



**Digital Commons@**

Loyola Marymount University  
LMU Loyola Law School

Loyola of Los Angeles Law Review

---

Volume 19  
Number 4 *Symposium: Environmental Litigation  
and Enforcement*

Article 8

---

6-1-1986

## Enforcing Environmental Laws: A Look at the State Civil Penalty Statutes

Daniel P. Selmi

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

---

### Recommended Citation

Daniel P. Selmi, *Enforcing Environmental Laws: A Look at the State Civil Penalty Statutes*, 19 Loy. L.A. L. Rev. 1279 (1986).

Available at: <https://digitalcommons.lmu.edu/llr/vol19/iss4/8>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# ENFORCING ENVIRONMENTAL LAWS: A LOOK AT THE STATE CIVIL PENALTY STATUTES

*Daniel P. Selmi\**

## I. INTRODUCTION

Enforcement of environmental law has been controversial since the massive increase in environmental regulation began in 1969.<sup>1</sup> During the early 1970's, disputes centered on issues such as whether technological infeasibility provides a defense to enforcement actions and on the prospect that environmental regulation would result in draconian industrial shutdowns.<sup>2</sup> By the early 1980's the debate had shifted dramatically; its focus became the lack of enforcement initiative at the federal level.<sup>3</sup> Recently, public concern over the improper disposal of hazardous wastes has brought a new emphasis on criminal prosecutions as an enforcement

---

\* Associate Professor of Law, Loyola Law School, Los Angeles, California. B.A. 1972, J.D. 1975, University of Santa Clara; M.P.A. 1981, Harvard University. Professor Selmi is a former Deputy Attorney General, Environment and Natural Resources Sections, Office of the California Attorney General (1976-83), and former Chair, California State Bar Committee on the Environment (1984-85).

The author expresses his appreciation to Elissa A. Parker, Esq. and David Nawi, Esq., who commented on an earlier draft of this Article. Opinions expressed in the Article are, of course, those of the author only. The author also would like to thank Christie L. Morehead, Loyola Law School '86, for her invaluable contribution to researching this Article, and Hilda Weintraub, Loyola Law School '87, who also provided significant research assistance.

1. The passage of the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347 (1982)), was the first step in what became a flood of environmental legislation in the 1970's. *See ENVIRONMENTAL QUALITY: THE TENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY* iii (1980) (transmittal message from the President noting that during the decade from 1970 to 1980, "Congress has passed more than two dozen pieces of landmark legislation designed to preserve or enhance environmental quality . . .").

2. *See, e.g., Union Elec. Co. v. EPA*, 593 F.2d 299 (8th Cir. 1979) (discussing when the issue of economic and technological feasibility of air pollution controls could be raised under the Clean Air Act); *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885 (8th Cir. 1977) (same).

3. *See J. LASH, K. GILLMAN & D. SHERIDAN, A SEASON OF SPOILS* (1984). Responding to a barrage of congressional and public criticism, the Administrator of the Environmental Protection Agency launched a highly publicized effort to increase that agency's enforcement efforts. *See, e.g., Memo of the Month, ENVTL. FORUM*, May 1984, at 48 (reproducing a memorandum from the EPA Deputy Administrator to EPA Regional Administrators stating that the level of enforcement activity under the Resource Conservation and Recovery Act was insufficient and calling for increased enforcement of that Act).

tool for hazardous waste violations.<sup>4</sup>

A significant feature of the environmental enforcement framework is its federal nature. Federal legislation largely has set the policy parameters of environmental law,<sup>5</sup> but this legislation envisions that the principal enforcement efforts will take place at the state level. The typical model of federal environmental law delegates implementation and enforcement of regulatory efforts to states, with the federal government retaining oversight enforcement authority.<sup>6</sup>

Both politics and pragmatism dictated this congressional choice. Complete federalization of environmental enforcement would radically centralize power traditionally exercised by the states, a politically unacceptable outcome. Further, increased federal enforcement would require a much larger federal bureaucracy. Budgetary considerations alone have precluded this development in the past, and the federal deficit undoubtedly will increase dependence on state enforcement in the future.<sup>7</sup>

State agencies enforcing environmental laws have a panoply of legal remedies available to them, including cease and desist orders,<sup>8</sup> injunc-

4. See U.S. GEN. ACCOUNTING OFFICE, *ILLEGAL DISPOSAL OF HAZARDOUS WASTE: DIFFICULT TO DETECT OR DETER* 38-41 (1985) (discussing criminal prosecutions for hazardous waste violations). The 1984 Amendments to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1982), as amended by Pub. L. No. 98-616, tit. I, § 101a, 98 Stat. 3224 (1984), responded to the rising public concern over hazardous waste disposal.

5. See, e.g., Clean Air Act (CAA) § 110, 42 U.S.C. § 7410 (1982) (state implementation plan provisions requiring states to prepare a plan for federal approval that will meet federal ambient air quality standards).

6. F. ANDERSON, D. MANDELKER & A. TARLOCK, *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 321 (1984) ("The states have the first opportunity and primary responsibility [for enforcing air pollution law and] are continuously involved in scores of environmental actions, creating an important subfield of environmental law.") *Id.* See also Clean Water Act (CWA) § 309(a)(1), 33 U.S.C. § 1319(a)(1) (1982) (authorizing Administrator of EPA to bring suit if, after he has notified the state of a violation, the state has not commenced appropriate enforcement action within thirty days).

7. The budget pinch caused by the federal deficit also may increase reliance on other enforcement methods. For example, a recent article quoted EPA lawyers as stating that budgetary curbs affecting agency enforcement efforts under the so-called "Gramm-Rudman" mandatory spending reduction law may prompt them "to take a more favorable view of citizen suits," i.e., suits brought by private individuals or groups to enforce environmental laws. The article suggests that because of EPA budget cuts, the agency may be more willing to share information with environmentalists who bring enforcement actions. Effron, *U.S. Agencies Feel Gramm-Rudman Pinch*, Nat'l L.J., Feb. 17, 1986, at 3, col. 1, at 10, col. 1. For a discussion of citizen suits, see Fadil, *Citizen Suits Against Polluters: Picking up the Pace*, 9 HARV. ENVTL. L. REV. 23 (1985); Miller, *Private Enforcement of Federal Pollution Control Laws*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,309 (1983); Barr & Hernandez, *When Citizens Sue: Some Federalism Issues*, 19 LOY. L.A.L. REV. 1341 (1986).

8. See, e.g., N.H. REV. STAT. ANN. § 125-C:9 (1985) (emergency order); UTAH CODE ANN. § 26-24-14(4) (1953 & Supp. 1984).

tions,<sup>9</sup> damages<sup>10</sup> and criminal penalties.<sup>11</sup> However, an important tool is the power to assess or request that a court assess civil penalties against polluters. Civil penalties are monetary fines that are generally intended to deter violations of environmental standards rather than to punish.<sup>12</sup>

The nature of environmental law violations dictates the important role that penalties play in enforcement. Injunctive relief and cease and desist orders require enforcement officials to discover the violation prior to or during its occurrence, while in many instances those officials learn of violations after the fact.<sup>13</sup> At that point an injunction or cease and desist order cannot remedy prior harm. Furthermore, because injunctions merely order violators to cease illegal actions, they provide no incentive that deters different violations in the future. While some factual patterns are amenable to criminal prosecution, the burden of proof and difficulty of obtaining convictions for environmental crimes limit the role of prosecutions. Lastly, regulatory agencies traditionally have used civil monetary penalties as an important enforcement tool,<sup>14</sup> and environmen-

---

9. See, e.g., CAL. HEALTH & SAFETY CODE § 42453 (West 1979).

10. See, e.g., NEV. REV. STAT. § 445.331(2) (1979).

11. See 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.04, at 3-384 to 3-386 (1985) (listing maximum and minimum state criminal penalties for water pollution violations); Currie, *State Pollution Statutes*, 48 U. CHI. L. REV. 27, 62-69 (1981) (discussing state enforcement tools generally).

12. See ENVTL. PROTECTION AGENCY, STUDY OF LITERATURE CONCERNING THE ROLES OF PENALTIES IN REGULATORY ENFORCEMENT 4 (Sept. 1985). "Penalties assessed by regulatory agencies tend to be, in most cases, remedial rather than punitive in nature. Their primary purposes are to bring the violator back into compliance and to deter him from further noncompliance." *Id.* The study also notes that while regulatory agencies can punish violators through civil penalties, "[r]egulatory agencies have generally used sanctions for remedial purposes, not for punishment." *Id.*

13. See Comment, *The Use of Civil Penalties In Enforcing the Clean Water Act Amendments of 1977*, 12 U.S.F.L. REV. 437, 446 (1978) (noting that civil penalties avoid the "all or nothing solution, so often associated with injunctions"). See also Mix, *The Misdemeanor Approach to Pollution Control*, 10 ARIZ. L. REV. 90, 92 (1968) (observing that the air pollution control district in Los Angeles at that time had found injunctive remedy "to be of very limited value").

14. A variety of articles have discussed the use of civil monetary penalties by federal agencies. See, e.g., Bickart, *Civil Penalties Under Section 5(m) of the Federal Trade Commission Act*, 44 U. CHI. L. REV. 761 (1977); Murphy, *Money Penalties—An Administrative Sword of Damocles*, 2 SANTA CLARA L. REV. 113 (1962); Olds, Unkovic & Lewin, *Thoughts on the Role of Penalties in the Enforcement of the Clean Air and Clean Water Acts*, 17 DUQ. L. REV. 1 (1978); Schmeltzer & Kitzes, *Administrative Civil Penalties Are Here to Stay—But How Should They Be Implemented?*, 26 AM. U.L. REV. 847 (1977) (discussing civil penalties under the Consumer Product Safety Act). For more general discussions, see Gellhorn, *Administrative Prescription and Imposition of Penalties*, 1970 WASH. U.L.Q. 265; Goldschmid, *Report in Support of Recommendation 72-6: An Evaluation of the Present and Potential Use of Civil Money Penalties As a Sanction by Federal Administrative Agencies*, in 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896 (1972).

tal enforcement agencies formed or reorganized in the late 1960's and early 1970's have drawn on the earlier experiences of agencies using civil penalties.

