment of the tuition must accompany your registration. You are encouraged to mail in your registration as soon as possible since enrollment is limited. Walk-in registrations will be accepted subject to space availability and it is recommended that you call CLE International at (303) 480-0055 to make sure that space is available.

TAX DEDUCTION: Income tax deduction is allowed for expenses of continuing education (including enrollment fees, travel costs) undertaken to maintain or improve professional skills.

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TUITION: The Seminar fee of $495 per person (or $450 each for three or more registrants from the same firm) includes attendance at all sessions, lunch on Thursday, continental breakfast on Friday, coffee breaks, and all course materials. Full refund (less a $25 administrative charge) will be made if cancellation notice is received by 5 pm on the Friday preceding the Seminar.

HOMESTUDY PACKAGE: CLE International will offer a complete video cassette transcript of the Seminar, including all course outlines and materials, for $495 plus $10 shipping and handling. The course outlines alone are available for $75 plus $5.

SEMINAR LOCATION: The Seminar will be held at the elegant new Hyatt Regency Hotel in the Denver Tech Center, 7800 Tufts Avenue, Denver, CO 80237. A block of rooms at the special rate of $75 single or double occupancy has been set aside for a limited time for Seminar attendees. For room reservations, please call the hotel directly at (303) 779-1234, and identify yourself as a Seminar registrant.

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STATE OF ALASKA
DEPT. OF ENVIRONMENTAL CONSERVATION

STEVE COWPER, GOVERNOR

OFFICE OF THE COMMISSIONER
PO BOX O, JUNEAU, ALASKA 99811-1800 (907) 465-2600

February 7, 1990

POSITION PAPER

House Bill 409

The Department strongly supports this legislation. As has been so aptly pointed out in the aftermath of the T/V Exxon Valdez, the key to dealing effectively with a major oil spill is prevention. An active role on the part of the regulatory agencies in preventing a spill is essential. This principle applies as well to preventing other kinds of environmental pollution. House Bill 409 would provide some of the necessary tools to streamline the enforcement processes and enable the Department to encourage compliance with existing regulatory safeguards.

This bill addresses four major issues: access, administrative penalties, compliance orders, and environmental audits. Each issue is addressed separately below.

ACCESS

The ability to inspect to determine whether pollution violations are occurring is a necessary component of a credible enforcement program. Current practices have prevented the Department from gaining access quickly when necessary. Current law requires the consent of the facility owner or obtaining a search warrant before possible violations can be investigated, often leading to the dissipation or dispersal of the pollution before the Department can enter and gather the evidence necessary to charge the polluter with a crime.

Section 1 of House Bill 409 adds to existing authority the right to copy records. Section 2 allows reasonable access to regulated facilities for the purpose of investigating actual or suspected pollution violations without the consent of the owner. The proposed changes in this bill should significantly improve the Department's ability to investigate violations.

ADMINISTRATIVE PENALTIES

Penalties are an important enforcement tool that reduces the economic incentive to violate existing environmental laws. The Department currently has two avenues to pursue when a violation

occurs: 1) issue or negotiate a compliance order requiring corrective action, or 2) commence a judicial enforcement action. The ability to assess administrative penalties would provide a process to impose a financial incentive to comply with the law.

Administrative penalties procedures already exist in 28 other states and are used extensively by the federal government. They have proven to offer an efficient and fair means of enforcement. Handling matters administratively, rather than judicially, is far more expeditious and cost effective for both industry and the Department. Development of sound administrative penalty criteria and establishment of a consistent track record when penalties are imposed adds fairness and certainty to the process. The administrative penalty process also allows for judicial review, should the violator choose to contest the decision.

COMPLIANCE ORDERS

An essential component of a sound, effective environmental enforcement program is the ability to issue compliance orders without cumbersome procedural delays. The Department cannot currently issue a compliance order to stop ongoing pollution or commence cleanup of a contaminated site without a lengthy hearing process.

Section 5 of House Bill 409 would allow compliance orders to be effective immediately, so that pollution will stop and clean up will commence. This process would prevent delays from being introduced when the goal is to promptly eliminate risks to the public health and environment.

A person's right to contest liability or seek contribution from other responsible parties is not curtailed under this section. An affected party has 30 days to request an administrative hearing which can be elevated to a judicial review if necessary. A request for an administrative hearing, however, does not affect the provisions and deadlines set out in the compliance order. In essence, this section provides that rights and liabilities can be litigated after the fact, while protection of the public health and environment must take place immediately. This is essentially a reversal of the existing situation. This is an important tool for the Department's enforcement program.

ENVIRONMENTAL AUDITS

This section would allow the Department, as part of an ongoing enforcement action, to require an environmental audit to be performed by an independent contractor selected by the person required to conduct the audit. The Department retains authority to approve the selection of the contractor.

Audits have proven to be beneficial to both industry and government because they insert a neutral, yet qualified party into the process. Environmental audits have also been a part of effective prevention programs because potential problems can be identified before reaching unmanageable or catastrophic proportions.

The four components of this bill will significantly add to the Department's ability to protect the public health and the environment through a more efficient, effective enforcement program.

COMMENTS OF EXXON COMPANY, U.S.A

ON LATEST DRAFT OF CSHB 409

Last week Exxon Company, U.S.A. presented its initial testimony regarding CSHB 409. Since that time, a new draft of the bill has been circulated. Virtually all of the comments incorporated in Exxon's initial testimony are also applicable to the current proposal. Today's testimony is intended to expand upon our original comments in a couple of specific areas and address the alterations in the bill.

The procedures described in this bill would deny all Alaska's citizens (not just oil companies) the most basic due process protections. The bill seeks to impose arbitrary and unilateral procedures in non-emergency situations. The DEC already has more than ample statutory authority to issue any immediate order in an emergency. This bill would allow the exercise of regulatory power justified only in an emergency when there is no emergency.

As we testified last week, the current compliance order statute sets forth a three stage procedure for non-emergency situations. First, the DEC gives the citizen notice of the alleged environmental violations. The citizen then has an opportunity to meet with the department and to attempt to cure the violations. Finally, if the problem cannot be satisfactorily resolved on an informal basis, an administrative hearing is held to determine what

action would be appropriate.

This existing procedure is the appropriate way to deal with non-emergency situations. It is our understanding that this committee has been told that the proposed amendments are necessary to conform Alaska's compliance order procedures to federal law. As a general rule, that is simply not correct.

As you are aware, the federal government has a very wide and complex range of environmental statutes and regulations, many of which provide some type of compliance order authority. Most federal compliance order procedures, however, incorporate a three step notice and opportunity to be heard procedure similar to Alaska's current compliance order statute. The compliance order procedures employed in Part 24 of the EPA regulations on hearings are a good example.

The EPA's three stage process protects citizens' due process rights to reasonable notice and opportunity to be heard before the government takes final action against them. It also reflects common sense. Most alleged environmental violations can be resolved without resort to formal judicial enforcement actions. The procedure proposed in HB 409 threatens Alaskans with an impossible dilemma: either immediately comply with arbitrary compliance orders, or refuse to obey the DEC order at the risk of immediate penalties and force the Department of Law to file a

judicial enforcement action. The current statutory procedures are far preferable to this type of confrontation. For these reasons Exxon strongly recommends that the compliance order procedures not be amended.

The new draft contains an entirely new section on nonconsensual searches of "pervasively regulated facilities." This new section is unnecessary and unreasonable. In 1977, the Alaska Supreme Court held that a similar rule which allowed OSHA inspectors to enter workplaces without a search warrant violated the Alaska Constitution. In 1978, the U.S. Supreme Court held that an OSHA regulation allowing a warrantless search violated the federal constitution.

The language in the latest draft would allow the DEC to enter and search "pervasively regulated facilities," without a warrant. In the absence of an emergency, there is no legal justification for this type of search in the enforcement of environmental laws. The United States Supreme Court has held that certain types of enterprises may be searched without a warrant, but the businesses to which they have applied this rule have been limited to enterprises involving liquor and firearms. The warrantless search provisions are therefore unconstitutional and should be taken out of the bill.

Finally, we have objections to the administrative penalty provisions of the proposed bill. No one has presented any reasonable justification to show that administrative penalties are needed. Section 760 of the present statutes provides more than ample judicial penalties.

If administrative penalties are adopted, they should at the least include the procedural safeguards contained in similar federal statutes. The proposed scheme provides for an assessment notice to be sent out that becomes final in 30 days. A hearing may be requested, but there is no indication of when or whether such a hearing will take place. The safeguards of the Administrative Procedure Act are expressly denied.

Those major federal environmental laws which do provide for administrative penalties also provide for notice and a right to a hearing before the penalty can be imposed. (The Clean Air Act, Federal Insecticide Fungicide and Rodenticide Act (FIFRA), the Solid Waste Disposal Act, the Toxic Substances Control Act, the Clean Water Act, and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).)

Citizens who deal with the Alaska Department of Environmental Conservation should be afforded the same due process protections by DEC as they are by the federal agencies. These rights include the right to a notice of the assessment, a clear right to a

hearing, comprehensive rules that describe the hearing process, and the requirement that the administrative agency make and prove its case before the citizen is required to bear the burden of suffering any penalty.

In closing, we would like to emphasize that this bill, if adopted, would seriously impact all Alaskan citizens and businesses. Alaskans, like all Americans, are entitled to the basic due process protections when dealing with state administrative agencies and their staff. The proposals included in CSHB 409 would significantly undermine those protections. We continue to believe that the existing statutes fairly address both emergency and non-emergency situations, and therefore recommend that this bill not be enacted into law.

Thank you.

exxn409.com

ACCESS

ENVIRONMENTAL QUALITY LAWS

HAWAII

(A) To enter upon permittee's or variance holder's premises or premises of a person subject to pretreatment requirements in which an effluent source is located or in which any records are required to be kept under the terms and conditions of the permit or variance or pretreatment requirements;

(B) To inspect any monitoring equipment or method required in the permit or variance or by pretreatment requirements; and

(C) To sample any discharge of pollutants or effluent;

AIR LAWS

WASHINGTON

70.94.200 *Investigation of conditions by control officer or secretary of social and health services or director of health — Entering private, public property.* For the purpose of investigating conditions specific to the control, recovery or release of air contaminants into the atmosphere, a control officer, the department, or their duly authorized representatives, shall have the power to enter at reasonable times upon any private or public property, excepting nonmultiple unit private dwellings housing two families or less. No person shall refuse entry or access to any control officer, the department, or their duly authorized representatives, who requests entry for the purpose of inspection, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with any such inspection.

NEW JERSEY

26:2C-9.1

No person shall obstruct, hinder or delay, or interfere with by force or otherwise, the performance by the department or its personnel of any duty under the provisions of this act, or of the act of which this act is amendatory and supplementary, or refuse to permit such personnel to perform their duties by refusing them upon proper identification or presentation of a written order of the department, entrance to any premises at reasonable hours.

VIRGINIA

§10-17.22. Right of entry. — Whenever it is necessary for the purposes of this chapter, the Board or any member, agent or employee when duly authorized by the Board may at reasonable times enter any establishment or upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations.

SOUTH DAKOTA

34A-1-41. Any duly authorized officer, employee, or representative of the department may enter and inspect that part of any property, premise or place in which he has reasonable grounds to believe is the source of air pollution at any reasonable time for the purpose of investigating the air pollution or of ascertaining the state of compliance with this chapter and rules and regulations in force pursuant thereto. No person shall refuse entry or access to any authorized representative of the department who requests entry for the purpose of such investigation, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with any such investigation.

VERMONT

§557. Inspections

Any duly authorized officer, employee, or representative of the secretary may enter and inspect any property, premise or place on or at which an air contaminant source is located or is being constructed or installed at any reasonable time for the purpose of ascertaining the state of compliance with this chapter and rules in force pursuant thereto. No authorized person shall refuse entry or access to any authorized representative of the secretary who requests entry for purposes of inspection, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with the inspection. If requested, the owner or operator of the premises shall receive a report setting forth all facts found which relate to compliance status.

Pennsylvania

§4013.1. Search Warrants. — Whenever an agent or employe of the department, charged with the enforcement of the provisions of this act, has been refused the right to examine any air contamination source, or air pollution control equipment or device, or is refused access to or examination of books, papers and records pertinent to any matter under investigation, such agent or employe may apply for a search warrant to any Commonwealth to issue the same to enable him to have access and examine such property, air contamination source, air pollution control equipment or device, or books, papers and records, as the case may be. It shall be sufficient probable cause to issue a search warrant that the inspection is necessary to properly enforce the provisions of this act.

