

# Lawyer Insights

## What Cos. Must Know About EPA Clean Air Act Penalty Math

By Shannon Broome, Chuck Knauss and Jagdeep Singh  
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Earlier this month, Michael Regan was confirmed as the new head of the [U.S. Environmental Protection Agency](#). In his tenure as secretary of North Carolina's Department of Environmental Quality, Regan effectuated a significant uptick in inspections and penalties against regulated companies.

His enforcement focus aligns with the Biden administration's anticipated efforts to ramp up environmental enforcement. A key area of attention is going to be enforcement of the Clean Air Act, which is one of the most comprehensive and complex regulatory schemes.

So it won't be surprising if companies that normally would not find themselves in the EPA's sights for enforcement are on the receiving end during the next four years.

When clients are facing a Clean Air Act enforcement action, the first question that they tend to ask their environmental experts and lawyers is, "If the EPA finds that the company violated the regulations, how bad is this going to be?" They want to know how their operations might be impacted — and, of course, the likely penalty that the EPA would assess, whether they are in for major litigation and if they might be able to resolve the matter quickly.

The answer is always: "It depends" — an answer that can be a bit frustrating. One reason for this is that the Clean Air Act only sets maximum penalty amounts, and it does not create a lookup table based on the type of violation.

For example, for most types of violations, the act authorizes fines up to about \$103,000 per day. In practice, however, the penalties authorized by environmental statutes are rarely, if ever, assessed at that level by a court or by the EPA in a settlement of an enforcement action.

Simply put, there is a lot of bandwidth between zero and the maximum penalty. Given this range, over the years, the EPA has developed penalty policies that it uses in approaching settlements and judicial cases, to help ensure that the government treats similarly situated defendants similarly — i.e., fairly.

After all, fairness is one of the key principles of justice in our legal system. The policies are also aimed at ensuring that the penalties deter future conduct that would violate the law.

Finally, by providing a framework for penalty evaluation, the EPA seeks to expedite the settlement process for certain types of violations. This is why there is a range of penalty policies, even within the Clean Air Act, addressing different provisions of the statute — e.g., for stationary sources, for fuels.

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Before getting into the penalty analysis points, it is important to acknowledge that companies' decisions to settle cases, or to proceed to court, are about much more than the amount of the penalty. We have been involved in many cases where the company being enforced against believed that it did nothing wrong — and even when the government was willing to settle the case for a reasonable penalty, the company decided that it wanted vindication.

Similarly, companies may be leery of a settlement that allows an EPA interpretation of regulations that may constrain their future operations — and therefore, if the government is unwilling to provide a path forward that is consistent with what the company considers to be authorized operations under the regulations, the company may choose to pursue the litigation route.

Numerous other situations may cause a company to contest an action based on principle, such as where the government failed to provide the regulated public adequate notice of an interpretation of law, even if that interpretation would be within the permissible range.

This article outlines how the EPA generally applies its penalty criteria in those cases where a settlement does make sense, and how a court might do so if a settlement is not in the cards in a given case. The article provides a lookup table to give a sense of the multifactor analysis that the agency typically performs to arrive at settlement amounts. For companies facing EPA enforcement, early strategic evaluations of how the agency might calculate proposed penalties can significantly influence outcomes.

### **From where does EPA derive its authority to assess Clean Air Act penalties?**

The Clean Air Act explicitly establishes the EPA's penalty authority. It provides authority for both judicial and administrative enforcement.

For example, Section 113 of the act allows the EPA to seek, and a court to assess, a civil penalty of up to \$25,000 per day in 1980 dollars. The EPA has periodically provided updates on this maximum penalty amount after adjusting it based on the consumer price index, and currently the amount is \$48,762 per day for administrative penalty assessment and \$102,638 for civil judicial penalties.

Another relevant provision is Section 205 of the act, which provides the same maximum penalty as Section 113, but specifically addresses each manufacturer or dealer violation for mobile sources — e.g., vehicle violations. For violations attributable to other parties, e.g., if a consumer tampers with a vehicle's emissions controls, the fine is up to \$4,876 per violation.

### **Can the EPA assess penalties administratively without going to court?**

Yes, it can — but the agency's authority to do so is limited to certain specified amounts. Under Section 205 of the act, for example, the EPA's administrative penalty assessment authority for mobile sources and fuels is limited to \$200,000 total in 1980 dollars, which is \$390,092 today, as adjusted by EPA based on the consumer price index.

If the agency wants to exceed those amounts in a settlement, then as a matter of practice, it seeks the concurrence of the [U.S. Department of Justice](#) to waive the judicial enforcement option and allow the parties to settle for the larger penalty, without going through the process of filing a complaint in court and obtaining judicial approval of a settlement.

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### **What factors go into deciding the penalty amount below the statutory maximums?**

Section 113 of the Clean Air Act provides that the following factors are to be considered in determining the amount of a penalty:

- The size of the business;
- The economic impact of the penalty on the business;
- The violator's compliance history and good faith efforts to comply;
- The duration of the violation;
- Payment by the violator of the penalties previously assessed for the same violation;
- The economic benefit of noncompliance; and
- The gravity, i.e., seriousness, of the violation.