This Article analyzes state statutes that authorize enforcement of environmental laws through the imposition of civil penalties, emphasizing hazardous waste, air pollution, water pollution, pesticide and similar state pollution statutes.<sup>15</sup> The purpose of the Article is to offer insights into state enforcement efforts by examining the enforcement standards and procedures found in those statutes. Of course the statutory provisions tell only part of the enforcement picture; definitive conclusions about the efficacy of state enforcement efforts depend on analysis of a number of additional factors. For example, the state agency's bureaucratic structure would have to be analyzed, as well as the agency's settlement policies and practices. Nonetheless, consideration of the statutory framework is a necessary beginning point. The statutes arm the agencies with enforcement powers, declare the monetary fines that may be assessed, indicate the circumstances under which a penalty may be sought, and establish the procedures that a state court or state agency must follow in deciding whether a penalty is warranted. In short, the statutes erect a structure that both orders and constrains the penalty process.<sup>16</sup>

The significant characteristics of state civil penalty provisions are examined below in three parts. First, the penalty amounts authorized and the criteria for imposing the penalty are analyzed. This discussion reveals the breadth of the authority that agencies exercise and emphasizes methods such as rulemaking or policymaking that they could adopt

---

15. State occupational safety and health legislation was not considered. Additionally, this Article does not address state legislation implementing the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201-1328 (1982). State legislation under SMCRA, which is administered by the Department of Interior, is required to track the federal statute closely and thus yields less insight into the overall development of state penalty procedures. See SMCRA § 503, 30 U.S.C. § 1253; ENVTL. PROTECTION AGENCY, PRACTICES OF SELECTED FEDERAL AGENCIES' OVERSIGHT OF STATE CIVIL PENALTIES 1 (1985). "The surface mining law . . . includes factors which delegated states must consider in assessing penalties. No EPA-administered statutes include this type of direction on state assessment of penalties."

16. The most comprehensive compilation to date of state civil penalty statutes is found in ENVTL. L. INST., STATE CIVIL PENALTY AUTHORITIES AND POLICIES, A REPORT PREPARED FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY (Sept. 27, 1985) [hereinafter cited as STATE CIVIL PENALTY AUTHORITIES], which was completed while this Article was in preparation and which contains some commentary on the laws. See also AMERICAN INS. ASS'N, SURVEY OF ENVIRONMENTAL POLLUTION LEGISLATION & REGULATION: HAZARDOUS SUBSTANCES (1984). For a general analysis of state statutes in the environmental area, see Currie, *supra* note 11. The same author also has written on enforcement of Illinois environmental law. Currie, *Enforcement Under the Illinois Pollution Law*, 70 NW. U.L. REV. 389 (1975).

to guide their discretion. Second, the Article explores assessment procedures that agencies use in imposing penalties, concluding that statutes should provide more direction to agencies and require them to explain the reasons for their penalty decisions. The Article then focuses on statutes establishing standards for judicial control of the penalty process, both when the court imposes penalties and when the court reviews an administratively assessed penalty. The discussion notes that if the agency has assessed the penalty, the courts often defer to that decision on judicial review, a result that enhances the agencies' enforcement powers.

Finally, the Article sets forth several observations on the manner in which this statutory framework affects state agency enforcement efforts. It concludes that agency assessment rather than penalty imposition through courts is likely to improve the penalty process.

In this discussion, federal environmental law is relevant to set the context for state enforcement efforts. Because that body of law has greatly influenced the content of state penalty statutes, it must be examined briefly.

## II. THE INFLUENCE OF FEDERAL ENVIRONMENTAL LAW

### A. *The Federal Regulatory Model*

The purposes of environmental law and how those purposes are translated into enforceable environmental restrictions largely explain the need for civil penalty authority. From an economic standpoint, the purpose of environmental regulation is to internalize costs that otherwise would be imposed on society as a whole,<sup>17</sup> a result that theoretically could be accomplished through emission fees, marketable permits, taxes or other methods.<sup>18</sup> However, in addressing environmental problems Congress has markedly preferred what has been termed "command and control" regulation.<sup>19</sup> Under this type of regulation, statutes command polluters to reduce emissions to certain administratively or legislatively prescribed levels and to take other steps, such as monitoring emissions.<sup>20</sup> For example, the Environmental Protection Agency (EPA) promulgates

---

17. Marshall, *Environmental Protection and the Role of the Civil Money Penalty: Some Practical and Legal Considerations*, 4 ENVTL. AFF. 323, 324-27 (1975).

18. See Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256, 1264 (1981).

19. *Id.* at 1264-65. See also *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1041 (2d Cir. 1985) (the Comprehensive Environmental Response, Compensation, and Liability Act "is not a regulatory standard-setting statute such as the Clean Air Act").

20. See CWA § 301, 33 U.S.C. § 1311(b) (1982) (calling for pollution reduction to level achieved by "best practicable control technology currently available" and "best available control technology economically achievable").

performance standards that new stationary sources of air pollution must meet under the Clean Air Act,<sup>21</sup> sets effluent limitations for sources under the Clean Water Act,<sup>22</sup> and establishes performance standards for hazardous waste facilities.<sup>23</sup> While the "command and control" method is increasingly criticized as economically inefficient,<sup>24</sup> it remains the prevalent congressional choice in almost every area of environmental law.<sup>25</sup>

Despite this emphasis on federally mandated control efforts, Congress has continued to rely on the states to achieve federal goals and to administer the regulatory permit programs.<sup>26</sup> Generally, federal legislation authorizes state administration of federal standards if the state can establish a program meeting certain minimum requirements.<sup>27</sup> The Resource Conservation and Recovery Act (RCRA)<sup>28</sup> is typical. Under that Act, EPA issues guidelines to assist states in developing their hazardous waste regulatory programs; states then may submit a hazardous waste program to the Administrator of EPA for approval. After receiving that authorization, the state administers the permit program for storage, treatment and disposal of hazardous waste.<sup>29</sup>

To receive approval under most major federal environmental laws, a state program must include the capacity to undertake specific enforcement measures. For example, under EPA regulations implementing the Clean Water Act,<sup>30</sup> a state seeking authority to administer a program

---

21. CAA § 111, 42 U.S.C. § 7411 (1982).

22. CWA § 301, 33 U.S.C. § 1311 (1982).

23. Resource Conservation and Recovery Act § 3004, 42 U.S.C. § 6924 (1982).

24. See Ackerman & Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1334-40 (1985); Stewart, *Economics, Environment, and the Limits of Legal Control*, 9 HARV. ENVTL. L. REV. 1, 6-9 (1985).

25. For an article critical of the arguments that environmental regulation must be changed, see Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 STAN. L. REV. 1267, 1273 (1985), contending that "[d]espite its imperfections, command-and-control regulation has fostered significant improvements in environmental quality at a societal cost that has not proved prohibitive."

26. See, e.g., F. SKILLERN, ENVIRONMENTAL PROTECTION: THE LEGAL FRAMEWORK § 3.07, at 89-90 (1981):

The Congressional method of achieving and maintaining national standards for pollutants always focused on the states. The 1970 Amendments [to the Clean Air Act] continued the process introduced in the 1967 Air Quality Control Act. The process, which has been followed in subsequent environmental programs, uses federal standards and regulations that are carried out and enforced through state plans and programs.

27. CWA § 402(b), 33 U.S.C. § 1342(b) (1982); RCRA § 3006(b), 42 U.S.C. § 6926(b) (1982); CAA § 111(c)-(d), 42 U.S.C. § 7411(c)-(d) (1982).

28. 42 U.S.C. §§ 6901-6987 (1982).

29. RCRA § 3006, 42 U.S.C. § 6926 (1982).

30. 40 C.F.R. § 123.27 (1985). Part 123 contains the complete requirements for state programs under the Clean Water Act. *Id.*

must demonstrate that its program includes civil penalties assessable "in at least the amount of \$5,000 a day for each violation."<sup>31</sup> Upon approval, the state becomes the primary enforcement authority, although EPA retains the power to bring actions against polluters for civil penalties or other relief.<sup>32</sup>

This model of federal environmental law strongly influences the state civil penalty statutes. States generally are eager to receive EPA approval to administer their own hazardous waste, air and water programs. To meet the EPA requirement of adequate enforcement authority, states often enact enforcement provisions similar to those in the federal acts. Little incentive exists for states to implement creative enforcement mechanisms if those measures would jeopardize EPA authorization of state programs.

At the same time, the federally imposed enforcement requirements leave a fair amount of discretion to the states in constructing their own civil penalty programs. For example, states may specify the criteria for assessment of a penalty, an important factor in any penalty program.<sup>33</sup> Also, states usually may decide whether the court or the agency imposes the penalty, arguably the most important choice affecting the success of a civil penalty enforcement program.<sup>34</sup>

### B. Characteristics of the Federal Penalty Statutes

Two characteristics of the federal civil penalty statutes are particularly important in their effect on state statutes. First, the dollar amounts that the statutes authorize for penalties are high in comparison with non-environmental federal civil penalty provisions. A 1979 study of the 348

---

31. *Id.* § 123.27(a)(3)(i). Other remedies that must be available include: (1) the power to restrain a person by order or lawsuit from engaging in an unauthorized activity "which is endangering or causing damage to public health or the environment," *id.* § 123.27(a)(1); and (2) criminal fines "assessable in at least the amount of \$10,000 a day for each violation." *Id.* § 123.27(a)(3)(ii). The maximum civil or criminal fine must be assessable for each instance of violation and, if the violation is continuous, for each day of violation. *Id.* § 123.27(b)(1).

32. *See, e.g.,* CWA § 309(b), 33 U.S.C. § 1319(b) (1982). *See also* ENVTL. PROTECTION AGENCY, POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT "AGREEMENTS" 1 (1984). EPA notes that "[w]hile States and local governments have primary responsibility for compliance and enforcement actions within delegated or approved States, EPA retains responsibility for ensuring fair and effective enforcement of federal requirements, and a credible national deterrence to non-compliance." *Id.* The document sets forth the EPA "policy framework for implementing an effective State/Federal enforcement relationship through national program guidance and Regional/State 'agreements.'" *Id.* The policy framework was being revised at the time this Article was written.

33. But see *infra* note 125 discussing EPA's requirement that fault not be a factor in establishing the statutory violation.

34. *See infra* text accompanying notes 172-76.



federal civil penalty statutes then extant found that only thirty-five set dollar limits of \$10,000 or more per violation, while twelve imposed limits of \$25,000 or more.<sup>35</sup> Nine of these twelve statutes were environmental in nature, and two of the nine were included in federal legislation permitting states to apply for enforcement authority.<sup>36</sup> To the extent that penalty amounts indicate the priority Congress attaches to regulatory mandates, environmental requirements are important.

The second significant characteristic of the federal environmental statutes is their lack of specificity concerning when a penalty is appropriate and how to calculate the amount of a penalty. The federal statutes contain few constraints or standards circumscribing penalty decisions by a court or an agency. The Clean Air Act, for example, declares merely that any person who violates certain provisions regulating new motor vehicles "shall be subject to a civil penalty of not more than \$10,000," with each violation for a motor vehicle or motor vehicle engine constituting a separate offense.<sup>37</sup> The statute gives no further indications to guide the authority imposing the penalty. Other environmental statutes are not quite as broad, setting forth some factors that the Administrator of EPA or the court must consider in assessing any penalty.<sup>38</sup> Nonetheless, de-

35. Diver, *Report in Support of Recommendation 79-3: The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, in RECOMMENDATIONS AND REPORTS OF THE ADMIN. CONF. OF THE U.S. 203, at 214 (1979).