Rhode Island

23-23-12. Whenever the director has reason to believe that emission is occurring in excess of that permitted under any rule, regulation or order made hereunder, the director may without hearing conduct tests to determine the emission of air contaminants from premises, buildings or other places belonging to or controlled by any person, or to require such person to provide such information as he may request regarding such emission. The person owning or controlling the premises, building or other place to be tested shall provide the director or his representatives or consultants access during working hours. The director, his representatives or consultants shall be empowered to erect scaffolding provide necessary holes and stack or duct work or such other sampling and test facilities. The director may specify the testing method to be used by qualified personnel in accordance with good professional practice and should such test show that a violation of a rule or regulation made hereunder or any order of the director was occurring the person shall pay in addition to any other regulatory, civil, and/or criminal penalties the entire cost of such test or tests and an additional administrative fine of up to one hundred percent (100%) of said cost of such test or tests. Said costs and fines shall be deposited in the account established in §23-23-12.1.

Section 81-1508. (1) Any person who violates any of the provisions of the Environmental Protection Act, or who fails to perform any duty imposed by such act shall:

North Dakota

23-25-05.

1. Any duly authorized officer, employee, or agent of the department may enter and inspect any property, premise, or place on or at which an air contaminant source is located or is being constructed, installed, or established at any reasonable time for the purpose of ascertaining the state of compliance with this chapter and rules and regulations enforced pursuant thereto. If requested, the owner or operator of the premises shall receive a report setting forth all facts found which relate to compliance status.

2. The department may conduct tests and take samples of air contaminants, fuel, process material, and other materials which affect or may affect emission of air contaminants from any source, and shall have the power to have access to and copy any records required by department rules or regulations to be maintained, and to inspect monitoring equipment located on the premises. Upon request of the department the person responsible for the source to be tested shall provide necessary holes in stacks or ducts and such other safe and proper sampling and testing facilities exclusive of instruments and sensing devices as may be necessary for proper determination of the emission of air contaminants. If an authorized representative of the department, during the course of an inspection, obtains a sample of air contaminant, fuel, process material, or other material, he shall issue a receipt for the sample obtained to the owner or operator of, or person responsible for, the source tested.

Nebraska

"(c) For refusing the right of entry and inspection to any authorized departmental representative, for violation of any effluent standards and limitations, filing requirements, monitoring requirements, or water quality standards, for failure to obtain a permit, or for violation of a permit or any permit condition or limitation or any rules, regulations, or orders of the director under the National Pollutant Discharge Elimination System, created by the Clean Water Act, as amended, 33 U.S.C. 1251 et seq., be subject to a civil penalty of not more than five thousand dollars per day, the amount of such penalty to be based on the size of the operation and the degree and extent of the pollution;

WATER LAWS

ALABAMA

Any member of the commission or its employees or agents, without advance notice and upon presentation of appropriate credentials, may enter any property or any industrial or other establishment at any reasonable time for the purpose of collecting such information, and no owner or official in charge shall refuse to admit such member, employee or agent for any purposes necessary to the discharge of his official duty. Any records, reports or information obtained by any member, employee or agent of the commission from any person shall be subject to the provisions of this subsection concerning confidentiality.

INDIANA

13-1-3-6. The department has the right through any authorized agent, to enter at all reasonable times in or upon any private or public property for the purpose of inspecting and investigating conditions relating to the pollution of any water of this state. The department may call upon any state officer, board, department, school, university, or other state institution, and the officers or employees thereof, and receive any assistance necessary to carrying out this chapter.

COLORADO

25-8-306. Authority to enter and inspect premises and records. (1) The division has the power, upon presentation of proper credentials, to enter and inspect at any reasonable time and in a reasonable manner any property, premise, or place for the purpose of investigating any actual, suspected, or potential source of water pollution, or ascertaining compliance or noncompliance with any control regulation or any order promulgated under this article. Such entry is also authorized for the purpose of inspecting and copying records required to be kept concerning any effluent source.

(2) In the making of such inspections, investigations, and determinations, the division, insofar as practicable, may designate as its authorized representatives any qualified personnel of the department of agriculture. The division may also request assistance from any such state or local agency or institution.

(3) If such entry or inspection is denied or not consented to, the division is empowered to and shall obtain, from the district or county court for the judicial district or county in which such property, premise, or place is located, a warrant to enter and inspect any such property, premise, or place prior to entry and inspection. The district and county courts of the state of Colorado are empowered to issue such warrants upon a proper showing of the need for such entry and inspection.

MONTANA

75-5-603. Power to inspect. The authorized representative of the department, upon presentation of his credentials, may at reasonable times enter upon any public or private property to:

(1) investigate conditions relating to pollution of state waters or violations of permit conditions;

(2) have access to and copy any records required under this chapter;

(3) inspect any monitoring equipment or method required under 75-5-602(3); and

(4) sample any effluents which the owner or operator of such source is required to ~~sample under~~ 75-5-602(4).

SOUTH DAKOTA

A-2-45. The secretary shall, at reasonable times, have access to any point source, including an industrial user of a publicly owned treatment works, and copy any records, inspect any monitoring equipment or method required under §34A-2-44, to sample any effluents being discharged into the waters of the state, or to assure compliance with the provisions of this chapter.

34A-2-46. The secretary may enter, upon presentation of proper credentials any premises in which a point source, including an industrial user of a publicly owned treatment works, is located or in which any records is required to be maintained pursuant to §34A-2-44 are located.

RHODE ISLAND

46-12-15. The director shall have full powers to inspect, and make orders regulating and directing all methods, means and devices employed on any steamer or other vessel in the waters of the state, or at any installation on land, in receiving, carrying, storing, heating, handling or discharging any petroleum, gasoline, kerosene, tar, oil, or any product or mixture thereof; and the director may by order prescribe all rules and regulations to prevent the discharge or escape of any of said substances into the waters of the state.

WASHINGTON

90.48.355 — Right of entry, access to records, pertinent to department investigations. The department through its duly authorized representatives, shall have the power to enter upon any private or public property, including the decks of any ship, at any reasonable time, and the owner, managing agent, master or occupant of such property shall permit such entry for the purpose of investigating conditions relating to violations or possible violations of RCW 90.48.315 through 90.48.365, and to have access to any pertinent records relating to such property, including but not limited to operation and maintenance records and logs: provided, That in connection with the authority granted herein no person shall be required to divulge trade secret processes.

WASHINGTON

WAC 173-201-110 SURVEILLANCE. A continuing surveillance program, to ascertain whether the regulations, waste disposal permits, orders, and directives promulgated and/or issued by the department are being complied with, will be conducted by the department staff as follows:

(1) Inspecting treatment and control facilities.

(2) Monitoring and reporting of waste discharge characteristics.

(3) Monitoring receiving water quality.

ARKANSAS

82-1905. Persons operating disposal system — Furnishing information and permitting examinations and surveys. — Subdivision 1. FURNISHING INFORMATION. The owner or operator of or any contributor of sewage, industrial wastes, or other wastes to any disposal system or industrial user of a publicly owned treatment system, when requested by the Director, shall furnish to the Department any information which is relevant to the subject of this Act and shall establish and maintain such records, make such reports, install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), sample such effluents and provide such other information as the Director may reasonably require.

Subdivision 2. EXAMINATION OF BOOKS AND RECORDS. The Department or any authorized employee or agent thereof, may examine and copy any book, papers, records or memoranda pertaining to the operation of a disposal system.

Subdivision 3. ENTRANCE ON PROPERTY. Whenever it shall be necessary for the purpose of this Act, the Department or any authorized member, employee or agent thereof may enter upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations.

CIVIL PENALTIES
(ADMINISTRATIVE)

TABLE 13

CIVIL PENALTIES UNDER HAZARDOUS WASTE LAWS

State	Administrative Civil Penalties	Judicial Civil Penalties
Alabama	$25,000/day ($250,000 "cap")	$25,000/day (no "cap")
Alaska	None	$100,000 plus $10,000/day
Arizona	None	$10,000/day
Arkansas	$25,000/day	None
California	$10,000/day $1,000-$10,000/day (Porter-Cologne Act)	$10,000/day $25,000/day (intentional or negligent violation or violation of order) $25,000-$20,000-$15,000-$10,000-$5,000/day (Porter-Cologne Act)
Colorado	None	$25,000/day
Connecticut	$25,000/day	$25,000/day
Delaware	"reasonable penalty" (viol. of law, permit, reg.) $25,000/day (viol. of order)	$25,000/day
District of Columbia	None	$25,000/day
Florida	None	$50,000/day
Georgia	$25,000/day	None
Hawaii	$10,000/day	$10,000/day
Idaho	None	$10,000/day

Note: Penalty amount shown is the maximum assessment per violation unless otherwise indicated.

Note: States that lack authority to impose administrative civil penalties absent a violator's consent receive a "None" in the administrative penalties column.

Table 13 (continued)

State	Administrative Civil Penalties	Judicial Civil Penalties
Illinois	$25,000/day	$25,000/day
Indiana	$25,000/day	$25,000/day (plus an additional $500/hour for violating any emergency order)
Iowa	$1,000/day	$10,000/day
Kansas	$10,000/day	$10,000/day
Kentucky	None	$25,000/day
Louisiana	$25,000/day $50,000/day (order violation)	$25,000/day $50,000/day (order violation)
Maine	None	$25,000/day
Maryland	$1,000/day ($50,000 "cap")	$10,000/day
Massachusetts	$1,000/day $25,000/day (for unauthorized release, handling without license, failure to report)	$25,000/day
Michigan	None	$25,000/day
Minnesota	$10,000 per inspection (regardless of # violations or days; waived if corrected within 30 days of receipt of order)	$25,000/day
Mississippi	$25,000/day	None
Missouri	None	$10,000/day
Montana	None	$10,000/day
Nebraska	None	$10,000/day
Nevada	None	$10,000/day
New Hampshire	None	$50,000/day

Table 13 (continued)

State	Administrative Civil Penalties	Judicial Civil Penalties
New Jersey	$25,000 per violation (plus $2,500/day after receipt of order)	$25,000/day $50,000/day (violation of order or failure to pay)
New Mexico	$10,000/day	$10,000/day
New York	$25,000/day $50,000/day (subs. violation)	$25,000/day $50,000/day (subs. violation)
North Carolina	$10,000/day	None (de novo review of admin. penalty)
North Dakota	None	$25,000/day
Ohio	None	$10,000/day
Oklahoma	$10,000/day (but only for viol. of order)	$10,000/day
Oregon	$10,000/day	None
Pennsylvania	$25,000/day	$25,000/day
Rhode Island	$10,000/day	$10,000/day
South Carolina	$25,000/day	$25,000/day
South Dakota	None	$10,000/day
Tennessee	$10,000/day	None
Texas	$10,000/day	$25,000/day
Utah	None	$10,000/day
Vermont	None	$10,000/day
Virginia	None	$10,000/day
Washington	$10,000/day	None
West Virginia	None	$25,000/day
Wisconsin	None	$25,000/day
Wyoming	None	$10,000/day

Compliance / "Cease and Desist Orders

LOUISIANA

D. Requirements of compliance orders

Any order issued under this Section shall state with reasonable specificity all of the following:

(1) The nature of the violation.

(2) A time limit for compliance.

(3) That in the event of noncompliance, a civil penalty may be assessed.

E. Civil Penalties.

(1) Any person found to be in violation of any requirement of this Chapter may be liable for a civil penalty, to be assessed by the commission, the secretary, the assistant secretary, or the court of not more than one million dollars or the cost of any cleanup made necessary by such violation and a penalty of not more than twenty-five thousand dollars for each day of violation and may be subject to revocation or suspension of any permit, license, or variance which had been issued to said person. Any person found to be in violation of this Chapter shall be liable for legal interest from the date of the assessment of a civil penalty until paid.

(2) Any person to whom a compliance order or a cease and desist order is issued pursuant to R.S. 30:1073(C) who fails to take corrective action within the time specified in said order shall be liable for a civil penalty to be assessed by the commission, the secretary, the assistant secretary, or the court of not more than fifty thousand dollars for each day of continued violation or noncompliance.

(3) (a) In determining whether or not a civil penalty is to be assessed and in determining the amount of the penalty or the amount agreed upon in compromise, the following factors shall be considered:

(i) The history of previous violations or repeated noncompliance.

(ii) The nature and gravity of the violation.

(iii) The gross revenues generated by the respondent.

(iv) The degree of culpability, recalcitrance, defiance, or indifference to regulations or orders.

(v) The monetary benefits realized through noncompliance.

(vi) The degree of risk to human health or property caused by the violation.

(vii) Whether the noncompliance or violation and the surrounding circumstances were immediately reported to the department and whether the violation or noncompliance was concealed or there was an attempt to conceal by the person charged.

(viii) Whether the person charged has failed to mitigate or to make a reasonable attempt to mitigate the damges caused by his noncompliance or violation.

(ix) The costs of bringing and prosecuting an enforcement action, including staff time, equipment use, hearing records, expert assistance, and such other items as the commission finds to be a cost of the action.

(b) The secretary may supplement such criteria by rule. In the event that the order with which the person failed to comply was an emergency cease and desist order, no penalty shall be assessed if it appears, upon later hearing, that said order was issued without reasonable cause.