Section 205 of the Clean Air Act provides similar factors to be considered in cases of violations related to mobile sources. These factors are typical of all environmental statutes' penalty provisions, such as the Clean Water Act and the Resource Conservation and Recovery Act.

### **How are the penalty factors considered by the EPA in settlement discussions?**

While each case turns on its own facts, and the process of arriving at a final penalty amount can be extremely complex, the EPA has developed a series of penalty policies under various provisions of the Clean Air Act — and under other environmental statutes as well — which provide some guidance as to how the process works in practice.

Generally, the agency, at a minimum, seeks to recover the economic benefit of noncompliance — i.e., the amount of money that the alleged violator gained by not following the rules. Even this assessment is complex, however, because precisely defining the benefit a company may have received depends on numerous considerations.

Once the economic benefit is determined, it generally serves as the basis for taking into account the remaining statutory factors. An example may help in illustrating how this process works in practice.

For simplicity's sake, assume that a company and the EPA agree that the economic benefit of noncompliance is \$100. The EPA would then seek to calculate a gravity component, and the penalty would have an upward multiplier based on that factor. It is a rare case that does not include a gravity-based increase in the penalty, though it can occur sometimes.

After the gravity component is determined, the EPA tends to apply other factors — e.g., history of compliance, cooperation of the defendant in the investigation, etc. — to increase or decrease the penalty.

Additionally, there is a catchall category in the agency's policies that includes considerations like litigation risk that affect the ultimate penalty negotiation. Interestingly, litigation risk can actually reduce the economic benefit component and the gravity component of the penalty.

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So if the economic benefit is \$100, the EPA might apply the following adjustments:

Typical Factor Considered	Increase or Decrease	Possible Supporting Reasons	Effect on Penalty
Gravity	3x	Assumes violation had significant emissions consequences and/or impacted the integrity of the enforcement regime.	+\$300
Degree of cooperation	-20%	Assumes company fully cooperated in the investigation.	-\$60
Prompt self-reporting	-10%	Assumes company disclosed the violation before EPA discovered it.	-\$30
Degree of willfulness/negligence	0%	Assumes some combination of the following applies: company makes reasonable argument that the negligence or willfulness was on lower end or not present, company was on lower end of "sophistication" scale in terms of dealing with the compliance issues in the industry, and events that caused the violation were not reasonably within the company's control and not reasonably foreseeable.	\$0
Size of the business	\$0	Assumes company's net worth to be in the lowest category stipulated by EPA, though this dollar figure addition varies with the regulation that has been violated.	\$0
History of noncompliance	0%	Assumes no prior violation (though there are "lack of relatedness" arguments that can be made even if there is prior noncompliance).	\$0
Litigation risk	-10%	Assumes EPA perceives a challenge in proving an element of the violation; note that litigation risk can also impact the economic benefit component, which is too complex for this simplified example.	-\$30
Total Gravity Component			\$180

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The total penalty in the above illustration would be the economic benefit plus adjusted gravity = \$100 + \$180 = \$280. Of course, these numbers are simply to show how the calculation is done. In practice, as mentioned earlier, Clean Air Act violations can run from a few thousand dollars into the millions.

Another key consideration is what the EPA calls "the ability to pay" — the agency takes into consideration the alleged violator's demonstration of its lack of means to pay a penalty. The EPA has a detailed policy relating to the ability to pay, which renders the analysis complicated.

The overarching message is that the agency has a policy of generally not seeking penalties that are clearly beyond the alleged violator's means. However, a counterbalancing policy demands that the EPA should not seek a penalty so low that it is looked upon as the agency's way of aiding an ailing company.

### **What legal considerations come into play in a settlement negotiation or in a judicial resolution?**

Legal considerations are important beginning when the EPA first approaches a company — or even before, if the company discovers and self-discloses the violation. When responding to any inquiry from the government, it is important to ensure that any answers preserve available defenses, because even if a company ultimately settles a claim of violation, the company's leverage in the penalty negotiation is maximized by ensuring that the defenses are not waived.

And even the cases that seem as if they are going to be settled sometimes end up proceeding to court. In those situations, it is important to have all communications with the government conducted in a manner that protects the company.

Other key factors are the scope of the alleged violations covered by the settlement; implications related to potential follow-on actions by state agencies or citizens (which may also depend on the scope of the alleged violations); implications of the settlement for the company's future business actions; the potential for stipulated penalties (which are agreed-upon future penalties a company may pay under the settlement at the occurrence of certain events, e.g., a future flaring event at a refinery); whether a supplemental environmental project would be agreed to by the defendant and how that affects the overall penalty assessment; and many more.

### **Key Takeaways**

For companies finding themselves in the crosshairs of EPA enforcement, proactive and strategic actions early on can make key differences in outcomes. One such action is evaluating how the agency might calculate your proposed penalty, and strategically positioning your company, such as by quickly evaluating weaknesses in the EPA's case so that you can use the litigation risk factor in your negotiations to reduce the penalty.

The strategy should also account for the more traditional penalty factors, by attempting to minimize economic benefit and maximize gravity credits for cooperation, mitigation and the like.

Such a strategic approach early on is key to ensuring the ability to defend, and reducing the risk of a large penalty or reputational damage coming out of enforcement. Do not take a plug-and-play attitude, but use the framework provided in this article to enter the negotiating process well-prepared to preserve defenses and maximize leverage.

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