36. *Id.* The nine environmental statutes were: (1) 15 U.S.C. § 2615(a) (1976) (unauthorized manufacture or distribution of toxic substances: \$25,000); (2) 16 U.S.C. § 971e(c) (1976) (illegal importation of protected species of fish: \$100,000); (3) 16 U.S.C. § 971e(A) (1976) (catching or transporting such fish: \$50,000 for second offense); (4) 16 U.S.C. § 1376(b) (1976) (taking protected marine mammals: \$25,000); (5) 16 U.S.C. § 1433 (1976) (violation of marine sanctuaries regulation: \$50,000); (6) 16 U.S.C. § 1858 (1976) (violation of fishery management plan: \$25,000); (7) 33 U.S.C. § 1415(a) (1976) (ocean dumping: \$50,000); (8) 42 U.S.C. § 6928 (1976) (improper disposal of hazardous wastes: \$25,000); and (9) 42 U.S.C. § 7413(b) (Supp. 1977) (stationary source air pollution violations: \$25,000). Diver, *supra* note 35, at 214 n.59.

The latter two of these statutes are federal legislation authorizing states to seek EPA approval for their enforcement programs. Diver, *supra* note 35, at 214 n.59. Of the important federal statutes that EPA administers in the fields of hazardous waste, air and water pollution and pesticides, the *lowest* penalty is \$500 per day for the first violation of the Federal Insecticide, Fungicide, and Rodenticide Act. FIFRA § 14(a)(2), 7 U.S.C. § 136f(a)(2) (1982). Subsequent offenses may be penalized not more than \$1000 for each offense. *Id.*

37. CAA § 205, 42 U.S.C. § 7524 (1982). Similarly, the Noise Control Act specifies that any person who violates specified paragraphs is subject to a civil penalty not to exceed \$10,000 per day of violation, with each day of violation constituting a separate violation. Noise Control Act § 11(a)(2), 42 U.S.C. § 4910(a)(2) (1982).

38. *See, e.g.*, Toxic Substances Control Act (TSCA) § 16(a), 15 U.S.C. § 2615(a) (1982) (stating that the Administrator shall assess a civil penalty taking into account the nature, circumstances, extent, and gravity of the violation or violations; ability of the violator to pay; effect on his or her ability to do business; history of prior violations; degree of culpability; and other factors "as justice may require"). The Clean Air Act stationary source provisions re-

spite the fact that the penalty amounts authorized may have important economic ramifications, on the whole the federal environmental statutes do not contain extensive criteria governing penalty assessment.<sup>39</sup>

Both of these factors—the size of the penalties authorized and the discretion accorded the court or agency imposing the penalty—strengthen the position of the agency enforcing the regulatory scheme. When a penalty accrues at a rate of \$5000 to \$25,000 per violation, with each day that the violator transgresses the regulatory standard deemed a separate violation, the possible penalty can rapidly multiply if the violation is not quickly discovered or promptly corrected. At the same time, if the agency assesses the penalty, the statute vesting discretion in the agency places few constraints on the exercise of its penalty powers. Unless the agency itself attempts to structure its discretion through adopted policies,<sup>40</sup> it will have wide latitude in deciding when to seek penalties and what penalty amount is appropriate.

If a state seeking EPA certification of its enforcement program adopts a penalty statute modeled after federal penalty provisions, the state statute will import these characteristics. Accordingly, we would expect many state penalty statutes to set large dollar amounts per day of violation, and to contain relatively few criteria for determining when a penalty is warranted and what that penalty should be in a given case.

### III. STATE PENALTY AMOUNTS AND STATUTORY ASSESSMENT CRITERIA

#### A. *Penalty Amounts*

The logical beginning points for examining state civil penalty stat-

---

quire the court to consider the size of the business, the economic impact of the penalty on the business and the seriousness of the violation. CAA § 113(b), 42 U.S.C. § 7413(b) (1982).

39. See Diver, *supra* note 35, at 214 (noting that Congress on the whole “has imposed few constraints on the discretion of the penalty-imposing authority to determine the amount of the penalty within the stated limits”).

40. EPA has formulated extensive civil penalty policies. In 1984, the Agency announced the adoption of an Agency-wide civil penalty policy in two documents: (1) *Policy on Civil Penalties*, dated Feb. 16, 1984, which is intended to set forth the agency's general penalty philosophy; and (2) *A Framework for Statute-Specific Approaches to Penalty Assessments*, dated Feb. 16, 1984, which is intended to provide guidance to specific programs on how to develop medium-specific penalty policies. ENVTL. PROTECTION AGENCY, POLICY ON CIVIL PENALTIES, NO. GM-21 (1984) [hereinafter cited as POLICY ON CIVIL PENALTIES]; ENVTL. PROTECTION AGENCY, A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS: IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, NO. GM-21 (1984) [hereinafter cited as A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS]. These documents have been followed by a series of penalty policies for specific regulatory programs.

utes are the maximum and minimum amounts authorized as well as the criteria for determining the amount of a penalty in a particular case. These figures establish the boundaries of administrative or judicial discretion in fixing a penalty.

### 1. Statutory maximum and minimum penalties

The typical state statute authorizing civil penalties is a "variable penalty" statute establishing the outer limits of the penalty range, with penalties accruing either on a "per day" or "per violation" basis. The penalty amount actually imposed in a given situation may bear little relation to these limits set by the legislature. Nonetheless, the statutory limits are significant because they provide at least some indication of the legislative importance attached to the environmental violation and because they determine the outside liability in specific situations.<sup>41</sup>

Hazardous waste violations stand at the top of the penalty hierarchy. The state civil penalty statutes indicate a high level of legislative concern over hazardous waste handling and disposal, with the majority of statutes authorizing a penalty of up to \$25,000 per day of violation.<sup>42</sup> The Michigan Hazardous Waste Management Act is typical. The Act authorizes penalties for violations of a statutory provision or a rule promulgated under it, stating that the court "may impose a civil fine of not more than \$25,000 for each instance of violation, and, if the violation is continuous, for each day of continued noncompliance."<sup>43</sup> A few states place even more emphasis on this area. New Hampshire has set an outside limit of \$50,000 per violation,<sup>44</sup> while Florida likewise has adopted a \$50,000 per day limit, with that state's Resource Recovery and Management Act making a violator liable for certain additional damages as well.<sup>45</sup>

---

41. See Lawrence, *Judicial Review of Variable Civil Money Penalties*, 46 U. CIN. L. REV. 373, 407 (1977) (noting that increasing money penalties for more serious violations places higher premiums on what society wants controlled).

42. The recent Environmental Law Institute study concluded that "[t]he majority of state hazardous waste programs have authority to levy penalties as large as the largest federal maximum under RCRA." STATE CIVIL PENALTY AUTHORITIES, *supra* note 16, at 8.

43. MICH. COMP. LAWS § 299.548(1) (West 1984). The Michigan Act allows the attorney general "or a person" to bring an action, thus apparently authorizing a civil penalty action to be brought as a citizen suit. Other penalty provisions in the hazardous waste area include: ALA. CODE § 22-30-19(d) (1981); ARK. STAT. ANN. § 82-4213(b) (Supp. 1985); DEL. CODE ANN. tit. 7, § 6309 (1983); S.C. CODE ANN. § 44-56-140 (Law. Co-op. 1985); W. VA. CODE § 20-5E-16 (1985); and WIS. STAT. ANN. § 144.74(2) (West Supp. 1985). All of these statutes establish a penalty limit of at least \$25,000 per day.

44. N.H. REV. STAT. ANN. § 147-A:17 (Supp. 1985).

45. FLA. STAT. ANN. § 403.727(3)(a) (West Supp. 1986).

Other violations of state pollution laws typically call for penalties that are substantial but smaller than the penalties for hazardous waste violations. Water pollution variable penalties often have outside limits of \$10,000 per violation or per day,<sup>46</sup> although some are as high as \$25,000 per day.<sup>47</sup> State drinking water legislation falls into much the same category.<sup>48</sup> Strikingly, pesticides apparently reflect even less legislative concern,<sup>49</sup> a fact that must be attributed more to industry lobbying power than to impartial analysis of environmental harm.

If a state legislature is concerned that a penalty accruing on a per day or per violation basis may become excessive, establishing an upper cap on the penalty is a possibility, although a little used one. A Maryland law regulating hazardous waste allows the imposition of a penalty of up to \$1000 for each violation "but not exceeding \$50,000 total."<sup>50</sup> Similarly, a Nevada statute governing hazardous waste disposal areas subjects violators to "[p]enalties of no more than \$3,000 per day for each separate failure to comply with a license or agreement or \$25,000 for any 30-day period for all failures to comply."<sup>51</sup>

While most statutes merely prescribe an upper limit to the daily or "per violation" penalty amount, some impose a lower limit as well. Presumably, setting a minimum indicates a legislative intent that the violation always deserves at least some civil sanction, an amount that can be substantial. For example, Washington legislation establishes \$1000 as the minimum penalty for certain water pollution violations, an amount sufficient to secure the attention of any regulated entity.<sup>52</sup> Perhaps the most interesting statute of this type is a Wisconsin law directed toward reducing sulfur dioxide emissions from power plants. A utility violating

---

46. See, e.g., GA. CODE ANN. § 12-5-52(a) (1982); KAN. STAT. ANN. § 65-170d(a) (1985); W. VA. CODE § 20-5A-17 (1985); WIS. STAT. ANN. § 147.21(2) (West 1974).

47. WASH. REV. CODE ANN. § 80.50.150(1) (Supp. 1986).

48. See KAN. STAT. ANN. § 65-171s (1985) (prescribing penalties for violation of drinking water standards and conditions of operating a public water supply system).

49. See, e.g., R.I. GEN. LAWS § 23-25-28(a) (1985) (\$5000 for each offense); TEX. AGRIC. CODE ANN. § 76.156(a) (Vernon 1982) (\$50 to \$1000 per day); W. VA. CODE § 19-16B-22(c) (1984) (commissioner may assess penalty for violation of the Pesticide Use and Application Act not to exceed \$200 upon a person other than private applicator).

50. MD. HEALTH-ENVTL. CODE § 7-266(b)(2)(i) (Supp. 1985). A Puerto Rico water pollution statute also sets a maximum of \$50,000 "for violations of this chapter." P.R. LAWS ANN. tit. 12, § 1518(a) (1978).

51. NEV. REV. STAT. § 444.744 (1981).

52. WASH. REV. CODE ANN. § 80.50.150(1) (Supp. 1986). See also KY. REV. STAT. ANN. § 350.990(2) (Bobbs-Merrill 1983). Under that legislation, any person who engages in surface coal mining operations without first securing a permit "shall be liable to [sic] a civil penalty for damages to the Commonwealth of not less than five thousand dollars (\$5,000) nor more than twenty-five thousand dollars (\$25,000)." *Id.*

the law's prohibitions "shall forfeit not less than \$25,000 nor more than \$50,000" for each violation.<sup>53</sup>

In the usual case, however, the disparity between the upper cap and the lower limit is so large that the minimum amount does not practically constrain the agency's discretion in seeking penalties or make a significant statement about the legislature's concern. The Alabama Water Pollution Control Act exemplifies this tendency, declaring that violators shall be liable for a penalty of "not less than \$100.00 nor more than \$10,000.00" for the violation.<sup>54</sup> Furthermore, if the statutory scheme expressly authorizes the agency to mitigate penalties,<sup>55</sup> or if the agency assumes that it has this power, the minimum loses almost all significance.