(4) No penalty shall be assessed without the person charged being given notice and an opportunity for a hearing on such charge. The person charged may waive a hearing on the issue of whether or not a violation has occurred, and his culpability for such violation and any other ultimate issue. When a hearing on the violation is waived, a decision may be rendered upon the uncontested facts.

(5) After submission for a penalty determination at a hearing, the commission, secretary, or assistant secretary shall provide an opportunity for relevant and material public comment relative to any penalty which may be imposed.

LOUISIANA

C. Compliance orders; emergency cease and desist orders

(1) Upon a determination that a violation of this Chapter is occurring or is about to occur which is endangering or causing damage to public health or the environment, the commission, the secretary, the assistant secretary or an authorized technical secretary may issue an emergency cease and desist order. Upon a finding that the ordered cessation of operations, or any portion thereof, will not completely abate the damages to the environment, in addition to the emergency cease and desist order, affirmative obligations may be imposed on the violator requiring him to take whatever steps deemed necessary to abate the irreparable damage to the environment. The issuance of such an emergency cease and desist order shall not be subject to the limitations and formalities relating to notice and hearings imposed with regard to adjudications under R.S. 49:950 et seq., but shall be subject to all other applicable provisions of law. The emergency cease and desist order shall remain in force until a hearing can be held concerning the situation which prompted the emergency order, but in no event shall such an emergency order remain in force longer than fifteen days.

(2) Upon determining that a violation of any requirement of this Chapter has occurred or is about to occur, notice may be given either by personal service or certified mail, return receipt requested, to the violator of his failure to comply with such requirement or proceed pursuant to Paragraph (3) of this subsection. If such violation extends beyond the thirtieth day after notification, the commission, secretary or assistant secretary shall either issue an order requiring compliance within a specified time period, or the commission shall commence a civil action for appropriate relief, including a temporary or permanent injunction.

(3) Upon determining that a violation of any requirement of this Chapter has occurred or is about to occur, the commission, secretary, the assistant secretary or the authorized representative of the assistant secretary shall either issue an order requiring compliance within a specified time period or the commission or secretary shall commence a civil action for appropriate relief, including a temporary or permanent injunction.

No prior hearing required

CONNECTICUT

Section 22a-7. Cease and desist order, subsequent hearing

The commissioner, whenever he finds after investigation that any person is causing, engaging in or maintaining, or is about to cause, engage in or maintain, any condition or activity which, in his judgment, will result in or is likely to result in imminent and substantial damage to the environment, or to the public health within the jurisdiction of the commissioner under the provisions of chapters 440, 442, 445, 446a, 446c, 446d and 446k or whenever he finds after investigation that there is a violation of the terms and conditions of a permit issued by him that is in his judgment substantial and continuous and it appears prejudicial to the interests of the people of the state to delay action until an opportunity for a hearing can be provided, may, without prior hearing, issue a cease and desist order in writing to such person to discontinue, abate or alleviate such condition or activity. Upon receipt of such order such person shall immediately discontinue, abate or alleviate or shall refrain from causing, engaging in or maintaining such condition or activity. The commissioner shall, within ten days of such order, hold a hearing to provide the person an opportunity to be heard and show that such condition does not exist. Such order shall remain in effect until ten days after the hearing within which time a new decision based on the hearing shall be made.

WATER LAWS

ALABAMA

(k) Whenever the commission has cause to believe that any person is violating any rule or regulation promulgated by the commission, the commission shall cause a prompt investigation to be made in connection therewith. If, upon inspection, the commission discovers a condition which is in violation of the provisions of this chapter, or any rule or regulation promulgated pursuant thereto, it shall be authorized to order such violation to cease and to take such steps necessary to enforce such an order. The said order shall state the items which are in violation and shall provide a reasonable specified time within which the violation must cease. The person responsible shall make the corrections necessary to comply with the requirements of this chapter, or rule or regulation promulgated pursuant thereto, within the time specified in the order. Nothing in this subsection shall be deemed to prevent the commission or the attorney general from prosecuting any violation of this chapter, or any permit, order or rule or regulation promulgated pursuant thereto, notwithstanding that such violation is corrected in accordance with any order.

DELAWARE

§6163. Cease and desist order

The Secretary shall have the power to issue an order to any person violating any rule, or regulation, or permit condition, or lease condition, or provision of this Chapter, to cease and desist from such violation. Any cease and desist order issued pursuant to this section shall expire (1) after 30 days of its issuance, or (2) upon withdrawal of said order by the Secretary, or (3) when the order is superseded by an injunction, whichever occurs first.

COLORADO

25-8-605. Cease and desist orders. If the division determines, with or without hearing, that a violation of any provision of this article or of any order, permit, or control regulation issued or promulgated under authority of this article exists, the division may issue a cease and desist order. Such order shall set forth the provision alleged to be violated, the facts alleged to constitute the violation, and the time by which the acts or practices complained of must be terminated.

ENVIRONMENTAL AUDITING: DEVELOPING A "PREVENTIVE MEDICINE" APPROACH TO ENVIRONMENTAL COMPLIANCE

Courtney M. Price and Allen J. Danzig***

TSCA(2)

I. INTRODUCTION

Achieving and maintaining compliance with the nation's environmental laws and regulations is a primary goal of federal and state regulatory agencies. As environmental regulation has matured, the emphasis has expanded from initial compliance to continuous compliance. Recent major environmental incidents have demonstrated the critical need for companies to reassess their environmental programs[1] and for regulatory agencies to develop new compliance approaches. In developing compliance strategies under the environmental statutes, the United States Environmental Protection Agency (EPA) has found that traditional administrative and judicial enforcement efforts are not always sufficient to achieve a high level of compliance from all regulated entities, including industry, municipalities and federally-owned facilities. This has become particularly apparent under the environmental programs which regulate hazardous wastes and toxic substances. To address this issue, EPA has explored the concept of environmental auditing[2] as an innova-

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The views expressed in this article are the personal views of the authors. No official support or endorsement by the United States Environmental Protection Agency is intended or implied.

1. *See* Mays, *Environmental Audits: A New Enforcement Tool*, EPA JOURNAL, June 1985, at 27.

2. Several books have been written to assist corporations in developing environmental audit programs. *See e.g.*, H. BLAKESLEE & T. GRABOWSKI, A PRACTICAL GUIDE TO PLANT ENVIRONMENTAL AUDITS (1985); J. GREENO, G. HEDSTROM & M. DIBERTO, ENVIRONMENTAL AUDITING—FUNDAMENTALS AND TECHNIQUES (1985); L. HARRISON, THE MCGRAW HILL ENVIRONMENTAL AUDITING HANDBOOK (1984); T. TRUITT, D. BERZ, D. WEINBERG, J.B. MOLLOY, G. GOLDMAN, G. PRICE & B. FLORENCE, ENVIRONMENTAL AUDIT HANDBOOK—BASIC PRINCIPLES OF ENVIRONMENTAL COMPLIANCE AUDITING (2d ed. 1983).

tive approach to promote increased compliance by the regulated community.

"Environmental auditing is a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."[3] Auditing has been more broadly defined as "an independent appraisal of a corporation's environmental control systems and its environmental assets and liabilities to enable management to make rational decisions relating to environmental matters."[4] Audits can be used to "verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated material and practices."[5] Auditing may also be viewed as a quality assurance check by "verifying that management practices are in place, functioning and adequate."[6]

Many corporate auditing programs, which began as a check on compliance status, have evolved into a more comprehensive audit of environmental management control systems to assess environmental risks.[7] For example, in reviewing a corporate management system for polychlorinated biphenyls (PCBs),[8] an audit may analyze the system and procedures for handling, storing, marking, cleaning up spills, inspecting, record keeping and annual inventorying. The audit could also look for risks not yet identified.

Audits should not be confused with the compliance monitoring activities required by environmental laws, regulations or permits. Audit programs do not replace the inspection programs of regulatory agencies;[9] they evaluate direct compliance activities, such as obtaining permits, installing controls, monitoring compliance, reporting violations and keeping records.[10]

This Article will describe EPA's efforts to encourage environmental auditing by regulated entities. First, it discusses the evolution of govern-

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3. U.S. Envtl. Protection Agency, Interim Environmental Auditing Policy Statement, 50 Fed. Reg. 46,504 (1985).

4. Reed, *Environmental Audits and Confidentiality: Can What You Know Hurt You as Much as What You Don't Know?*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,303 (Oct. 1983).

5. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,504.

6. *Id.*

7. ARTHUR D. LITTLE, INC., CURRENT PRACTICES IN ENVIRONMENTAL AUDITING, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY 1-2 (1984).

8. Polychlorinated biphenyls are defined as "any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees or any combination of substances which contains such substance." 40 C.F.R. § 761.3 (1985).

9. *See* Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,504.

10. *Id.*

ment and corporate interest in environmental auditing, including the benefits gained by firms which have instituted auditing programs. The Article then discusses EPA efforts to promote environmental auditing through publication of the Agency's Interim Environmental Auditing Policy Statement[11] and the Agency's negotiation of environmental auditing provisions in enforcement case settlement agreements. Finally, the Article discusses the major settlement agreements which contain environmental auditing provisions, and concludes with some recommendations on the appropriate use of environmental auditing in achieving EPA's goal of continuous compliance.

II. Evolution of Corporate Environmental Auditing Programs

Environmental auditing programs were developed for sound business reasons, primarily to assist regulated entities[12] in evaluating compliance and in managing existing and potential pollution control problems, rather than merely reacting to environmental crises.[13] Much of the impetus for auditing programs has come from a number of recent cases in which the release of chemicals in the environment has caused and continue to cause businesses to incur major costs.[14] A highly toxic cloud of methyl isocyanate released from the Union Carbide plant in Bhopal, India, which claimed about 2000 lives and 200,000 injuries and led to damage claims of billions of dollars, is the most dramatic example of a situation which has caused some companies to reassess their environmental and safety problems.[15] Auditing programs also evolved, in part, from Securities and Exchange Commission (SEC) enforcement case settlements, which required environmental auditing.[16] As a result of these developments, several hundred major corporations in the country have voluntarily developed environmental audit programs.[17] Realizing that they need to encourage a higher level of corporate attention to environ-

11. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,504.

12. Regulated entities include private firms and public agencies with facilities subject to environmental regulation. Public agencies include federal, state or local agencies, and special purpose organizations such as regional sewage commissions. *Id.* at 46,504 n.1.

13. *Id.* at 46,504.

14. Mays, *supra* note 1, at 27.

15. *Id. See also* Hall, *Environmental Audits—A Corporate Response To Bhopal*, ENVTL. FORUM, Aug. 1985, at 36.

16. *See In re* Occidental Petroleum Corp., [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶¶ 82,622, 83,356 n.34 (1980); *In re* United States Steel Corp., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,319 (1979); SEC v. Allied Chem. Corp., No. 77-0373 (D.D.C. 1977). *See also* Reed, *supra* note 4, at 10,303-04.

17. Address by Francis Phillips, Deputy Regional Administrator, U.S. Envtl. Protection

mental compliance, the federal government and state regulatory agencies have also taken a strong interest in auditing.

The benefits of environmental auditing are tangible and significant.[18] First, firms face potential civil and criminal liability under state environmental laws and the environmental statutes administered by EPA, such as: the Clean Air Act,[19] the Clean Water Act,[20] the Resource Conservation and Recovery Act (RCRA),[21] the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[22] and the Toxic Substances Control Act (TSCA).[23] The new EPA *Policy on Civil Penalties*, issued February 16, 1984, directs that penalties must, at a minimum, reflect the economic benefit or savings of delayed compliance,

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Agency, Region VI, at the Government Institutes, Inc. Environmental Auditing Course (Apr. 18, 1985).

18. *See generally* ARTHUR D. LITTLE, INC., BENEFITS OF ENVIRONMENTAL AUDITING, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY (Dec. 1984) [hereinafter BENEFITS OF ENVIRONMENTAL AUDITING]; J. GREENO, G. HEDSTROM & M. DIBERTO, *supra* note 2, at 11-21; L. HARRISON, *supra* note 2, at 1-9 to 1-21.

19. 42 U.S.C. §§ 7401-7642 (1982). Clean Air Act § 113(b) provides up to $25,000 civil penalties per day of violation. CAA § 113(b), 42 U.S.C. § 7413(b). Section 113(c) provides criminal penalties of $25,000 and jail terms of up to one year for certain knowing violations. *Id.* § 113(c), 42 U.S.C. § 7413(c).

20. 33 U.S.C. §§ 1251-1376 (1982) (minor subsequent amendments have been enacted). Section 309(b) of the Clean Water Act provides up to $10,000 civil penalties per day of violation, including a permit limitation or condition. CWA § 309(b), 33 U.S.C. § 1319(b) (1982). Section 309(c) provides criminal penalties of $25,000 and jail terms of up to one year for certain knowing violations. *Id.* § 309(c), 33 U.S.C. § 1319(c) (1982).

21. 42 U.S.C. §§ 6901-6987 (1982). RCRA provides a comprehensive program for the cradle-to-grave management of hazardous wastes. This program covers generators, RCRA § 3002, 42 U.S.C. § 6922 (1982), and transporters, *id.* § 3003, 42 U.S.C. § 6923 (1982), as well as facilities which treat, store or dispose of hazardous waste. *Id.* § 3004, 42 U.S.C. § 6924 (1982). RCRA provides for civil penalties of up to $25,000 per day. *Id.* § 3008(g), 42 U.S.C. § 6928(g). RCRA criminal penalties include

> knowingly transporting any hazardous waste to a facility that does not have a permit; knowingly treating, storing, or disposing of any hazardous waste without a permit or in violation of any material condition of a permit; knowingly making any false material statement in any document filed, maintained, or used to comply with RCRA; and, for any person who has handled or is handling any hazardous waste, knowingly destroying, altering, or concealing any record required by regulations to be maintained.

Id. § 3008(d), 42 U.S.C. § 6928(d) (1982).

22. 42 U.S.C. §§ 9601-9657 (1982). CERCLA creates a fund for cleaning up abandoned hazardous waste sites and imposes strict joint and several liability on persons who arrange for treatment or disposal, or who arranged with a transporter for transportation for treatment or disposal of hazardous substances at such facilities. CERCLA §§ 106-107, 42 U.S.C. §§ 9606-9607 (1982).

23. Section 16(a)(1) of TSCA provides for civil penalties of up to $25,000 per day of violation of the Act. TSCA § 16(a)(1), 15 U.S.C. § 2615(a)(1) (1982). Section 16(b) provides for criminal penalties of $25,000 per day of violation, or imprisonment for up to one year, for knowing or willful violations. *Id.* § 16(b), 15 U.S.C. § 2615(b).

as well as the seriousness or gravity of the violation.[24] Violators also face potential environmental liability for violations of certain SEC disclosure requirements,[25] and tort liability arising from personal injury, property damage or toxic tort claims.[26] Indeed, environmental audits may be required in order for a firm to obtain pollution liability insurance.[27]

Audits may be needed especially where a company wants to purchase, sell, lease or modify facilities. The company must be aware of any real or potential liabilities associated with the transaction to ensure that undisclosed liabilities will not come back to affect future operations.[28] The audit will also assist facility managers in understanding and interpreting regulatory requirements and potential liabilities.[29] Thus, an environmental audit provides corporate management with assurance that potential problems have been addressed before serious accidents, government enforcement or private lawsuits may result.[30]

Second, firms can save money by assessing potential environmental violations and risks as well as by making capital spending decisions to correct violations, to reduce risks and to maintain proper operation of treatment systems.[31] For example, a firm may realize cost savings through process changes which reduce the amount of raw materials needed and which result in less pollution at the end of the manufacturing process.[32] Thus, when a corporation must obtain a new National Pollutant Discharge Elimination System (NPDES) permit, it may choose to review not just the basis for the permit, but the entire manufacturing process to determine if cost-effective changes may be needed.[33] A com-

24. See *infra* notes 98-106 and accompanying text for a discussion of the *Policy on Civil Penalties*.

25. *See* Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1982). SEC regulations require all publicly held companies to disclose the effects of compliance with, and legal proceedings under, federal and state law through public filings to the SEC. Regulation S-K, Item 101(c)(1)(xii), 17 C.F.R. § 229.101(c)(1)(xii) (1985); Instruction 5 to Item 103, 17 C.F.R. § 299.103 (1985). Significant misstatements or omissions could result in criminal or civil liability under the federal securities laws. *See* L. HARRISON, *supra* note 2, at 2-109 to 2-119.

26. *See* ...rrett, *Compensating Victims of Toxic Substances: Issues Concerning Proposed Legislation*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,172 (June 1983).

27. H. BLAKESLEE & T. GRABOWSKI, *supra* note 2, at 5-6.

28. J. GREENO, G. HEDSTROM & M. DIBERTO, *supra* note 2, at 13.

29. *Id.* at 14. *See also* L. HARRISON, *supra* note 2, at 29.

30. *See* J. GREENO, G. HEDSTROM & M. DIBERTO, *supra* note 2, at 13-14.

31. BENEFITS OF ENVIRONMENTAL AUDITING, *supra* note 18, at 6-8, 11-14; Friedman, *Managing and Resolving Corporate Environmental Issues*, ENVTL. FORUM, Feb. 1985, at 28-31.

32. Friedman, *supra* note 31, at 31.

33. *Id.*

pany may also effect such savings by implementing similar changes at other company plants.

Third, an environmental auditing program can result in an improved relationship between a firm, regulatory agencies and the public, particularly where audit-discovered violations are identified and corrected within a relatively short period.[34] Further, EPA generally bases its enforcement priorities on industries with significant compliance problems.[35] Also, in developing an appropriate enforcement response to particular violations, EPA may give some consideration to expeditious, good faith efforts to achieve compliance.[36]

Finally, regulatory agencies such as EPA obtain significant benefits from environmental auditing programs. These benefits include better assurances of compliance from regulated entities, more efficient use of government inspection and enforcement resources, improved cooperation with companies, better compliance information and useful information about audit systems.[37] Thus, environmental auditing can significantly complement the government's efforts to achieve continuous compliance.

While the benefits of auditing programs are significant, regulated entities have perceived some risks in developing such programs. Audit reports may generate information on violations of a pollution control statute which may not be otherwise discovered by a regulatory agency during its normal compliance monitoring activities. Such information could form the basis for an EPA or state enforcement action.[38] An audit report can also create potential criminal liability where the government can establish that corporate officials knew of violations.[39] Finally, the environmental statutes authorize private citizens to sue violators through "citizen suit" provisions.[40] Of course, a well-run audit program should expeditiously correct identified violations and other potential liabilities.

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34. *See* H. BLAKESLEE & T. GRABOWSKI, *supra* note 2, at 5; M. WEISS, ISSUES OF CONFIDENTIALITY AND DISCLOSURE IN ENVIRONMENTAL AUDITING, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY 2 (1984).

35. *See generally* OFFICE OF THE ADM'R, U.S. ENVTL. PROTECTION AGENCY, AGENCY OPERATING GUIDANCE, FY 1986-1987, at 1-2 (discussing the EPA Priority List for Fiscal Year 1986-1987).

36. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS—IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES 19-20 (1984) [hereinafter cited as IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES].

37. BENEFITS OF ENVIRONMENTAL AUDITING, *supra* note 18, at 1.

38. *See* Reed, *supra* note 4, at 10,304.

39. *Id.*

40. *See, e.g.*, RCRA § 7002, 42 U.S.C. § 6972 (1982). *See also* Miller, *Private Enforcement of Federal Pollution Control Laws*, pt. I, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,309 (Oct. 1983).

There are also risks from the private sector. The audit report may contain trade secrets about the company's production process.[41] Thus, firms may attempt to limit governmental access to such reports, particularly if they contain information not required to be reported under one of the environmental statutes.

To address these concerns, well-informed counsel can assist in structuring an audit system to protect particularly sensitive information through application of the attorney-client privilege and other exceptions to the discovery rules.[42] Further, in developing an approach to encourage the growth of environmental auditing, EPA has sought to recognize the legitimate concerns of regulated entities while preserving its enforcement prerogatives.

III. Development of EPA Environmental Auditing Policy

EPA's interest in environmental auditing evolved from recognition of mutual gains to be derived by the regulated community and the federal government. In view of recent environmental calamities and the increased complexity of environmental regulation, EPA has sought to encourage a higher level of corporate consciousness regarding compliance with environmental laws.[43] However, the Agency does not have sufficient resources to enforce these laws against all regulated entities who are in violation, and must consider innovative approaches to make compliance and enforcement programs more efficient. EPA has attempted to preserve its enforcement options while providing sufficient flexibility to give regulated entities an incentive to conduct audits.[44] Thus, the Agency has addressed concerns about Agency access to and use of audit reports in enforcement actions, as well as the concern for flexibility in corporate design and management of auditing programs.

In developing a policy on environmental auditing, EPA originally considered mandatory auditing programs requiring firms to hire external auditors to certify compliance with permits and other requirements. However, the Agency rejected this concept.[45] Regulated entities have strongly objected to using audits as an additional regulatory program or requirement.[46] EPA subsequently considered less structured methods to

41. Reed, *supra* note 4, at 10,304.
42. *See id.* at 10,308.
43. *See* Mays, *supra* note 1, at 27.
44. *Id.*
45. For a discussion of the evolution of EPA policymaking in environmental auditing, see L. Harrison, *supra* note 2, at 5-3 to 5-21.
46. *See* Office of Policy, Planning & Evaluation, U.S. Envtl. Protection

encourage achievement of auditing goals, and encouraged auditing through participation in numerous auditing conferences, workshops and seminars sponsored by EPA, states, localities, trade associations and professional organizations.[47] EPA's policy work in this area culminated in November, 1985, with the publication of the Interim Environmental Auditing Policy Statement.[48]

A. The Environmental Auditing Policy Statement

1. Encouraging environmental auditing

The *Environmental Auditing Policy Statement* initially provides that: "It is EPA policy to encourage the use of environmental auditing by regulated entities [including federal facilities] to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards."[49] While state and local regulatory agencies have independent jurisdiction over regulated entities, EPA encourages states to adopt the *Environmental Auditing Policy Statement* and approach auditing in a consistent manner.[50] EPA also encourages regulated entities to adopt sound environmental management practices that improve environmental performance, including programs that ensure the adequacy of internal systems to achieve, maintain and monitor compliance.[51]

The policy further states that EPA will not dictate or interfere with the environmental practices of private or public organizations,[52] and will not prescribe minimum requirements for audit programs. Nonetheless, to provide some guidance to regulated entities which want to develop environmental audits, the policy outlines the common elements of effective audits:

(1) explicit management support for environmental auditing and commitment to follow-up on audit findings;

(2) an environmental audit function independent of audited activities;

(3) adequate team staffing and auditor training;

AGENCY, PUBLIC COMMENTS RECEIVED ON THE EPA INTERIM ENVIRONMENTAL AUDITING POLICY STATEMENT (1986) [hereinafter cited as PUBLIC COMMENTS].

47. Speech by James Edward, U.S. Envtl. Protection Agency, EPA's Environmental Auditing Outlook: Compliance and Enforcement's View, at the Edison Electric Institute (Sept. 27, 1984).

48. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,505-08.

49. *Id.* at 46,504.

50. *Id.* at 46,506.

51. *Id.* at 46,505.

52. *Id.*

(4) explicit audit program objectives, including scope, resources and frequency;

(5) a process which collects, analyzes, and interprets documents and information on compliance and management effectiveness sufficient to achieve audit objectives;

(6) specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions and schedules for implementation; and

(7) quality assurance procedures to assure that the environmental audits are accurate and thorough.[53]

The policy emphasizes that ultimate responsibility for the environmental performance of the facility lies with top management, and that independent internal or third party auditors should conduct the audit.[54] Corporate officials have agreed that top management support and responsibility for environmental decisions are critical to successful auditing programs.[55]

2. Agency requests for audit reports

Second, the policy addresses the extent to which EPA may make requests to obtain audit reports. The extent of Agency access to and use of audit information in enforcement has created the greatest concern among regulated entities.[56] In addressing this issue, EPA has attempted to balance the use of its broad authority to obtain compliance-related information with these concerns.

EPA can obtain audit generated information in several ways. The major environmental statutes authorize EPA to require extensive monitoring, recordkeeping and reporting schemes relating to compliance with these laws.[57] Pursuant to this authority, EPA has promulgated regula-

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53. *Id.* at 46,507.

54. *Id.* at 46,505.

55. *See, e.g.*, Freedman, *Organizing and Managing Effective Corporate Environmental Protection Programs*, ENVTL. FORUM, May 1984, at 40-41. In describing the Occidental Petroleum Corporation's environmental management program, Mr. Freedman states: "Top corporate management now is strongly committed to and involved in the company's environmental management programs, as perhaps best demonstrated by the Board of Directors' [sic] having taken the relatively unusual step of having established an Environment Committee composed of board members." *Id.* at 41.

56. *See generally* PUBLIC COMMENTS, *supra* note 46.