In addition to placing a cap on the total penalty or requiring a penalty minimum, a variety of other techniques exist to structure the penalty amount that a court or agency can impose. Commonly a statute will establish an initial penalty for an event and then alter the penalty for continued violations. A Georgia statute sets an initial maximum of \$1000 for a violation of an emergency order and then authorizes an additional civil penalty not to exceed \$500 for each day that the violation continues.<sup>56</sup> New York's penalty statute for petroleum and other liquid spills places a \$2500 liability limit on defined responsible persons for an initial incident; it then permits an additional penalty not to exceed \$500 for each day the "contravention or contribution thereto continues."<sup>57</sup>

Another method of defining the penalty structure is to establish a penalty for the initial violation but make further penalties contingent on a specific administrative event. The event could be the receipt of an order<sup>58</sup> or of written notification from the enforcing agency.<sup>59</sup>

---

53. WIS. STAT. ANN. § 144.385(8) (West Supp. 1985).

54. ALA. CODE § 22-22-9(o) (Supp. 1981). See also N.Y. ENVTL. CONSERV. LAW § 71-2103(1) (McKinney Supp. 1986) (any person violating variety of provisions "shall be liable for a penalty not less than two hundred fifty dollars nor more than ten thousand dollars for said violation and an additional penalty of not to exceed five hundred dollars for each day during which such violation continues"). Of course, if the upper limit on the variable penalty is not large, the lower limit becomes more of a limiting factor on the agency's discretion. See, e.g., S.C. CODE ANN. § 48-39-170(C) (Law. Co-op. Supp. 1985) (allowing South Carolina Coastal Council to assess civil penalty of \$100 to \$1000 per day of violation).

55. See *infra* text accompanying notes 142-48.

56. GA. CODE ANN. § 12-8-41(a) (Supp. 1982).

57. N.Y. ENVTL. CONSERV. LAW § 71-1941(1) (McKinney 1984). The penalty can be imposed only for spills of polluting liquids that are stored in amounts over 1100 gallons. *Id.* See also N.J. STAT. ANN. § 48:13A-12b (West Supp. 1985) (establishing penalties of not more than \$500 for a first offense; not less than \$100 nor more than \$1000 for a second offense; and not less than \$500 nor more than \$1000 for a third and every subsequent solid waste offense).

58. See N.J. STAT. ANN. § 58:10A-10d (West Supp. 1985). The New Jersey Commissioner of Environmental Protection is authorized to assess a civil penalty of not more than

Finally, the penalty statutes may address the situation where a company or individual follows earlier violations with additional transgressions. The statutes often disapprove of this conduct by mandating an increase in the penalty amount for the subsequent violations. One possibility is to increase the penalty by a fixed amount or percentage if the violation is repeated within a specified time frame. A Wisconsin pesticide statute is quite specific; a violator is to forfeit between \$100 and \$500 for the first violation, and not less than \$200 nor more than \$1000 for any subsequent violation within five years.<sup>60</sup> Even if the statute does not expressly require increased penalties, however, subsequent violations are likely to result in increased penalties under most schemes, since statutes often require or allow the penalty imposing authority to consider the violator's record of past violations.<sup>61</sup>

## 2. Methods to circumscribe penalty amounts

This discussion demonstrates that in the environmental area, state civil penalty statutes generally set wide monetary limits within which courts or agencies may assess penalties. The reason for this wide latitude is the inability of a legislative body to foresee all situations in which penalties will be applied.<sup>62</sup> Consequently, the legislature must rely on the court's or the agency's exercise of discretion under a statute.

If the agency rather than a court imposes the penalty, important institutional considerations arise. Courts serve a well-recognized constitutional function in imposing penalties; in contrast, agencies are generally creations of legislatures rather than state constitutions. For this reason alone, such a broad delegation of economic authority to an agency

---

\$5000 for each violation and additional penalties of not more than \$500 for each day during which the violation continues after receipt of a compliance order from the Department of Environmental Protection. The statute also requires the amount assessed to fall within a range established through regulation by the Commissioner for violations of a similar type, seriousness and duration. *Id.* See *infra* notes 151-52.

59. See N.C. GEN. STAT. § 143-215.114(a)(1) to (a)(2) (1983). Under this section, air pollution violators may be assessed a civil penalty of not more than \$5000, with each day considered a separate offense, only after written notification from the Environmental Management Commission. *Id.*

60. WIS. STAT. ANN. § 94.71(1)(a)(1) (West Supp. 1985). An Arizona statute directs a state commission regulating certain kinds of waste to establish administrative sanctions determined by the severity and category of violation. Under the commission's rules, if the violation is repeated within five years, the penalty increases by 25%. ARIZ. ADMIN. COMP. R.12-1-1202 (1983).

61. See *infra* text accompanying note 134.

62. See Lawrence, *supra* note 41, at 407. "A variable monetary penalty enables an administrative agency to tailor the amount to both the offense and its perpetrator, neither of which can be precisely foreseen by the legislature." *Id.*

bears close examination to determine if the agency is using that power in an appropriate manner.<sup>63</sup> Even more importantly, effective environmental protection depends upon vigorous but fair enforcement, and the agency's use of the penalty power could be either insufficient to deter violators or excessive for the offense. Thus, particular attention should be given to whether the delegation could be structured more tightly to achieve the legislative purpose in the environmental law area.

Two legislative alternatives are available to circumscribe the exercise of penalty power by environmental agencies more narrowly. First, the legislative body could draft the statute to limit agency discretion. However, specification in this manner is feasible only where the legislature can easily foresee the manner of violation,<sup>64</sup> and the paucity of such statutes testifies to the difficulty of this undertaking.

A second possibility is more feasible: requiring the agency to structure its discretion by establishing penalty amounts through rulemaking or similar interpretive endeavors.<sup>65</sup> The Connecticut Environmental Protection Act<sup>66</sup> exemplifies this approach. It requires the Commissioner of Environmental Protection to adopt schedules "establishing the amounts, or the ranges of amounts, of the civil penalties which may become due under this section."<sup>67</sup> The Act itself merely sets the outer limits of those penalty amounts.<sup>68</sup> As an alternative, a statute could direct the agency to establish a schedule of penalties for specific types of viola-

---

63. Broad-based delegations of power to administrative agencies conflict with traditional notions of democracy, particularly the separation of powers principle. See R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 25 (1985). The authors comment that "[i]mportant questions concerning the legitimacy of the administrative law process have arisen because agency government has developed in a manner that appears to violate the classical definition [of democracy]." This conflict gives rise to demands for increased scrutiny of the administrative process.

64. The California Water Code contains a limited attempt at such quantification. It authorizes a Regional Water Quality Control Board to impose a penalty for certain violations "in an amount which shall not exceed ten dollars (\$10) for each gallon of waste discharged." CAL. WATER CODE § 13350(e)(1) (West Supp. 1986). A superior court may impose liability for the same violations in an amount not to exceed \$20 for each gallon of waste discharged. *Id.* § 13350(e)(2). Where the characteristics of the type of pollutant discharged also can be foreseen, statutory quantification is even more feasible. See VA. CODE § 62.1-44.34:4 (1982) (\$250 limit for failure to report oil spills up to 2500 gallons; \$500 limit for oil spills up to 10,000 gallons; \$10,000 limit for oil spills of more than 10,000 gallons).

65. See, e.g., ARIZ. REV. STAT. ANN. § 30-687B (Supp. 1985) (for radiation); IOWA CODE ANN. § 455B.109 (West Supp. 1985) (water, air and waste management); NEV. REV. STAT. §§ 444.7402(b), 445.6102 (1979) (hazardous waste and air pollution); N.J. STAT. ANN. § 58:10A-10d (West 1982); OR. REV. STAT. § 468.130(1) (1983) (air pollution); WYO. STAT. § 35-11-901(c) (Supp. 1985) (various violations).

66. CONN. GEN. STAT. §§ 22a-1 to -27 (1985).

67. *Id.* § 22a-6b(a).

68. *Id.*

tions, leaving the agency flexibility in assessing penalties in other situations.<sup>69</sup> Nevada, for example, requires its water pollution commission to establish by regulation a schedule of administrative fines not exceeding \$500 for "lesser violations" of certain statutes and regulations.<sup>70</sup>

The rulemaking mechanism provides several advantages over the prototypical broad, unstructured delegation authorizing assessment of penalties. The agency can tailor the penalties in light of the particular enforcement problems it faces, problems that can vary depending on the location of the agency's jurisdiction, the characteristics of the regulated community and the pollutant regulated. The enforcing agency is in a better position than the legislature to render judgments about specific penalty policy, since those decisions entail use of the type of expertise for which the agency was established. Additionally, because the rulemaking process normally will allow for public comment,<sup>71</sup> regulated entities and other interested parties will have the opportunity to influence the rules, thereby increasing the rules' legitimacy. While public comment is not as valuable in the penalty area as it is when the agency is adopting substantive regulations,<sup>72</sup> public input still could be useful.<sup>73</sup> Lastly, the breadth of the penalty imposition powers found in the environmental area raises fears of unchecked discretionary power that could be exercised in a manner inconsistent with the statutory purpose. To some extent, establishing penalty schedules by rulemaking encourages the agency to further consider the relationship between the transgression and the penalty, thus promoting more rational use of its penalty discretion.

The possibility exists, however, that while the agency may adopt rules, they may contain few constraints circumscribing its discretion.

---

69. This type of scheme was apparently intended in recent hazardous waste legislation enacted in Tennessee. The Tennessee legislation directs the Solid Waste Disposal Board to "promulgate and adopt rules and regulations establishing a schedule of administrative penalty amounts for certain specific non-discretion [sic] violations or categories of violations established by this part." TENN. CODE ANN. § 68-46-114(c)(2) (Supp. 1985). See also *id.* § 69-3-115(a)(3).

70. NEV. REV. STAT. § 445.601(2) (1979). See also IOWA CODE ANN. § 455B.109 (West Supp. 1985) (commission may establish by rule a schedule or range of penalties for "minor violations of this chapter or rules, permits or orders adopted or issued under this chapter").

71. Presumably the agency establishing the rules would use informal "notice and comment" rulemaking, rather than more formal procedures. See Model State Administrative Procedure Act (U.L.A.) § 3(a) (1980) (prior to adoption of any rule agency shall afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing).

72. See Diver, *supra* note 35, at 311.

73. Generally, commentators agree that rules will be better fashioned as a result of public participation. See, e.g., Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 573-75 (1977).



The agency may seek to preserve maximum flexibility in the rules, believing that flexibility will enhance its bargaining position in any settlement negotiations.<sup>74</sup> If the agency takes this position, these benefits of rulemaking would be thwarted.

### B. *Penalty Assessment Criteria*

#### 1. The purpose and theoretical basis of penalty criteria

Since most penalty statutes prescribe a "per day" or "per violation" penalty within broad dollar limits, the monetary provisions of the penalty statutes offer little indication of the actual penalty that will be assessed for a particular violation. As a result, the primary question becomes how the individual penalty will be fixed within those limits. The penalty criteria found in environmental penalty statutes are central to answering this question.