57. *See, e.g.*, CWA § 308, 33 U.S.C. § 1318 (1982); CAA § 114, 42 U.S.C. § 7414 (1982). In United States v. Tivian Laboratories, Inc., 589 F.2d 49, 55 (1st Cir. 1978), *cert. denied*, 442 U.S. 942 (1979), the court upheld EPA's broad authority to make information requests under these statutes.

tions on monitoring, recordkeeping and governmental access.[58] Thus, information which is generated by an audit containing required reporting data, such as a Clean Water Act discharge monitoring report, must be reported to EPA or a state agency although it does not have to be reported as part of the audit.[59] In addition, EPA has authority to request production of audit files and reports where reasonably related to authorized investigations under several statutory provisions, even if the information is not required to be reported.[60] The Agency can obtain access to information that is relevant to an authorized enforcement investigation, including information used to prepare audits and the audit reports themselves.[61] Finally, audit reports could be obtained by governmental or private parties through discovery in civil litigation.[62]

Recognizing that routine Agency requests may have some inhibiting effect on auditing programs, the policy statement provides that "EPA will *not* routinely request environmental audit reports."[63] At the same time, EPA maintains its authority to request and receive information in audit reports under the various environmental statutes.[64] EPA may require such reports where consent decrees contain audit provisions with reporting requirements, where a company's management practices are raised as a defense, or where state of mind is a relevant element of inquiry.[65] Importantly, the policy recognizes that regulated entities have continuing obligations to monitor, record or report information required under environmental statutes, regulations or permits, and that EPA has access to that information.[66]

Industry commentators on the *Environmental Auditing Policy Statement* felt that EPA did not go far enough to limit its policy on access to audit reports. They also felt that access should be limited to bad faith efforts to conceal evidence of violations or criminal investigations.[67]

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58. *See, e.g.*, Clean Water Act—National Pollutant Discharge Elimination System (NPDES) regulations, 40 C.F.R. § 122 (1985).

59. *See* ENVTL. L. INST., ENVIRONMENTAL AUDIT ISSUE PAPER: DUTIES TO REPORT OR DISCLOSE INFORMATION ON THE ENVIRONMENTAL ASPECTS OF BUSINESS ACTIVITIES. REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY 4 (1985).

60. *Id.*

61. *See* Mobil Oil Corp. v. EPA, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20,635 (N.D. Ill. 1982), *aff'd*, 716 F.2d 1187 (7th Cir. 1983); Public Serv. Co. v. EPA, 509 F. Supp. 720 (S.D. Ind. 1981), *aff'd*, 682 F.2d 626 (7th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

62. *See* Reed, *supra* note 4, at 10,305.

63. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,505 (emphasis in original).

64. *Id.*

65. *Id*

66. *Id.*

67. *See* PUBLIC COMMENTS, *supra* note 46, comments of GPU Service Corp.

EPA rejected this line-drawing since many Agency legal officials felt that such a limited set of circumstances could appear to offer a defense to those unwilling to provide required or requested information, and thus limit circumstances where EPA would request audit reports.

Nonetheless, with counsel's assistance to set up an audit system, regulated entities can take certain steps to protect audit generated information. While the Federal Rules of Civil Procedure would generally favor disclosure of audit information,[68] a company may attempt to demonstrate that one of the exceptions to the discovery rules applies.[69] These include the attorney-client privilege,[70] the work product doctrine[71] and the privilege for self-evaluative documents.[72] However, it may not be practical to bring the entire audit process within one of these exceptions given the regulated entity's interest in developing corporate-wide support and technical expertise for an audit program.

3. EPA enforcement response to environmental auditing

Next, the *Environmental Auditing Policy Statement* addresses the impact of environmental audit programs on EPA enforcement response. The Agency examined the extent to which it could reduce the potential disincentives for auditing consistent with maintenance of a strong en-

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68. FED. R. CIV. P. 26(b)(1) states:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

69. For a discussion on protecting the confidentiality of environmental audits, see L. HARRISON, *supra* note 2, at 4-3 to 4-15; Reed, *supra* note 4, at 10,305-07.

70. To demonstrate the attorney-client privilege, the following elements must be present: (1) the communication at issue must have been made as part of legal advice given by an attorney; (2) the communication must be between attorney and client; and (3) the communication must be treated in a confidential manner. The privilege can be waived through voluntary disclosure by the holder of the privilege. MCCORMICK ON EVIDENCE §§ 87-97 (E. Cleary 3d ed. 1984).

71. The work product doctrine applies to documents, notes and other tangible things prepared in anticipation of litigation. The protection is generally lifted if the party seeking discovery has substantial need of the materials in the preparation of his case and is unable without undue hardship to obtain the substantial equivalent by other means. *See* FED. R. CIV. P. 26(b)(3). An attorney's mental impressions, conclusions, opinions or legal theories may be protected whether or not a showing is made. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981).

72. The self-evaluation privilege may be established by showing: (1) an internal review process serves an important public interest; (2) disclosure would cut off candid reviews; and (3) preparation of the reviews is for internal use only. *See* Reed, *supra* note 4, at 10,306. However, courts have been unwilling to apply the privilege to prevent disclosure to a government agency. *See* Federal Trade Comm'n v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980).

forcement program.[73] In other words, where a violator institutes an environmental auditing program, should the government reduce its compliance monitoring or reduce enforcement responses to violations that are either alleged in an enforcement action or discovered by an audit?

As with EPA access to audit reports, the appropriate EPA enforcement response to environmental auditing does not present the Agency with significant legal constraints. The environmental statutes and case law generally allow EPA flexibility in developing enforcement responses to environmental violations. Several courts have held that the duty to find a violation is not mandatory.[74] Where EPA makes a finding that a violation exists, EPA generally must take some type of formal enforcement action (i.e., either administrative or judicial) under the Clean Water Act,[75] under the Clean Air Act[76] or under RCRA.[77] All statutes authorize EPA to choose the type of formal enforcement response.[78] In addition, while the environmental statutes provide EPA with authority to obtain substantial penalties,[79] the law does not mandate that EPA obtain a certain level of penalty or other relief in an enforcement case.[80]

The *Environmental Auditing Policy Statement* provides that "EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental practice."[81] While audits may complement inspections, they do not provide a substitute for regulatory oversight.[82] However, the Agency recognizes that, in setting inspec-

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73. *See* ENVTL. L. INST., ENVIRONMENTAL AUDIT ISSUE PAPER: ENFORCEMENT RESPONSE, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY 4 (1986) [hereinafter cited as ENFORCEMENT RESPONSE].

74. Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977); Caldwell v. Gurley Ref. Co., 533 F. Supp. 252 (E.D. Ark. 1982). *Contra* South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118 (D.S.C. 1978).

75. *See* South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 131 (D.S.C. 1978); People *ex rel.* Scott v. Hoffman, 425 F. Supp. 71, 77 (S.D. Ill. 1977). *But see* Sierra Club v. Train, 557 F.2d 485, 490 (5th Cir. 1977).

76. *See* Council of Commuter Orgs. v. Metropolitan Transit Auth., 683 F.2d 663 (2d Cir. 1982); Luckie v. Gorsuch, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20,400 (D. Ariz. 1983); Conoco, Inc. v. Gardebring, 503 F. Supp. 49, 51 (N.D. Ill. 1980). *Contra* Kentucky *ex rel.* Hancock v. Ruckelshaus, 497 F.2d 1172, 1177 (6th Cir. 1974), *aff'd on other grounds sub nom.*, Hancock v. Train, 426 U.S. 167 (1976); New England Legal Found. v. Costle, 475 F. Supp. 425, 436 (D. Conn. 1979), *aff'd in part, rev'd in part*, 632 F.2d 936 (2d Cir. 1980).

77. *See* Luckie v. Gorsuch, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20,400 (D. Ariz. 1983).

78. *See* ENFORCEMENT RESPONSE, *supra* note 73, at 9-10.

79. *See supra* notes 19-23.

80. *See* ENFORCEMENT RESPONSE, *supra* note 73, at 9-10.

81. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,505.

82. *Id.*

tion priorities, "facilities with a good compliance history may be subject to fewer inspections."[83]

Similarly, EPA states that it will not reduce its enforcement responses or offer other incentives in exchange for auditing.[84] However, the Agency explains that, in developing a particular enforcement response to violations, "EPA policy is to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct environmental problems."[85] Reasonable efforts to avoid noncompliance, expeditious correction of environmental problems discovered through audits or other means, and implementation of measures that will prevent the recurrence of these problems may be considered by EPA as honest and genuine efforts to assure compliance.[86]

Industry commentators on the *Environmental Auditing Policy Statement* have sought a more definitive statement on the use of discretion in levying penalties where an auditing program exists.[87] While EPA does not provide such a statement, it has provided additional guidance on enforcement response in related policy statements and has agreed to use some enforcement discretion in negotiating consent decrees with audit provisions.[88]

The *Agencywide Compliance and Enforcement Strategy*[89] directs EPA to select enforcement responses on a case-by-case basis after considering: (1) the gravity of the violation in terms of environmental impact and effect on EPA's ability to carry out its programs; (2) the reasons why the violation occurred; and (3) the nature of the violator, including its compliance record and the economic benefit it gained as a result of the violation.[90] Many EPA program-specific enforcement policies further set enforcement priorities for certain categories of violations.[91] For example, under the *RCRA Enforcement Response Policy*, a primary enforcement priority is all Class I groundwater violations.[92] Further, EPA policy sets categories of violations for which cash penalties must be

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 46,505-06.

87. *See* PUBLIC COMMENTS, *supra* note 46, comments of GPU Service Corp.

88. For a discussion of environmental audit provisions in EPA consent decrees, see *infra* notes 104-20 and accompanying text.

89. ENVTL. PROTECTION AGENCY, AGENCYWIDE COMPLIANCE AND ENFORCEMENT STRATEGY AND STRATEGY FRAMEWORK FOR EPA COMPLIANCE PROGRAMS (1984).

90. *Id.* at 25.

91. *See, e.g.*, ENVTL. PROTECTION AGENCY, RCRA ENFORCEMENT RESPONSE POLICY 6-14 (1984).

92. Class I violations involve a release or threatened release of hazardous wastes to the

paid.[93]

EPA has also developed a policy establishing criteria for federal enforcement where initial enforcement of an environmental statute has been delegated to the state.[94] To generally avoid federal enforcement, states must take "timely and appropriate" enforcement action.[95] The policy requires initiation of formal legal action by a state within a certain period of time after detection (either through issuance of an administrative order or civil referral), and sets criteria for selecting appropriate state enforcement responses.[96] Program-specific policies have defined and implemented the "timely and appropriate" concept.[97]

Although it does not explicitly address auditing, EPA's *Policy on Civil Penalties*[98] also provides some guidance for calculating penalties in administrative and judicial enforcement actions where the violator agrees to perform an activity, such as an audit, as part of a settlement. At a minimum, the penalty must remove the economic benefit for failure to comply[99] and obtain an additional amount to reflect the seriousness or gravity of the violation.[100] The gravity component of the penalty can be adjusted to reflect the following factors: (1) degree of willfulness; (2) history of noncompliance; (3) ability to pay; and (4) degree of cooperation.[101] Statute-specific penalty policies also discuss these adjustment factors.[102] Expeditious correction of past compliance problems may result in some mitigation.[103]

Thus, a company's willingness to set up an environmental auditing program as part of a settlement, as well as expeditious correction of new

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environment, failure to assure groundwater protection, proper post-closure care, or delivery of wastes to a permitted interim status facility. *Id.* at 11.

93. ENFORCEMENT RESPONSE, *supra* note 73, at 11-13.

94. ENVTL. PROTECTION AGENCY, IMPLEMENTING THE STATE/FEDERAL PARTNERSHIP IN ENFORCEMENT AGREEMENTS (1984).

95. *Id.* at 11-14.

96. *Id.* at 11-12.

97. For example, the *RCRA Enforcement Response Policy* requires administrative action or case referral for certain class I violations within 90 days. RCRA ENFORCEMENT RESPONSE POLICY, *supra* note 91, at 6.

98. ENVTL. PROTECTION AGENCY, POLICY ON CIVIL PENALTIES (1984) [hereinafter cited as POLICY ON CIVIL PENALTIES]. A companion EPA policy document issued on the same day provides guidance on how to write penalty assessment guidelines for a particular environmental program. *See* IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, *supra* note 36.

99. IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, *supra* note 36, at 2, 6-14.

100. *Id.* at 2-3, 4-16.

101. *Id.* at 16-24.

102. *See, e.g.*, ENVTL. PROTECTION AGENCY, FINAL RCRA CIVIL PENALTY POLICY 16-21 (1984).

103. IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, *supra* note 36, at 21.

audit-discovered violations, could show cooperation, potentially allowing partial mitigation of the penalty amount.[104] Such an approach serves the Agency settlement goal of swift resolution of environmental problems.[105] Of course, any adjustment may not reduce the penalty below an amount which is greater than the stated economic benefit by some nontrivial amount.[106]

EPA consent decree guidance[107] also recognizes that defendants may agree to take certain actions, above and beyond those necessary to meet statutory requirements, in order to offset a cash penalty, as long as this type of agreement is explicitly noted in the decree.[108] A well developed audit system could produce additional environmental protection by going beyond current monitoring and reporting requirements.[109]

The *TSCA Settlement with Conditions Policy*[110] appears to allow for some type of mitigation if the remedy includes an audit. This policy provides that EPA may agree to remit a portion of the proposed civil penalty where the violator agrees to take extensive and specific remedial actions.[111] The remedial actions may be related not only to the violations discovered by the Agency, but also to other current violations which have not yet been discovered,[112] e.g., through an audit of other company facilities where similar violations are suspected.