##### a. *the need for penalty standards*

Commentators have persuasively argued that penalty imposition standards are necessary.<sup>75</sup> As Professor Davis summarized the problem, discretionary power can be either too broad or too narrow, but in American law the problem is primarily the former.<sup>76</sup> He suggests that discretion be "confined," principally through rulemaking, and "structured" through such means as policy statements, rules and findings.<sup>77</sup>

Penalty standards serve two separate but related functions. First, they indicate the underlying goals that the legislative body intends the penalty process to serve. Civil penalty statutes theoretically can serve a

74. For example, the Oregon "Air Quality Schedule of Civil Penalties" constrains the agency only minimally in some areas. A violation of an order of the Environmental Quality Commission, the Department of Environmental Quality or any regional air quality authority will call for a penalty "[n]ot less than one hundred dollars (\$100) nor more than ten thousand dollars (\$10,000)." OR. ADMIN. R. § 340-12-050 (1986). On the other hand, the Department's "Noise Control Schedule" is more circumscribed. *See, e.g., id.* § 340-12-052 (defining the penalty for certain violations as "[n]ot less than one hundred dollars (\$100) nor more than five hundred dollars (\$500)").

75. *See Diver, supra* note 35, at 288. "The proposition that persons charged with the determination of penalties should be guided by reasonably clear, complete and objective policies seems too obvious to warrant prolonged discussion. Others have made the case for standards so often and so forcefully as not to require repetition." *Id.* (citing, *inter alia*, *Dickinson v. Davis*, 277 Or. 665, 561 P.2d 1019 (1977)). In a lengthy comment on mitigation of civil penalties, the *Dickinson* court observed that "[a]dministrative discretion is not a magic word. It is only a range of responsible choice in pursuing one or several objectives more or less broadly indicated by the legislature . . ." *Id.* at 673, 561 P.2d at 1023.

76. K. DAVIS, *DISCRETIONARY JUSTICE* 52 (1969).

77. *Id.* at 54-55, 97.

range of purposes that are not always consistent with each other.<sup>78</sup> A clearly drawn penalty statute informs the court or the agency of the legislature's choice of penalty goals and the relative priority to be accorded them. In doing so, the statute gives important direction to the penalty imposing body when it assesses a penalty and helps ensure the legitimacy of that process.

In addition to establishing the goals of the penalty process, statutory criteria serve as standards for the actual assessment of the penalty. The penalty goals and the assessment standards are closely related, since the standards will implement the overall penalty goals.<sup>79</sup> For example, a statute could establish compensation for environmental harm as the underlying purpose of the civil penalty, and then direct the court or agency to consider specific criteria designed to achieve compensation in assessing the actual penalty.

Indeed, discussion over the need for penalty criteria is academic. The question is not whether penalty criteria should exist but who will establish them, for the act of fixing a penalty requires the imposing authority to exercise some discretion. That discretion necessarily is based on standards;<sup>80</sup> if they are not established statutorily, the agency will act under its own standards. However, those criteria will not be legitimized through legislation and, in the worst case, may be unarticulated and thus unknown to the penalized party.

*b. goals of civil penalty systems in environmental law*

Before examining the actual penalty criteria in the state statutes, a brief discussion of the theoretical goals that civil penalty statutes could serve in the environmental area is necessary. This examination establishes the groundwork for determining whether the goals found in state statutes either adhere to or deviate from these theoretical ends.

"Civil" monetary penalties by definition are non-criminal, and commentators frequently observe that they are not principally intended to punish the violator.<sup>81</sup> Nevertheless, the concept of punishment relates

---

78. See *infra* text accompanying notes 81-94.

79. See Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1461 (1979). Concerning the relationship between penalty standards and the purposes of the penalty, Professor Diver comments: "In order to frame a set of standards for determining the penalty amount appropriate for an individual violation, one must first identify the purpose or purposes the penalty is intended to serve." *Id.*

80. See Diver, *supra* note 35, at 289. The author terms the argument for penalty standards in one space "academic," since a penalty scheme can be administered only by applying some set of standards. *Id.*

81. Comment, *supra* note 13, at 445-46.

closely to deterrence, one of two main purposes that environmental civil penalty statutes may be designed to serve.<sup>82</sup> Deterrence is not, of course, a civil penalty goal peculiar to environmental regulatory mechanisms. Civil penalty statutes are included in a broad range of regulatory programs that prohibit entities and persons from certain actions or require conformance to specified criteria. However, deterrence can be a particularly important goal in environmental statutes because of the theoretical ability to calculate with some precision a penalty that would deter violators.<sup>83</sup>

When polluters transgress environmental standards, they often avoid pollution control costs that they would otherwise incur in complying. If those costs can be calculated, a penalty exceeding this amount would deter polluters from violating the regulatory standard. In other words, if the penalty amount exceeds the cost of compliance, an economically rational company would choose compliance in order to minimize its costs.<sup>84</sup> Thus, a penalty would achieve the objective of deterrence by forcing a regulated entity to pay pollution control costs that it would avoid if it did not comply.<sup>85</sup>

This relationship between deterrence and compliance costs, a rela-

---

82. Marshall, *supra* note 17, at 330-31; Schachter, *Some Criteria for Evaluating State and Local Air Pollution Control Laws*, 14 B.C. IND. & COMM. L. REV. 583, 635 (1973). See also *State ex rel. Brown v. Howard*, 3 Ohio App. 3d 189, 191, 444 N.E.2d 469, 471 (1981) ("Substantial penalties are recognized as a mechanism for deterring conduct which is contrary to a regulatory scheme"). But see *People ex rel. California Reg. Water Qual. Control Bd. v. Department of Navy*, 371 F. Supp. 82 (N.D. Cal. 1973) (court refused to impose civil penalty for an oil spill on ground it was a punitive action).

83. A recent EPA survey of hazardous waste enforcement officials at both the federal and state levels in five EPA Regions and five states asked interviewees to rank the importance they attached to a series of possible penalty criteria. The criteria included deterrence, returning the violator to compliance, ensuring equity among sources, ensuring consistency by taking similar action among sources, correcting environmental damage and removing the economic benefit of non-compliance. The survey concluded that "[a] majority of the State, Region and Headquarters RCRA offices interviewed listed deterrence as the major goal of a penalty assessment for that program." ENVTL. PROTECTION AGENCY, EXECUTIVE SUMMARY, EPA/STATE PERCEPTIONS REGARDING PRACTICES AND OVERSIGHT OPTIONS 1 (1985).

84. Note, *Deterring Air Polluters Through Economically Efficient Sanctions: A Proposal for Amending the Clean Air Act*, 32 STAN. L. REV. 807, 813 (1980). The author states that "[u]nder the economic theory of deterrence, the 'optimal'—most efficient and effective—economic deterrent is the fine that when discounted by the probability of detection just equals the economic value of noncompliance." *Id.* Simply setting the fine at the amount of money saved by the company through noncompliance is insufficient, since the company also will consider its chances of the violation being discovered. Accordingly, under this theory the amount of the penalty should be such that, when it is multiplied by the chance that the violation will be detected, the result equals the amount saved by the company through noncompliance. *Id.* at 812.

85. See *supra* note 82.

tionship that is the basis for the so-called "noncompliance" penalties under the federal Clean Air Act,<sup>86</sup> is the central focus of the penalty policy adopted by EPA. The EPA policy observes that "[i]f a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion."<sup>87</sup> To accomplish this goal, the EPA policy declares that, at a minimum, penalties should remove any significant economic benefits resulting from a failure to comply with the law.<sup>88</sup> If the penalty is set at a level less than that amount, the regulated community is encouraged to wait until an enforcement agency takes action before complying.<sup>89</sup>

Civil penalties to redress environmental violations also may serve a second goal: compensation.<sup>90</sup> Pollution causes harm to both human health and to inanimate objects, a fact that many pollution statutes explicitly recognize.<sup>91</sup> An environmental civil penalty statute could instruct the penalty imposing authority to set a penalty at a level that will compensate the public for the harm caused by the regulatory violation.

The goal of compensation is generally consistent with that of economic deterrence discussed above; both are designed to force polluters to internalize costs that otherwise would be imposed on society as a whole.<sup>92</sup> However, calculating a penalty to achieve compensation is not

---

86. CAA § 120, 42 U.S.C. § 7420 (1982). This section requires EPA to impose administrative penalties for stationary source violations that are calculated to recover the economic value of noncompliance. *Id.*

87. POLICY ON CIVIL PENALTIES, *supra* note 40, at 3.

88. *Id.* The EPA policy terms this amount the "benefit component," of the penalty. It then states that a second amount, a "gravity component," must be added to give a "preliminary deterrence" figure. *Id.* at 4.

89. ENVTL. PROTECTION AGENCY, CLEAN AIR ACT STATIONARY SOURCE CIVIL PENALTY POLICY 5 (1984). "[S]ettling for an amount which does not remove the economic benefit of noncompliance can encourage people to wait until EPA or the State begins an enforcement action before complying. For this reason, it is general Agency policy not to settle for less than this amount." *Id.*

90. Diver, *supra* note 35, at 285. "A second function which might conceivably be served by a civil money penalty is compensation . . . . Money penalties can . . . be utilized to serve a 'general' compensation function—that is, to compensate 'society' at large for harm which it has suffered at the hands of a violator." *Id.* See also *United States v. W.B. Enter.*, 378 F. Supp. 420 (S.D.N.Y. 1974) (observing that purpose of a civil penalty for discharge of oil under the Clean Water Act was to compensate government for environmental damage).

91. See, e.g., CAA § 109, 42 U.S.C. § 7409 (1982) (requiring EPA to adopt "health-based" primary ambient air quality standards and "welfare-based" secondary ambient air quality standards).

92. See E. YANG, R. DOWER & M. MENEFFEE, *THE USE OF ECONOMIC ANALYSIS IN VALUING NATURAL RESOURCE DAMAGE 1* (1984). The authors note that, in the case of spills,

[t]he users are often required to compensate the owners of the resource, private or

a simple task. While a polluter's avoided costs of compliance can be measured with some degree of precision, the methodology for quantifying environmental harm is not as well developed.<sup>93</sup> Nonetheless, because the existence of the harm is undoubted, we would expect compensation often to be a clearly articulated penalty goal in state civil penalty statutes, even if the implementation of that goal is problematic.

Environmental civil penalty statutes could fulfill other purposes as well. For example, a statute could require the penalty authority to formulate penalties in a manner that is predictable or consistent,<sup>94</sup> ends that are important to the regulated community. The statute might also stress that penalties are to take into account a violator's ability to pay. The legislative body would thereby emphasize that the penalty assessor must consider a broad array of economic interests, not merely compensation for harm or deterrence through full recovery of costs that the violator has avoided.

With these possible purposes for a penalty statute in mind, we now examine the state statutes to determine the extent to which they serve these theoretical goals.