B. Audit Provisions as Remedies in EPA Enforcement Actions

In addition to encouraging voluntary development of auditing programs, EPA has begun to seek audit provisions as remedies in certain administrative and judicial enforcement actions. The idea of using an enforcement action to negotiate an environmental audit is relatively new.[113]

Traditional EPA settlement agreements have required correction of specific violations and assessed penalties. Settlements typically include

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104. *See id.* at 19. *See also* ENFORCEMENT RESPONSE, *supra* note 73, at 15.

105. IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, *supra* note 36, at 5.

106. *Id.* at 5-6.

107. ENVTL. PROTECTION AGENCY, GUIDANCE FOR DRAFTING JUDICIAL CONSENT DECREES (1983).

108. *Id.* at 18.

109. *See* ENVTL. L. INST., ENVIRONMENTAL AUDITING ISSUE PAPER: PROVISION IN CONSENT DECREES, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY (1985) [hereinafter cited as PROVISION IN CONSENT DECREES].

110. *TSCA Settlement with Conditions*, in TSCA COMPLIANCE/ENFORCEMENT GUIDANCE MANUAL app. A (1984).

111. *Id.* at app. A-124.

112. *Id.*

113. Mays, *supra* note 1, at 27.

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the following provisions: (1) requiring compliance with applicable statutes or regulations and committing the defendant to a particular remedial course of action by a set date; (2) scheduling a timetable for achieving compliance which requires the greatest degree of remedial action as quickly as possible, including interim dates to allow for Agency monitoring of defendant's progress; (3) monitoring, reporting and sampling provisions; (4) requiring site entry and access and document review; (5) assessing civil penalties for statutory violations; and (6) assessing stipulated penalties for violating the consent decree.[114] These settlements may fail to address the lack of a company policy encouraging continuing compliance with environmental laws and regulations, as well as the absence of procedures which would effectively implement such a policy.[115]

EPA has broad authority to negotiate an audit provision in a consent decree as part of its authority to require self-monitoring as a remedy for violators.[116] EPA can obtain remedies not expressly authorized by statute or required under EPA regulations, where the decree's terms do not violate the statute's express prohibitions.[117]

While EPA consent decree guidance does not explicitly address provisions for environmental audits, the guidance would support an audit as contributing to compliance with applicable statutes and regulations.[118] In addition, an audit system can establish a remedial course of action which strengthens the compliance sections of consent decrees by examining a firm's compliance efforts on a continuing basis. Under this guidance, where a firm has a long history of repeated violations, EPA negotiators should consider including more stringent compliance monitoring provisions, particularly provisions requiring more frequent monitoring and testing by the source to ensure continued future compliance.[119] Additionally, while EPA enforcement policy encourages remedies which are closely related to the violations at issue, a more extensive management audit may be appropriate if the violations are a result of poor oversight by management.[120] The *TSCA Settlement With*

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114. GUIDANCE FOR DRAFTING JUDICIAL CONSENT DECREES, *supra* note 107, at 10-18, 22-24.

115. *See* Mays, *supra* note 1, at 27.

116. *See, e.g.*, CWA § 308, 33 U.S.C. § 1318 (1982); CAA § 114, 42 U.S.C. § 7414 (1982). *See also* PROVISION IN CONSENT DECREES, *supra* note 109, at 4.

117. PROVISION IN CONSENT DECREES, *supra* note 109, at 2. *See* United States v. Swift & Co., 286 U.S. 106 (1932).

118. *See* GUIDANCE FOR DRAFTING JUDICIAL CONSENT DECREES, *supra* note 107, at 10.

119. *Id.* at 14.

120. *See* PROVISION IN CONSENT DECREES, *supra* note 109, at 7.

Conditions Policy also implicitly supports incorporation of audit provisions in consent decrees as a broader remedial action to address undiscovered violations.[121]

The *Environmental Audit Policy Statement* states that EPA may propose auditing provisions in consent decrees and in other settlement negotiations where: (1) a systematic pattern of violations can be attributed to the absence of, or poor functioning of, an environmental management system; and (2) the type or nature of violations points to the likelihood of similar violations elsewhere in the facility or other facilities operated by the regulated entity.[122] Audit provisions in consent decrees can be an efficient and effective use of EPA's enforcement resources. Improvements resulting from an audit could apply throughout a multi-facility company, and raise the level of environmental compliance at all facilities.[123] In proposing audits in appropriate settlements, EPA also expects to encourage other regulated entities to develop auditing programs.

IV. EPA Use of Auditing in Consent Decrees

EPA has recently negotiated environmental audit provisions in several settlement agreements. Most auditing provisions are contained in administrative settlement agreements under TSCA[124] and RCRA.[125] In TSCA cases, EPA has generally negotiated environmental audit provisions for polychlorinated biphenyl (PCB) violations where EPA has suspected similar violations at other company facilities which are not the subject of the immediate enforcement action.[126] Under TSCA, for facilities with PCBs, the regulated entities generally have no affirmative duty to obtain federal use permits, discharge permits or waste manifests,[127] so a particular facility within a company may have little contact with the regulatory agency. Other company facilities also may not be familiar with TSCA requirements, and may have TSCA violations. In RCRA cases, EPA has negotiated audit provisions to address inadequate hazardous waste management practices, including monitoring, reporting and

121. *See TSCA Settlement with Conditions*, *supra* note 110, at app. A-124.

122. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,506.

123. *See* Mays, *supra* note 1, at 27.

124. 15 U.S.C. §§ 2601-2629 (1982).

125. 42 U.S.C. §§ 6901-6987 (1982).

126. *See, e.g.*, *In re* Owens-Corning Fiberglas Corp., No. TSCA-V-C-101 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

127. In addition, unlike statutes which generally regulate individual facilities, TSCA focuses on the testing, pre-manufacturing clearance, and regulation and distribution of individual toxic substances.

records on the disposition of PCB and PCB items at the facility.[137]

The consent agreement and final order in *Crompton* assessed a civil penalty and required the company to take the following actions in a compliance audit: (1) certify to EPA that it had conducted an inventory of PCBs, PCB items, heat transfer systems and hydraulic systems at each of its twenty-eight facilities; (2) submit a written report for each facility specifying the location and quantity of PCBs, PCB items, heat transfer systems and hydraulic systems at each of its twenty-eight facilities; (3) describe the audit at each facility; and (4) within sixty days of the effective date of the consent decree, certify by a responsible corporate official that each facility is in compliance with PCB regulations, including the basis upon which it would certify compliance.[138]

Owens-Corning involved a similar PCB compliance audit for sixty-three facilities[139] while the audit in *In re Potlatch Corp.* covered forty-eight company facilities.[140] The compliance audits in *EPA v. Chem-Security Systems, Inc.*[141] were limited to the facility at issue in the administrative enforcement actions, and required Chem-Security to conduct four quarterly TSCA (PCB) and RCRA compliance audits, and to send the audit reports to EPA.[142]

In *In re Diamond Shamrock Chemical Co.*,[143] EPA alleged that the company failed to notify EPA of its intention to manufacture a chemical substance not on the TSCA inventory and used for commercial purposes an illegally manufactured substance.[144] The consent agreement and order required the company to perform a TSCA compliance audit of all of its forty-three facilities, to evaluate the TSCA compliance status facilities, and to report TSCA violations discovered at those facilities.[145] In addition to reviewing PCB compliance, the audit required Diamond Shamrock to assess compliance with several other TSCA recordkeeping and

137. *In re* Crompton & Knowles, No. TSCA-PCB-82-0108, at 3-4 (EPA Reg. II Sept. 17, 1985) (Consent Agreement and Final Order).

138. *Id.* at app. B.

139. *In re* Owens-Corning Fiberglas Corp., No. TSCA-V-C-101, app. at 6-7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

140. *In re* Potlatch Corp., No. TSCA-V-C-137, at 4 (EPA Reg. V Aug. 3, 1983) (Consent Agreement and Final Order).

141. EPA v. Chem-Security Sys., Inc., No. 1085-07-42-2615P (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order).

142. *Id.* at 3-6.

143. Administrative Complaint, *In re* Diamond Shamrock Chem. Co., No. TSCA-85-H-03 (EPA Headquarters filed Mar. 18, 1985).

144. *Id.* at 1-7.

145. *In re* Diamond Shamrock Chem. Co., No. TSCA-85-H-03, Audit Agreement (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

recordkeeping requirements.[128]

Environmental audit provisions in consent decrees may be as broad or as narrow as the number, scope and severity of a company's violations seem to require.[129] EPA has generally negotiated two types of audit provisions: compliance audits and management audits. Compliance audits have been used where EPA finds that violations discovered at a facility may be typical of violations at other company facilities,[130] given the company officials' apparent lack of familiarity with regulatory requirements. In such cases, the companies have agreed to review the compliance status of all corporate facilities to ensure that similar violations do not exist, and to certify to EPA that all facilities are in compliance.[131] Where a firm does not accurately certify compliance, and EPA subsequently discovers violations at the certified facilities, EPA can proceed with a criminal enforcement action based on knowing and willful falsification of reports.[132]

Management audits have been negotiated where EPA believed that a pattern of violations resulted in large part from a lack of, or poor functioning of, corporate environmental management or operational controls.[133] In developing such controls, a company may be required to go beyond a review of facility compliance status and examine its entire environmental management policies, procedures, and organizational structure and programs affecting all company employees and operations.[134]

In re Owens-Corning Fiberglas Corp.[135] and *In re Crompton & Knowles Corp.*[136] involved TSCA administrative enforcement actions for PCB violations which resulted in settlement agreements involving compliance audit provisions. In *Crompton*, EPA alleged that the company failed to: (1) affix the required PCB warning label transformers; (2) inspect, record and report leaks to EPA; and (3) develop and maintain

128. *See, e.g., In re* Chemical Waste Management, Inc., Nos. RCRA-09-84-0037, TSCA-09-84-0009 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order).

129. Mays, *Environmental Audits: Addressing Root Causes*, CHEM. WEEK, May 29, 1985, at 4. *See also* Mays, *supra* note 1, at 27.

130. *See* Mays, *supra* note 129, at 4.

131. *See, e.g., In re* Owens-Corning Fiberglas Corp., No. TSCA-V-C-101, at 6-7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

132. *See* Reed, *supra* note 4, at 10,304.

133. Mays, *supra* note 1, at 27; Mays, *supra* note 129, at 4.

134. Mays, *supra* note 129, at 4.

135. Administrative Complaint, *In re* Owens-Corning Fiberglas Corp., No. TSCA-V-C-101 (EPA Reg. V filed Feb. 14, 1983).

136. Administrative Complaint, *In re* Crompton & Knowles Corp., No. TSCA-PCB-82-0108 (EPA Reg. II filed July 29, 1982).

reporting requirements and to report all discovered TSCA violations to EPA.[146]

In *In re Union Carbide Corp.*,[147] EPA alleged that Union Carbide manufactured and used for a commercial purpose a chemical substance without the required premanufacturing notice, and thus was not on the TSCA inventory in violation of sections 5 and 15 of TSCA.[148] As part of the settlement agreement, Union Carbide agreed to prepare over the following year: (1) an educational program designed to reemphasize premanufacturing notice compliance, which will be presented to a broad company audience; and (2) subsequent to the completion of such educational program, implement a program of not less than five test inputs to monitor responses for TSCA compliance.[149] Such a program will allow the corporation to assess the compliance capability under actual business conditions by responding to artificially created violations.

EPA has negotiated management environmental audits in several other administrative settlements with Chemical Waste Management, Inc. (CWM). In *In re Chemical Waste Management*[150] (Kettleman Hills facility), EPA alleged that CWM committed numerous RCRA violations including failure to implement an adequate groundwater monitoring system, failure to implement an unsaturated zone monitoring program, failure to develop an adequate closure plan, failure to make substantial modifications to the facility,[151] as well as violations of section 15 of TSCA.[152] CWM agreed to perform a compliance and management audit covering all RCRA and TSCA requirements at the facility. The con-

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146. *Id.* at 2-5.

147. Administrative Complaint, *In re* Union Carbide Corp., No. TSCA-85-H-06 (EPA Headquarters filed June 17, 1985).

148. *Id.* at 2.

149. *In re* Union Carbide Corp., No. TSCA-85-H-06, at 6-7 (EPA Headquarters Feb. 26, 1986) (Consent Agreement and Order). Similar TSCA violations formed the basis for an audit in *In re* BASF Wyandotte Corp., No. TSCA-V-C-410 (EPA Reg. V filed Apr. 25, 1986) (Consent Agreement and Final Order). The audit required BASF to review 13 facilities and certify that all chemicals required to be listed on the TSCA Chemical Substances Inventory were so listed. *Id.* at 2-3.

150. *See, In re* Chemical Waste Management, Inc., No. RCRA-09-84-0037 (EPA Reg. IX July 3, 1984) (Determination of Violation, Compliance Order and Notice of Right to Request Hearing); *In re* Chemical Waste Management, Inc., No. RCRA-09-84-0037 (EPA Reg. IX June 6, 1985) (Amended Determination of Violation, Compliance Order and Notice of Right to Request a Hearing).