## 2. The criteria in the state penalty statutes

### *a. deterrence and avoided economic costs*

Despite the importance of penalty goals to the functioning of a penalty system, a significant percentage of state penalty statutes contain no criteria. Instead, they leave the penalty totally in the hands of the court or agency, unencumbered by legislative direction concerning the purposes that the penalty is to serve or how it is to be set.<sup>95</sup> The lack of direction indicates that, in those states at least, the legislative bodies have

---

public, so that the cost of subjecting the resources to spills and releases is fully incorporated into the cost of the commercial use. Only under a compensation scheme which requires internalization of such costs can society attain the best use of the coastal resources.

*Id.*

93. *Id.* Yang, Dower and Menefee observe that the compensation system traditionally has broken down in situations where no economic market exists to value the resource damaged and where the resource is held by public trustees rather than private parties. However, the study continues on to note that in recent years much progress has been made in addressing these problems. *Id.*

The National Environmental Policy Act (NEPA) also alludes to the difficulty of quantifying environmental harms. NEPA requires federal agencies to insure that presently unquantified environmental amenities and values are given appropriate consideration in governmental decisionmaking. NEPA § 102(2)(B), 42 U.S.C. § 4332(2)(B) (1982).

94. See Diver, *supra* note 79, at 1457.

95. See, e.g., GA. CODE ANN. § 12-5-52(a) (1985); MISS. CODE ANN. § 17-17-29(1) (Supp. 1985).

given little thought to the proper role of penalty imposition in the regulatory scheme. Most statutes, however, set forth a legislative intent concerning how penalties should be determined. Indeed, they contain a vast range of criteria serving varied and often conflicting purposes.

Surprisingly few statutes expressly require a court or agency to consider deterrence of violations as a primary factor in imposing a penalty. Kansas water pollution legislation is one of the most explicit of these comparatively rare laws; a penalty assessed under that provision "shall constitute an actual and substantial economic deterrent to the violation for which it is assessed."<sup>96</sup> Connecticut lists as a factor the amount "necessary to insure immediate and continued compliance,"<sup>97</sup> while a Tennessee water pollution law states that the commission "may" consider "[w]hether the civil penalty imposed will be a substantial economic deterrent to the illegal activity."<sup>98</sup> Interestingly, a Maine statute forcefully requires consideration of deterrence but strangely asks the court to focus on the importance of setting a penalty to deter others—not the party on whom the penalty is imposed—from similar violations.<sup>99</sup>

A small number of statutes are more explicit in addressing deterrence. By requiring the penalty authority to consider the monetary benefits of noncompliance,<sup>100</sup> they emphasize the economic role that penalties can play in requiring companies to disgorge savings from avoided pollution control costs. North Carolina's air pollution control statute is perhaps the most direct; it requires the Environmental Management Commission to consider "the amount of money the violator saved by not having made the necessary expenditures to comply with the appropriate pollution control requirements."<sup>101</sup> Similarly, a California water pollution statute mandates the agency assessing a penalty to evaluate the "economic savings, if any, resulting from the violation."<sup>102</sup> Iowa's Environmental Quality Act stresses that the "costs saved or likely to be saved by noncompliance by the violator" are to be weighed.<sup>103</sup>

---

96. KAN. STAT. ANN. § 65-170d(b) (1985).

97. CONN. GEN. STAT. § 22-6a(c)(1) (1985).

98. TENN. CODE ANN. § 69-3-115(a)(2)(D)(i) (Supp. 1985).

99. ME. REV. STAT. ANN. tit. 38, § 349(5)(D) (West Supp. 1985).

100. *See, e.g.*, LA. REV. STAT. ANN. § 30:1073E(a)(v) (West Supp. 1986).

101. N.C. GEN. STAT. § 143-215.114(a)(3) (1983).

102. CAL. WATER CODE § 13327 (West Supp. 1986); *see also* 35 PA. CONS. STAT. ANN. § 6018.605 (Purdon Supp. 1985) ("savings resulting to the person in consequence of such violation").

103. IOWA CODE ANN. § 455B.109(1) (West Supp. 1985). *See also* ALASKA STAT. § 46.03.760(a)(3) (Supp. 1985), establishing as a factor "the economic savings realized by the person in not complying with the requirement for which a violation is charged." "Economic savings" is defined as the "sum which a person would be required to expend for the planning,

Precise language like that included in these three statutes can send a clear message to the agency or court imposing the penalty. If the statute states that the court or agency "shall" consider deterrence, the penalty imposing authority must carefully weigh the respondent's economic savings from noncompliance before imposing any penalty, since a penalty in this amount will be the minimum penalty that could deter the violation. Even if the statute is discretionary, declaring that the court or agency "may" consider deterrence rather than requiring that consideration, this statement would serve as some indication of legislative intent guiding the penalty imposition process.

Other statutes seem to emphasize deterrence, although the language of those enactments is less straightforward. If a court or agency is to determine whether a penalty would deter violations, one consideration might be the size of the business; the larger or more profitable the company, the larger the penalty needed to achieve deterrence. A small number of statutes apparently adopt this reasoning by authorizing the court or agency to consider the size of the business receiving the penalty.<sup>104</sup> Presumably, Louisiana legislators were thinking of deterrence as a goal when they included consideration of the "gross revenues generated by respondent" in a penalty statute.<sup>105</sup>

Overall, however, few statutes on their face directly require consideration of economic deterrent factors.<sup>106</sup> In fact, other penalty criteria not specifically linked to deterrence appear more frequently in the state statutes. These criteria could conflict with the goal of deterrence, particularly if deterrence is equated with setting a penalty at a level greater than the respondent's avoided costs. For example, some provisions direct the court or agency to weigh the violator's ability to pay a penalty, while other statutes use terms like the "economic and financial conditions of the person incurring a penalty"<sup>107</sup> or the violator's ability to continue in business.<sup>108</sup>

These "ability to pay" factors, while appropriate regulatory consid-

---

acquisition, siting, construction, installation and operation of facilities necessary to effect compliance with the standard violated." *Id.* § 46.03.760(d).

104. *See, e.g.*, R.I. GEN. LAWS § 23-25-28(a)(2) (1985).

105. *See* LA. REV. STAT. ANN. § 30:1073E(3)(a)(iii) (West Supp. 1986).

106. STATE CIVIL PENALTY AUTHORITIES, *supra* note 16, at 28, citing only 10 penalty statutes with deterrence listed as an explicit criteria. Thirty-five statutes include the economic benefit of noncompliance as a criteria. *Id.*

107. *See, e.g.*, OR. REV. STAT. § 468.130(2)(c) (1985); *see also* CONN. GEN. STAT. § 22a-6b(c)(5) (1985).

108. *See, e.g.*, CAL. WATER CODE § 13327 (West Supp. 1986); MONT. CODE ANN. § 80-8-306(5)(c) (1985).

erations in a general sense,<sup>109</sup> must be utilized in a sensitive manner to avoid undermining statutory environmental objectives. For example, regulatory prohibitions may be established to ensure that an industry as a whole attains a minimum amount of pollution control, and the statutory scheme may envision that a regulated entity should cease business if it cannot afford the costs of compliance.<sup>110</sup> If the statute allows the penalty authority to excuse or lower penalties to an amount below the avoided cost of regulatory compliance, the statutory intent could be thwarted.

The "ability to pay" criteria are symptomatic of environmental law's underlying ambivalence toward industrial closings caused by environmental regulations, an ambivalence that a Tennessee statute illustrates. The statute explicitly warns that "[t]he plea of financial inability to prevent, abate or control pollution by the . . . violator shall not be a valid defense to liability."<sup>111</sup> Thus, economic infeasibility of compliance cannot prevent liability. However, in setting the penalty the statute allows the authority to consider the "social and economic value of the air contaminant source" and the "economic reasonableness" of reducing or eliminating the air emissions.<sup>112</sup> These authorizations to consider economics seem to include evaluation of the violator's financial state<sup>113</sup> and thus could undercut the statutory prohibition against considering financial ability to pay. In fact, the "reasonableness" language hearkens to the traditional "balancing of the equities" under nuisance law,<sup>114</sup> a legal principle that modern statutory environmental laws in many instances were intended to overcome.

In summary, while some environmental civil penalty statutes expressly stress deterrence or avoided economic costs as criteria for determining the penalty, most are silent about these purposes. And a large number of the statutes expressly require that the violator's ability to pay

---

109. Diver, *supra* note 35, at 302 (commenting that the principle that a penalty otherwise appropriate should be adjusted to fit the financial circumstances of the violator is widely acknowledged).

110. *See, e.g.*, EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 69-72 (1980) (emphasizing that the Clean Water Act required firms to reduce pollution to a "best practical control technology" floor or to cease discharging pollutants at all).

111. TENN. CODE ANN. § 68-25-116(c) (Supp. 1985).

112. TENN. CODE ANN. § 68-25-106(2), (4) (Supp. 1985). Section 68-25-116(c) declares that in assessing penalties the factors specified in section 68-25-106 may be considered.

113. The "economic reasonableness" of reducing or controlling pollution could easily be construed to refer to the reasonableness from the violator's perspective. Similarly, the "economic value" of the source would also appear to encompass at least part of the violator's financial picture.

114. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 88A, at 631 (5th ed. 1984) (discussing "balancing the equities" under nuisance law).



must be considered, a factor that may conflict with and perhaps undermine the goal of deterrence.

*b. compensatory criteria*

Civil penalty statutes commonly require harm to be considered in setting any penalty amount. Much used terms include the "gravity"<sup>115</sup> of the violation or "significance"<sup>116</sup> of the harm caused and the "seriousness" of the violation.<sup>117</sup> Also common are references to the "extent"<sup>118</sup> or "nature"<sup>119</sup> of the violation.

Given the health-endangering effects of hazardous substances, civil penalty statutes for hazardous waste violations might be expected to stress consideration of those effects. Maryland's hazardous waste penalty statute fulfills this expectation. The statute mandates consideration of the extent that the violation, including its location, "creates the potential for harm to the environment or to human health or safety" and the degree of hazard posed by the waste materials involved.<sup>120</sup> The Massachusetts Hazardous Waste Management Act also addresses harm to health but takes a different approach. That Act's civil penalty provision begins by declaring that any violation shall be presumed to constitute irreparable harm to the public health, welfare and safety and to the environment.<sup>121</sup> Since the statute follows this presumption with provisions for both criminal and court-imposed civil penalties, the presumption apparently was intended to require the courts to focus carefully on the extent of harm in setting any penalties.<sup>122</sup>

115. See, e.g., CAL. WATER CODE § 13327 (West Supp. 1986); LA. REV. STAT. ANN. § 30:1073E(3)(a)(ii) (West Supp. 1986); MONT. CODE ANN. § 80-8-306(5)(C) (1985); N.C. GEN. STAT. § 143-215.91(a) (1983); 35 PA. CONS. STAT. ANN. § 7110.308(e) (Purdon Supp. 1985); R.I. GEN. LAWS § 23-25-28(a)(2) (1985).

116. MONT. CODE ANN. § 80-8-306(5)(c) (1985) (factors include whether significant harm resulted to health, the environment, agriculture, crops or livestock).

117. See, e.g., ALA. CODE § 22-30-19(d) (1981); ARIZ. REV. STAT. ANN. § 30-687B (West Supp. 1985) ("whether the violation was of a serious nature"); N.J. STAT. ANN. § 58:10A-10d (West Supp. 1985).

118. See CAL. WATER CODE § 13350(g) (West Supp. 1986). See also NEB. REV. STAT. § 81-1508(1)(g) (Supp. 1983) ("the degree and extent of the pollution, and any injuries to humans, animals, or the environment").

119. ARIZ. REV. STAT. ANN. § 30-687B (West Supp. 1985); KAN. STAT. ANN. § 65-171s(a) (1985).

120. MD. HEALTH-ENVTL. CODE ANN. § 7-266(b)(2)(ii), (5), (7) (Supp. 1985).

121. MASS. GEN. LAWS ANN. ch. 21C, § 10 (West Supp. 1985). The statute expressly makes the presumption rebuttable. *Id.*

122. *Id.* In a separate paragraph the statute also authorizes injunctive relief. The presumption could be important in any request for such relief, if the state requires irreparable injury before an injunction will issue. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.10, at 108 (1973). In many instances, however, courts find that the common law require-

The statutory language used in requiring consideration of harm, and thus indirectly establishing a compensation objective, is vague. Terms such as "significance" or "gravity" of the harm lack precision, and their open-endedness constitutes a legislative recognition of the difficulties in quantifying environmental harm. In a few instances, however, legislatures have required more specific quantification efforts from agencies. North Carolina's oil spill and hazardous substances control legislation lists "the estimated damages attributed to the violator" as a factor that must be weighed.<sup>123</sup> This language seemingly mandates the Environmental Management Commission to make an attempt to quantify the damage before reaching a final decision on a penalty figure.

To reiterate, the state civil penalty statutes often reflect compensatory objectives by setting forth broadly-worded criteria that require courts or agencies to consider the harm from the violation. These statutes indicate that many state legislatures intend civil penalties to fulfill the objective of reimbursing the public for environmental harms.

### c. *fault and equity*

A third set of civil penalty factors concerns neither deterrence nor compensation, focusing instead on the culpability of the alleged violator. But by injecting fault into the penalty imposition process, a significant number of state civil penalty statutes introduce a factor that usually is irrelevant to the initial finding of a statutory violation. Thus, even though the statutory violation may be determined on a strict liability basis, the fault of the violator can lower the penalty.

Most civil penalty statutes are silent about the standard of liability required before a violation may be found; they do not specify whether fault in the form of negligence, recklessness or intent is needed. In construing federal laws, EPA generally has interpreted statutory silence to mean that Congress intended a strict liability offense.<sup>124</sup> At the state

---

ment of irreparable injury is not applicable in environmental cases. *See, e.g.*, *Environmental Defense Fund v. Lamphier*, 714 F.2d 331, 338 (4th Cir. 1983).

123. N.C. GEN. STAT. § 143-215.91(a) (1983). The statute lists a number of other factors and declares that a violator "shall incur" a penalty set by the Environmental Management Commission "after taking into consideration" these factors. *Id.* Other statutes may allow an agency to recover damages to natural resources in addition to a civil penalty. *See* TENN. CODE ANN. § 68-23-415(b)(3) (1983) (authorizing both the assessment of a civil penalty and damages, including "any reasonable expenses incurred in . . . restoring the air, water, land and other property, including animal, plant and aquatic life, of the state to their former condition").

124. *See* A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS, *supra* note 40, at 17, noting that "most of the statutes which EPA administers are strict liability statutes." The issue has been litigated in a number of reported cases under the

level, while some statutes require a finding of fault before a penalty can be imposed,<sup>125</sup> most are silent and can similarly be interpreted to fall into the strict liability model.<sup>126</sup> Consequently, a violation calling for a civil penalty may be found without consideration of whether the violator acted negligently or with any other degree of fault.

The state penalty statutes consistently reject the idea that the violator's fault is irrelevant to all phases of the penalty process. Instead, they emphasize that the penalty imposing authority is to consider both the fault and attitude of the defendant in deciding the amount of the penalty. In other words, even though absence of fault is not a defense to the violation, fault influences the penalty amount and, indeed, whether a penalty is called for at all.

Some of the statutes focus directly on the culpability of the violator. They commonly ask the penalty imposing authority to consider whether the infraction was willful.<sup>127</sup> Others introduce negligence terminology by calling for inquiry into the "degree of care exercised by the offender"<sup>128</sup> or "the extent to which the violator exercised reasonable care."<sup>129</sup>

oil spill provisions of the Clean Water Act and courts have found that strict liability is called for under that Act. *See, e.g.*, *United States v. Coastal States Crude Gathering Co.*, 643 F.2d 1125, 1127 (5th Cir.), *cert. denied*, 454 U.S. 835 (1981); *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Marathon Pipe Line Co.*, 589 F.2d 1305, 1306 (7th Cir. 1978).

Litigation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) also raises this question. *See, e.g.*, *United States v. Stringfellow*, 20 Env't Rep. Cas. (BNA) 1912 (C.D. Cal. 1984); *see also* *United States v. Liviola*, 22 Env't Rep. Cases (BNA) 2028, 2031 (N.D. Ohio 1985) ("Congress patterned the civil penalty violation provisions of [RCRA] after the Clean Air Act and Clean Water Act, under which civil penalties are strict liability offenses not requiring proof of willful intent").

125. *See, e.g.*, Georgia's Hazardous Waste Management Act, GA. CODE ANN. § 12-8-81(a) (1982) (authorizing a civil penalty to be ordered against any person "negligently or intentionally failing or refusing to comply with any final or emergency order of the director issued as provided in this article").

Interestingly, in its regulations governing approval of state programs under federal legislation, EPA declares that state law should not provide a greater burden of proof and degree of knowledge or intent than federal statutes require of EPA when it sues. The regulations also have a "note" appended stating that "this requirement is not met if State law includes mental state as an element of proof for civil violations." 40 C.F.R. § 123.27(b)(2) (1985) (Clean Water Act regulations); *see also* 40 C.F.R. § 145.13(b)(2) (1985) (Safe Drinking Water Act regulations).

126. *See* *City of Galveston v. State*, 518 S.W.2d 413, 416 (Tex. Civ. App. 1975) (refusing to require state to prove scienter before court would assess civil penalty under state water pollution laws). For an example of the approach a court would take to decide whether some proof of fault is required, *see* *State v. Houdaille Indus., Inc.*, 632 S.W.2d 723 (Tex. 1982). As this case notes, the outcome may depend on legislative intent indicated in the provision's history.

127. *See, e.g.*, MD. NAT. RES. CODE ANN. § 8-1416(d) (1983).

128. *See, e.g.*, MONT. CODE ANN. § 80-8-306(5)(c) (1985).

129. *See, e.g.*, MD. HEALTH-ENVTL. CODE ANN. § 9-342(b)(2)(ii)(1) (Supp. 1985).

The state penalty statutes also often require the decisionmaker to examine conduct pre-dating the alleged violation as well as conduct occurring after that violation. The statutes contain a variety of these factors, which might be termed "good faith" criteria. Those concerning post-violation conduct include the violator's efforts to reduce or mitigate the damage,<sup>130</sup> the steps taken to correct the violation,<sup>131</sup> the effectiveness of those steps,<sup>132</sup> and the permittee's "demonstrated good faith."<sup>133</sup> These types of post-violation factors are consistent with the underlying goal that penalties should compensate for environmental harm, for if the violator quickly remedied the violation, the harm would be minimized. The purpose of examining pre-conduct violations, in contrast, is more closely linked to pure deterrence. If the violator has a history of environmental transgressions, particularly any serious enough to have merited a penalty, the history would indicate the need for a more sizeable penalty to deter future violations.<sup>134</sup>

Some statutes limit the relevancy of past violations. The statute may authorize the agency to evaluate past violations only if they are "part of a recurrent pattern of the same or similar type of violation,"<sup>135</sup> or restrict consideration of previous violations to the specific operation where the present violation occurred.<sup>136</sup> For larger defendants, however, the latter type of restriction is questionable. The deterrent impact of a penalty on a corporation cannot be judged by its effect on a discrete operating unit of that entity. Instead, the regulatory compliance of a wider component of the company would have to be examined to determine an appropriate penalty amount.<sup>137</sup>

#### *d. other factors*

While the categories outlined above account for the bulk of the penalty criteria, two other types of criteria must be considered. First, various states view civil penalties as at least a partial means of recouping enforcement costs, listing these costs as one of the penalty factors. Some

---

130. N.Y. ENVTL. CONSERV. LAW § 71-1941-19413c (McKinney 1984).

131. See OR. REV. STAT. § 468.130(2)(a) (1983).

132. See TENN. CODE ANN. § 69-3-115(a)(2)(D)(v) (Supp. 1985).

133. See TEX. WATER CODE ANN. § 27.1011(c) (Vernon Supp. 1986).

134. See *supra* text accompanying note 87-89.

135. MD. HEALTH-ENVTL. CODE ANN. § 2-610.1(c)(iii) (Supp. 1985).

136. KY. REV. STAT. § 350.990(1) (Supp. 1984).

137. See A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS, *supra* note 40, at 22, observing that with respect to larger corporations, it is sometimes difficult to determine whether a previous instance of noncompliance should affect the penalty. The policy declares that "the case development team should ascertain who in the organization had control and oversight responsibility for the conduct resulting in the violation." *Id.*

require the penalty authority to consider all enforcement costs,<sup>138</sup> while others limit the evaluation to unusual or extraordinary expenses.<sup>139</sup> A Wisconsin statute gives the flavor of these provisions; it authorizes the court to assess an "additional penalty" to cover "a portion or all of the total costs of the investigation, including monitoring, which led to the establishment of the violation."<sup>140</sup>

The second group of criteria is more troubling. A significant number of statutes authorize the agency or court to evaluate any additional factor it deems pertinent. The usual method is for the statute to list a series of factors and then to add that "other relevant factors" may be considered.<sup>141</sup>

These open-ended authorizations to enlarge the list of factors apparently are intended to ensure equity in specific situations that arise during the implementation of environmental penalty laws. But they also invite the court or agency to consider factors that may be inconsistent with the other criteria specifically identified in the statute. For example, a statute may establish compensation for environmental harm as the primary objective of the penalty process. However, this goal could be undermined by consideration of some "other relevant factor" that causes reduction in the penalty amount to a level not approximating compensation for that harm. In the worst case, the penalty could be imposed without articulation of the other factors deemed relevant.

### 3. Compromise and mitigation of penalties

The significant penalty amounts authorized by statute, the vague criteria for penalty imposition and other practical factors<sup>142</sup> tend to maximize the discretion provided to public agencies in deciding whether to seek penalties. An additional statutory power provided to the agencies also enhances that discretion. Many civil penalty statutes invest the agency with explicit power to compromise or mitigate claims.<sup>143</sup> Typically, the statute authorizes the agency to "remit or mitigate any penalty . . . or discontinue any action to recover the penalty upon such terms as it, in its discretion, shall deem proper."<sup>144</sup>

---

138. LA. REV. STAT. ANN. § 30.1073E(3)(a)(ix) (West Supp. 1986).

139. TENN. CODE ANN. § 68-46-114(b)(3)(D) (Supp. 1985).

140. WIS. STAT. ANN. § 147.21(5) (West 1974).

141. *See, e.g.*, 35 PA. CONS. STAT. ANN. § 691.605(a) (Purdon Supp. 1985).