151. *In re* Chemical Waste Management, Inc., No. RCRA-09-84-0037, at 5-26 (EPA Reg. IX June 6, 1985) (Amended Determination of Violation, Compliance Order and Notice of Right to Request a Hearing).

152. *In re* Chemical Waste Management, Inc., No. TSCA-09-84-0009 (EPA Reg. IX filed June 6, 1985) (Administrative Complaint and Notice of Hearing).

sent agreement and final order[153] included an audit which provided for an independent third party auditor to submit a proposal for the scope of work to EPA to audit waste operations and environmental management systems at the facility and in CWM's corporate environmental management department.[154] Within one year after obtaining a written agreement on the scope of work for the audit, the auditor was required to submit written reports to EPA on RCRA and TSCA compliance. These reports would:

> (1) identify and describe the facility's existing waste management operations, including management systems, policies and prevailing practices;
>
> (2) evaluate such operations, systems, practices and policies, identifying strengths and weaknesses; and
>
> (3) identify and describe areas of waste management operations and environmental management systems that could be significantly improved, including personnel training, corporate management and lines of authority, operations and maintenance procedures, interim stabilization, and quality control and assurance.[155]

Within ninety days after CWM's receipt of these reports, CWM was required to submit to EPA the portion of the report containing findings and recommendations of the auditor, CWM's evaluation of each option, and specific actions the company would take, as well as a schedule for implementation.[156] The administrative consent agreements in *In re Chemical Waste Management*[157] (Emelle facility) and in *In re Chemical Waste Management*[158] (Vickery facility) involved similar management audit requirements to address RCRA and TSCA violations.

In proposing environmental audit provisions in consent decrees, EPA has addressed concerns on EPA access to audit-generated information and the appropriate EPA response to violations discovered by an audit. Of course, where an audit is conducted pursuant to a settlement agreement, EPA has required greater access to audit data than under a voluntary audit program to ensure compliance with the settlement. EPA

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153. *In re* Chemical Waste Management, Inc., Nos. RCRA-09-84-0037, TSCA-09-84-0009 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order) (Kettleman Hills facility).

154. *Id.* at 4-5.

155. *Id.* at 5-7.

156. *Id.*

157. *In re* Chemical Waste Management, Inc., No. TSCA-84-H-03, at 16-20 (EPA Reg. IV Dec. 19, 1984) (Consent Agreement and Final Order).

158. *In re* Chemical Waste Management, Inc., Nos. TSCA-V-C-307, RCRA-V-85R-019, at 5-9 (EPA Reg. V Apr. 5, 1985) (Consent Agreement and Final Order).

has generally reserved its right to inspect defendant's facilities to determine the accuracy of compliance verifications and other submittals.[159] In addition, audits may identify and document violations that may otherwise have gone unnoticed by a regulatory agency.[160] In some settlements, reporting of audit-discovered violations has been limited to that necessary to ensure compliance with the terms of the settlement or as otherwise authorized by regulation or statute.[161] Some audits have required reporting of all audit-generated violations to EPA.[162]

An audit report may also include information on matters other than the immediate environmental issues, such as the production process, that the company would wish to keep confidential.[163] In some cases, defendants have been permitted to assert a business confidentiality claim with respect to information submitted in compliance with the settlement.[164] Another settlement specifies that audit-reported information would be treated as confidential by EPA to the extent authorized by the TSCA and RCRA.[165]

EPA has assessed penalties in all audit-related settlements for past violations, or those violations which were the subject of the original enforcement action.[166] To encourage environmental auditing in settlement agreements, EPA has been willing to limit somewhat its use of audit reports in prospective enforcement actions. In some settlements, EPA has reserved all enforcement rights regarding prospective violations.[167]

Recognizing the significant benefits of continous compliance at audited facilities, EPA has agreed in certain settlements that the results of an audit would not be used by EPA as direct evidence of violations; how-

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159. *See, e.g., In re* Owens-Corning Fiberglas Corp., No. TSCA-V-C-101, at 7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

160. *See* Reed, *supra* note 4, at 10,304.

161. *See, e.g.*, EPA v. Chem-Security Sys., Inc., No. 1085-07-42-2615P (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order); *In re* Owens-Corning Fiberglas Corp., No. TSCA-V-C-101 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

162. *See, e.g., In re* Diamond Shamrock Chem. Corp., No. TSCA-85-H-03, Audit Agreement, at 2-3 (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

163. *See* Reed, *supra* note 4, at 10,304.

164. *See, e.g., In re* Owens-Corning Fiberglas Corp., No. TSCA-V-C-101, at 7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

165. *In re* Chemical Waste Management, Inc., Nos. RCRA-09-84-0037, TSCA-09-84-0009, at 7 (EPA Reg. IX Nov. 7, 1935) (Consent Agreement and Final Order) (Kettleman Hills Facility).

166. *See, e.g., In re* Chem-Security Sys., Inc., No. 1085-07-42-2615P, at 4 (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order).

167. *See, e.g., In re* BASF Wyandotte Corp., No. TSCA-V-C-410, at 2, 4 (EPA Reg. V filed Apr. 25, 1986) (Consent Agreement and Final Order); *In re* Chem-Security Sys., Inc., No. 1085-07-42-2615P, at 5-6 (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order).

ever, EPA is not precluded from enforcing against violations discovered independently of the audit.[168] In *In re Chemical Waste Management* (Kettleman Hills facility) EPA allowed a six month grace period after completion of the audit to correct audit-discovered violations with no stipulated penalties, while EPA allowed a six month grace period after the settlement date to discover and remedy violations in *In re Diamond Shamrock Chemicals Co.* After this time period, EPA could enforce against such violations.[169] However, grace periods will probably only be considered where the government will achieve significant compliance benefits from the settlement. Also, a grace period does not preclude EPA from bringing enforcement action to enforce the consent agreement or to seek injunctive relief to abate a condition which may present an imminent and substantial endangerment, or an imminent hazard under TSCA.[170]

EPA should be willing to adjust its enforcement response where a company provides more compliance information on its facilities than the Agency would have obtained through its compliance monitoring programs, and where subsequent violations are quickly corrected. This could apply, in particular, where audit-discovered violations involve little or no economic benefit or savings to the violator under agency penalty policy, such as various TSCA reporting and recordkeeping violations. However, where a new violation does involve economic savings, EPA will probably, at a minimum, assess a penalty which reflects such savings, although it may provide some adjustment for the gravity aspect of the violation. To do otherwise would not be fair to the numerous companies within the same industrial category who have paid for the costs of pollution control and would place complying facilities at a competitive disadvantage.

V. CONCLUSION

Environmental auditing will play a growing role in the Nation's efforts to achieve continuous compliance with the environmental laws. EPA has encouraged the use of environmental auditing by regulated entities through its auditing policy and through use of audit provisions in appropriate settlement agreements. Audit programs serve regulated enti-

168. *In re* Chemical Waste Management, Inc., Nos. RCRA-09-84-0037, TSCA-09-84-0009, at 7 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order).

169. *Id. See also In re* Diamond Shamrock Chem. Corp., No. TSCA-85-H-03, Audit Agreement, at 8 (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

170. *In re* Diamond Shamrock Chem. Co., No. TSCA-85-H-03, Audit Agreement, at 8 (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

ties' interest in long-term cost savings and improved cooperation with regulatory agencies, while they complement the compliance efforts of regulatory agencies.

In implementing and refining Agency policy on auditing, EPA needs to be aware of the legitimate interest of regulated entities in disclosure of certain audit generated information and in taking enforcement responses which recognize defendants' genuine compliance efforts. EPA should also continue to obtain environmental audit provisions in consent decrees, particularly where a pattern of multi-facility compliance and environmental management problems exists. Moreover, by maintaining a strong enforcement program and penalty deterrent, EPA will encourage new voluntary environmental audit programs.

United States
Environmental Protection
Agency

Office of
Enforcement and
Compliance Monitoring
Washington DC 20460

FY 1988 Enforcement Accomplishments Report

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Judicial Enforcement - Criminal

The Agency's criminal enforcement program has steadily expanded its presence in the regulated community. As the second illustration indicates, criminal case referrals, numbers of defendants charged, and defendants convicted have increased over time. Since 1982, individuals have received prison sentences for committing environmental crimes totaling 91 years and over 450 years of probation have been imposed. Imposition of probation is an extremely effective part of the criminal program because in the event that an individual commits another crime (not limited to environmental crimes) while on probation, the provisions of the probation normally call for the automatic imposition of a prison sentence that was suspended in lieu of probation.

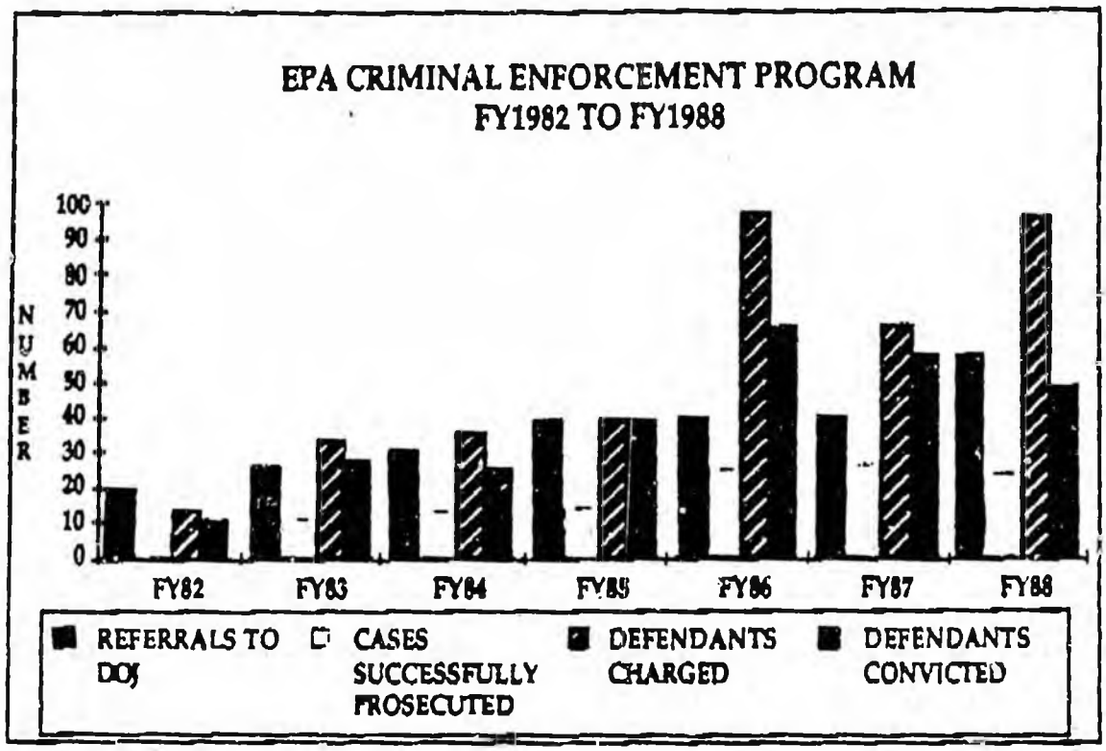

Illustration 2

Administrative Enforcement

Referral of civil and criminal judicial enforcement actions are the performance indicators most commonly looked to by the public and the Congress as they assess EPA's enforcement efforts. While judicial remedies are crucial to EPA's overall success, as time goes on other indicators also need to be evaluated to assess the Agency's effectiveness in enforcing environmental laws and regulations. In the statutes that Congress has enacted or reauthorized over the past few years, EPA has been given expanded authority to use administrative enforcement mechanisms to address violations and compel regulated facilities to achieve compliance or take other corrective actions. Administrative enforcement tools permit the Agency to impose penalties and direct regulated entities to undertake action to correct noncompliance in a less resource intensive way than judicial remedies. As Illustration number 3 shows, EPA enforcement programs are making substantial use of these tools. In FY1988, EPA's enforcement programs issued 3,085 administrative actions. As with judicial enforcement, administrative enforcement activity has been particularly high since EPA instituted internal management improvements in FY1984, with EPA enforcement programs taking 14,638 administrative actions since then. This total represents 43% of all administrative actions taken since the Agency was created.

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An Appeal for Significant Improvement in the Enforcement of Alaska's Environmental Laws

Recommended Legislative Remedies

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Trustees for Alaska

Introduction

In the wake of the Exxon Valdez oil spill, Alaska's greatest environmental tragedy, it is anticipated that the legislature will consider numerous approaches to improving public policy with the intent of preventing future spills. Many of these changes will focus on improvements within the Alaska Department of Environmental Conservation (DEC) which has the bulk of the State's responsibility with regards to oil spill prevention and response.

For any of the legislature's potential actions to succeed, however, they must be backed by one underlying factor - improved enforcement. While there are undoubtedly needs for change in spill prevention and response, the Commission must recognize that the current failure of existing regulatory safeguards is largely due to the inability of agencies, including DEC, to properly enforce the law and thereby create an atmosphere which encourages compliance by potential polluters.

The following outlines a package of legislative recommendations for improving the enforcement of Alaska's environmental laws and regulations. The implementation of these measures will ultimately be improved compliance, the ultimate tool in preventing future pollution catastrophes.

Recommendations

I. Authorize DEC to assess administrative penalties.

II. Strengthen criminal penalties for violations of pollution laws.

III. Authorize DEC to make reasonable inspections without first obtaining a warrant.

IV. Eliminate administrative and judicial "pre-enforcement review" of compliance orders.

V. Provide for citizen suits to enforce environmental statutes and regulations.

VI. Provide adequate funding for DEC to fulfill its regulatory

mandate.

Discussion of Recommendations

I. DEC SHOULD HAVE THE STATUTORY AUTHORITY TO ASSESS ADMINISTRATIVE PENALTIES

Among the tools that are necessary for DEC to have a credible, forceful, and efficient enforcement program is the authority to assess administrative penalties for violations of the State's environmental laws.

Penalties, generally, are an important enforcement tool because they greatly reduce the economic incentives to violate the State's environmental laws. However, DEC currently has the authority only to issue a compliance order requiring corrective action or to commence a judicial enforcement action for civil or criminal penalties.[1] Like most litigation, however, judicial enforcement actions require the State to commit substantial resources and time and, thus, are used only for the most extreme violators. By themselves, judicial enforcement actions cannot provide a sufficient enforcement threat.

A civil penalty program is thus a necessary tool for a credible enforcement arsenal. Administrative penalties could be assessed through a fair yet far less resource intensive administrative hearing procedure than court proceedings. Decisions by administrative hearing officers would be judicially reviewable on the record, rather than through a cumbersome trial

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[1] Two of these three tools, themselves, need to be strengthened, as explained below in sections IV and VI.

procedure.

Administrative penalties would greatly strengthen DEC's enforcement presence and capability by providing the agency with a relatively quick and efficient means of imposing penalties. The authority to assess administrative penalties is particularly important for the relatively numerous yet small violators, for whom DEC's commencement of lengthy judicial enforcement proceedings is simply not worthwhile. By greatly reducing the resources necessary to levy penalties, an administrative penalty program would provide an enforcement threat that is otherwise not present at all for these small violators.

Administrative penalties are an integral component of the federal environmental enforcement program.[2] Numerous state agencies also have the authority to assess penalties for violations of state environmental laws.[3] Administrative penalties should become an essential component of DEC's enforcement arsenal as well.

Of course, merely having the legal authority to assess penalties is not enough. DEC must also be given the corresponding budgetary resources to hire sufficient technical

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[2] See, e.g., section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g); section 3008(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a); section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1361(a); section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a); and section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9609.

[3] For example, see Washington, RCW 90.48.144.

staff and permanent hearing officers to make the administrative penalty process work.

II. CRIMINAL PENALTIES FOR VIOLATIONS OF STATE ENVIRONMENTAL LAWS SHOULD BE STRENGTHENED

Stiff criminal sanctions are another essential component of the kind of enforcement program that is necessary to achieve full compliance with the State's environmental laws. The current liability for criminal violations of Alaska's environmental laws is inadequate.

With a few exceptions, negligent and knowing violations of the State's environmental laws are currently only class B and A misdemeanors, respectively. AS 46.03.790(a), (b). Class B misdemeanors are punishable by a fine of not more than $1000 and by imprisonment for no longer than 90 days; Class A misdemeanors are punishable by a fine of not more than $5000 and by a maximum of imprisonment for one year. AS 12.55.035(b)(3), (4); 12.55.135(a), (b).

These liabilities stand in stark contrast with criminal liabilities for violations of federal environmental laws. For example, under section 309(c) of the federal Clean Water Act, negligent violations are punishable by either or both maximum fines of $25,000 per violation and/or one year imprisonment; knowing violations are punishable by either maximum fines of $50,000 per violation or by three years imprisonment. 33 U.S.C.

§ 1319(c).[4]

Alaska's criminal liabilities should be strengthened by making negligent violations Class A misdemeanors and knowing violations Class C felonies, which are punishable by a maximum fine of $50,000 per violation and five years' imprisonment. AS 12.55.035((b)(2); 12.55.125(e). In addition, the definition in AS 46.03.900(17) of "persons" who are subject to criminal sanctions should be amended to include "any responsible corporate officer." See Clean Water Act section 309(c)(6), 33 U.S.C. § 1319(c)(6).

The last legislature increased civil penalties for oil polluters (see SB 271) and considered tougher criminal sanctions in the oil pollution context. The legislature should now complete its mission and stiffen criminal sanctions for violations of all State environmental laws.

As to criminal liability for oil spills, in particular, two bills sponsored by the Governor and introduced in the last legislative session should become law. Among other things, HB 315 classifies as Class C felonies, oil spills of 10,000 barrels or more involving a failure to comply with an oil discharge contingency plan or a failure to adequately clean up a discharge of oil. HB 316 expands the penalties that can be levied against a defendant that is an organization by including fines equal to twice the damage or loss caused by the defendant.

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[4] See also, e.g., section 3008(d) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); section 113(c) of the Clean Air Act, 42 U.S.C. § 7413(c).

III. DEC SHOULD HAVE THE AUTHORITY TO MAKE REASONABLE INSPECTIONS WITHOUT FIRST OBTAINING A WARRANT

The ability to make inspections to determine whether violations of the State's environmental laws are occurring is still another necessary element of a credible enforcement program. Currently, AS 46.03.860 appears to require DEC to obtain a search warrant before it can investigate possible violations. Federal environmental laws, in contrast, contain no such warrant requirement. For example, section 308(a)(B) of the Clean Water Act expressly provides the EPA with a "right of entry" and with authority "at reasonable times" to make inspections and copy relevant records. 33 U.S.C. § 1318(a)(B).[5]

Consistent with federal environmental law, AS 46.03.860 should be amended to remove the warrant requirement and thereby improve the DEC's ability to investigate potential violations of the State's environmental laws.

IV. THERE SHOULD BE NO "PRE-ENFORCEMENT REVIEW" OF DEC'S COMPLIANCE ORDERS IN EITHER AN ADMINISTRATIVE ADJUDICATORY HEARING OR JUDICIAL PROCEEDING

A sixth tool that is necessary for a sound, effective State environmental enforcement program is the ability of the enforcing agency to issue compliance orders without cumbersome procedural constraints. DEC does not presently have this ability.

Current State law (AS 46.03.850) provides DEC with the authority to issue compliance orders for known or suspected

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[5] See also, e.g., section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6927; and section 114(a) of the Clean Air Act, 42 U.S.C. § 7414(a).

violations of the State's environmental laws, but the required procedures for issuing such orders are so cumbersome as to render the compliance order an infrequently used and thus ineffective enforcement tool.

State law appears to require that, before DEC can issue an order requiring a polluter to comply with an applicable State environmental law, the agency must first notify the polluter of its finding that the polluter is or may be in violation and give the polluter an opportunity to respond to the finding. AS 46.03.850(a), (b).[6]

In addition, although compliance orders become effective upon receipt (AS 46.03.850(c)), it appears that recipients can subsequently contest the order in an adjudicatory hearing that is required to include the extensive procedural steps set out in the Administrative Procedure Act. See AS 44.62. Recipients of a compliance order can also challenge an adverse ruling by a hearing officer in court. AS 44.62.560.

By requiring DEC to defend an order at administrative and, subsequently, judicial hearings, Alaska law imposes substantial resource constraints on the use of the compliance order as an enforcement tool by DEC (and its legal representatives in the Department of Law). These constraints effectively discourage DEC

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[6] AS 46.03.865 allows DEC to sidestep this pre-notification procedure, but only in the extremely narrow circumstances, where DEC has found that there is an "actual or imminent" discharge of either oil, a hazardous substance, or a low level radioactive material.

from invoking this tool, except in extremely rare circumstances.[7] As a result, the tool has not been used to fulfill its obvious role, as an efficient, relatively quick means for DEC to command compliance with the State's environmental laws and to compel the cleanup of unlawful discharges of harmful pollutants.

As with several of the other enforcement tools discussed above, State law regarding the procedures for issuing compliance orders does not compare with EPA's legal authority to issue orders to compel compliance with federal laws. Federal environmental law generally adheres to the sound policy of not allowing "pre-enforcement review" of EPA's compliance orders. This means that compliance orders which do not also require the recipient to pay an administrative penalty generally can not be challenged in any administrative or judicial proceeding, until and unless EPA commences a judicial proceeding to enforce the order and seeks penalties for violations of the order. At that time, the validity of the order can be questioned by the

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[7] In fact, the right of a recipient to challenge an order in an administrative adjudicatory hearing, by itself, appears sufficient to effectively discourage DEC from issuing compliance orders. DEC's budget does not include sufficient funds for a permanent in-house staff of hearing officers. Thus, when an adjudicatory hearing is requested, DEC must hire hearing officers on a contract basis. The substantial expense of such outside contracting, alone, strongly discourages DEC from issuing compliance orders.

recipient as a defense to EPA's enforcement suit.[8]

As the Second Circuit Court of Appeals recognized, in upholding the principle of no pre-enforcement review of compliance orders issued under the federal Clean Air Act:

> To introduce the delay of court review of administrative action taken to ameliorate a potential public health hazard would conflict with Congress' aim to 'accelerate . . . the prevention and control of pollution.' . . . In short, immediate pre-enforcement review of compliance orders . . . would 'serve neither efficiency nor enforcement' of the Clean Air Act.

Asbestec Const. Services, Inc. v. EPA, 849 F.2d 765, 769 (2d Cir. 1988).

Not until DEC's ability to issue compliance orders is as procedurally unencumbered as that of the EPA, will the compliance order become an effective tool in the State's environmental enforcement arsenal.

V. PRIVATE CITIZENS SHOULD HAVE THE AUTHORITY TO ENFORCE THE STATE'S ENVIRONMENTAL LAWS

The final, necessary, and, perhaps, most critical component of a viable, credible State enforcement program is the ability of citizens to act as "private attorneys general" by bringing suits to enforce the State's environmental laws. This ability is nonexistent under current law.

AS 46.03.760 and 46.03.765 provide State courts with authority to compel the payment of civil penalties and to grant

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[8] For example, section 113(h) of CERCLA, 42 U.S.C. § 9613(h) expressly prohibits federal courts from reviewing challenges to compliance orders, except under limited circumstances, including a suit brought by EPA to seek penalties for a violation of the order.

injunctive relief for violations of the State's environmental laws. But AS 46.03.870 provides that the bases for the enforcement actions listed above "inure solely to and are for the benefit of the state. . . ." Similarly, AS 46.03.890 provides that only State officials are authorized to enforce the State's environmental laws.

The ability of private citizens to enforce environmental laws is a critical supplement to government enforcement because resource constraints inevitably prevent governments from taking all the enforcement measures that would otherwise be warranted. Given the DEC's severely limited enforcement resources (even if a separate enforcement unit like the one recommended above were available), citizen suits are necessary to present to the regulated community a forceful and credible message that violations of the State's environmental laws will not be tolerated.

Congress has wisely recognized the value of citizen suits as supplements to governmental enforcement and thus provided citizens with ample authority to enforce the federal environmental laws.[9] The record of citizens suits to enforce these laws is a strong one. Citizens enforcement actions have proven not to be unreasonable avenues for harassment of industry

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[9] See, e.g., section 505 of the Clean Water Act, 33 U.S.C. § 1365; section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, section 304 of the Clean Air Act, 42 U.S.C. § 7604; and section 310 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659.

or the EPA, but to be valuable means for stopping major violators whom the EPA had not been able to reach.

Full enforcement and, in turn, compliance with the State's environmental laws will simply not be achieved without the ability of citizens as well as the government to enforce those laws.

VI. THE LEGISLATURE SHOULD PROVIDE ADEQUATE FUNDING FOR DEC TO FULFILL ITS LEGAL MANDATE OF PROTECTING THE ENVIRONMENT

A State such as Alaska which relies on a healthy environment for many of its economic mainstays such as tourism and fisheries and yet persistently scrimps on environmental protection will continue to run the risk of environmental and associated economic degradation. Current funding levels for DEC not only preclude effective enforcement, they also result in delayed and inadequately researched permits as well as narrow interpretation of regulations intended to protect the environment. Future funding should provide for sufficient personnel, including attorneys, to provide DEC the ability to more effectively enforce Alaska's environmental laws. A commitment to increased funding would more realistically reflect the immense mandate of environmental protection assumed by DEC and the importance of DEC's success in assuring that there will be a viable environment for Alaska's long term needs. We will be working shortly towards providing the legislature with some recommendations for DEC budget needs.