142. *See infra* text accompanying note 287.

143. The two concepts are substantially the same. By definition, any difference between them concerns the need for agreement of the party as well as the imposing authority; mitigation need not be consensual. *See Diver, supra* note 35, at 216.

144. N.C. GEN. STAT. § 143-215.91(a) (1983).

Even in the many cases where the statute is silent on whether the agency may mitigate, public agencies almost always construe their authorization to impose penalties as including a power to compromise.<sup>145</sup> Statutes rarely constrain the agency's ability to compromise claims. When a constraint exists, it may limit the amount of the penalty that may be compromised to a percentage of the original assessment.<sup>146</sup> Another alternative is to include specific criteria in the statute governing the use of the mitigation power along with a general grant of authority to mitigate.<sup>147</sup>

While legislatures routinely include authority to compromise or mitigate claims in civil penalty statutes, the need for this authority is questionable. The previous analysis of statutory penalty amounts in this Article demonstrates that agencies already possess wide discretion to seek penalties within broad dollar limits. To a large degree, an authorization to mitigate or compromise duplicates the grant of discretion in the penalty statute. Moreover, that authorization could be counterproductive. While agencies should strive for consistency in imposing penalties, they could construe statutes authorizing compromise or mitigation as justifying inconsistent penalty settlements.<sup>148</sup>

---

145. See Diver, *supra* note 35, at 217-18, noting that the utility of a "mitigaton" clause—an authorization for unilateral reduction of a penalty by the agency—is questionable:

[Congress] has quite freely incorporated mitigation clauses in agency-assessment variable-penalty statutes. . . . The utility of a mitigation clause in this context is far from obvious. A variable-penalty statute clearly empowers—indeed, implicitly directs—the decisionmaker to consider "mitigating" factors in assessing the penalty. And an explicit delegation of authority to "assess" a penalty would seem to subsume a power to compromise the claim.

*Id.*

146. See ALA. CODE § 22-30-19(g) (Supp. 1985). The statute authorizes the board to compromise and settle any hazardous waste penalty "in such amount, which in the discretion of the board may appear appropriate and equitable, to a maximum of 90 percent of the penalty." The compromise is limited to situations when, within one year or such other period as the board deems reasonable, the person takes action to eliminate or correct the violation. *Id.*

147. For example, Washington hazardous waste law contains a broad grant of mitigation authority but requires the department to "giv[e] consideration to the degree of hazard associated with the violation." WASH. REV. CODE ANN. § 70.105.080(2) (Supp. 1986).

148. If that situation occurs, any challenge to the agency's use of the mitigation power by the agency is unlikely. Except in the rare instance where a third party may challenge a settlement, court tests of the agency's ability to reach settlement in civil penalty cases would not be expected. The issue conceivably could arise if a citizen's suit were filed against a defendant who had settled with the enforcement agency or where some sort of enforcement action was ongoing. Litigation over the circumstances under which agency enforcement precludes citizen suits is becoming increasingly common. See, e.g., *Baughman v. Bradford Coal Co.*, 592 F.2d 215 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979); *Sierra Club v. SCM Corp.*, 572 F. Supp. 828 (W.D.N.Y. 1983); *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159 (S.D.N.Y. 1980).

#### 4. Methods for narrowing administrative discretion in penalty criteria

As this analysis reveals, many penalty statutes contain no criteria for guiding the penalty determination. Other statutes set forth specific criteria but leave those criteria open-ended, allowing the court or agency widespread latitude to consider additional factors deemed relevant. As a consequence, a court or agency imposing a penalty often has insufficient guidance in settling on a dollar amount, and similar violations could be treated in dissimilar fashions. The result may be an arbitrary penalty system, particularly in light of the high penalty amounts authorized on a daily or per violation basis.<sup>149</sup>

As noted above, commentators have persuasively argued that agencies should attempt to structure further their penalty processes and to narrow the range of discretion.<sup>150</sup> The legislative body could give the agency rulemaking authority to specify the penalty criteria it will follow. Alternatively, if the agency does not have rulemaking authority, it could adopt interpretive policies.

If the rulemaking option is used, the penalty statute could set outer monetary limits and require the agency to adopt standards that specify the circumstances when a certain range of penalties is appropriate. New Jersey has chosen this route; its Water Pollution Control Act declares that the amount assessed shall fall within a range established by regulation for "violations of similar type, seriousness, and duration."<sup>151</sup> The state's regulations implement this delegation impressively. For example, the "seriousness" factor is broken down into four categories of violation, which are described in detail.<sup>152</sup>

Alternatively, a statute may prescribe penalty criteria and authorize the agency to supplement those criteria by rulemaking. A Louisiana statute uses this approach, establishing certain statutory factors and then explicitly empowering the enforcement official to "supplement such criteria by rule."<sup>153</sup> If no statute specifically authorizes the agency to adopt

---

149. See *supra* text accompanying notes 42-49.

150. See, e.g., Diver, *supra* note 35, at 288-89. Diver argues for publication of penalty standards for the following reasons:

Revelation tends to reduce the disparities that inevitably arise in a system of secret law between those who have access to or the ability to decipher the rules and those who do not. It enhances accuracy by giving respondents some indication of the factors that will govern their case and to which they should address their arguments. Finally, it enhances the overall quality of decisionmaking by facilitating the self-correction of official errors.

*Id.* at 309-10.

151. N.J. STAT. ANN. § 58:10A-10d (West Supp. 1985).

152. See N.J. ADMIN. CODE tit. 7A, §§ 7:14-8:10 (1984).

153. LA. REV. STAT. ANN. § 30:1073E(3)(b) (West Supp. 1986).

penalty criteria, the agency could use generic rulemaking powers under its organic statute for this purpose.<sup>154</sup>

Rulemaking also could be used to narrow the agency's discretion in settling claims, or at least to require an explanation for the exercise of discretion in mitigating penalties. Connecticut has taken some steps in this area, requiring the Commissioner of Environmental Protection to explain his reasons for mitigating any penalty.<sup>155</sup>

Even if the agency has no rulemaking authority, it could adopt interpretive policies to guide its penalty discretion. EPA has followed this course, formulating interpretive policies for major regulatory programs that detail how the agency will proceed in imposing penalties.<sup>156</sup> The EPA civil penalty policy is particularly noteworthy for its efforts to establish a methodology for weighing various penalty criteria,<sup>157</sup> an issue almost never addressed by state civil penalty statutes. Several states also have attempted to establish interpretive penalty policies.<sup>158</sup>

This discussion does not assume that penalty criteria are a panacea, for they unquestionably have practical limits. A mathematical scale for computing penalties cannot be constructed,<sup>159</sup> nor would it be a good idea. Because penalty criteria such as harm and seriousness of the violation are not capable of precise quantification, the agency cannot bind itself to specific dollar penalty figures through predetermined criteria. Nonetheless, agency penalty statutes are currently so open-ended as to invite inconsistent decisionmaking, or at least the appearance that the agency penalizes in an arbitrary manner. Penalty criteria adopted by

---

154. See, e.g., ARK. STAT. ANN. § 82-4213(b) (Supp. 1985) (Any person violating the Act, a rule, or a permit "may in accordance with the regulations issued by the Commission be assessed a civil penalty by the Commission."); N.C. GEN. STAT. § 130A-22(f) (Supp. 1985) ("The Commission shall adopt rules concerning the imposition of administrative penalties under this section.").

155. Connecticut regulations allow the Commissioner of Environmental Protection, pursuant to explicit statutory authorization, to mitigate penalties. However, the Commissioner must maintain a record "of each instance in which he corrects a civil penalty." The record is to include the amount of the penalty before and after mitigation, and a "summary of the grounds for correction." CONN. AGENCIES REGS. § 22a-6b-503(h)(2) (1985).

156. See, e.g., ENVTL. PROTECTION AGENCY, RCRA CIVIL PENALTY POLICY (1984); ENVTL. PROTECTION AGENCY, NEW CLEAN WATER ACT CIVIL PENALTY POLICY (1986); ENVTL. PROTECTION AGENCY, CLEAN AIR ACT STATIONARY SOURCE CIVIL PENALTY POLICY (1984).

157. POLICY ON CIVIL PENALTIES, *supra* note 40, at 3-4 (calling for calculation of a "preliminary deterrence figure" based generally on avoided economic costs, which can then be adjusted by consideration of factors such as degree of culpability, history of noncompliance and ability to pay).

158. See STATE CIVIL PENALTY AUTHORITIES, *supra* note 16, at 70-93.

159. See N.J. ADMIN. CODE tit. 7A, § 7:14-8.10(a)(2) (1984) (noting that a "strictly mathematical scale for computing seriousness cannot practically be devised").



agencies can avoid these possibilities; at the same time, they will encourage settlement by assuring violators that they are being treated consistently. Additionally, although agency penalty policies do not bind courts if the penalties are judicially imposed, they can provide guidance to courts facing the task of putting a dollar figure on environmental violations.<sup>160</sup>

#### IV. ADMINISTRATIVE PROCEDURES IN ASSESSING PENALTIES

##### A. *Judicial or Administrative Penalty Assessment*

An important institutional choice that legislatures face is whether a state enforcement agency or a court should assess the civil penalty.<sup>161</sup> In recent years a trend has emerged to place this power in the agencies rather than the courts. As a result, the state penalty statutes have established various procedures that the agencies must use to impose a penalty.

##### 1. The constitutionality of agency assessment power

Traditionally, civil penalty statutes have empowered the courts rather than administrative agencies to assess penalties. For a long period of time, legal analysts questioned whether assessing penalties was an appropriate task for administrative agencies.<sup>162</sup> In contrast, penalty imposition has always been an accepted judicial function.

Doubts also existed concerning the constitutional validity of agency-assessed penalties. Some argued that courts would treat civil penalty proceedings as criminal in nature, and thus not suitable for administrative execution. The applicability of sixth and seventh amendment protections lurked in the background, and other due process claims could be envisioned.<sup>163</sup> Finally, widespread authorization of civil penalty powers

160. See *State ex rel. Brown v. Dayton Malleable*, 1 Ohio St. 3d 151, 153, 438 N.E.2d 120, 125 (1982) (trial court used EPA civil penalty policy as a guideline for assessing a penalty).

161. Marshall, *supra* note 17, at 335; Schmeltzer & Kitzes, *supra* note 14, at 850-61 (discussing the two approaches).

162. In 1955, for example, the Hoover Commission Task Force on Legal Services and Procedure warned of the problems in delegating penalty assessment to agencies. See 1 COMMISSION ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 242-44 (1955) (warning that the assessment power should not be delegated to agencies except under strict procedural safeguards).

163. See, e.g., Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281 (1978); Levin, *OSHA and the Sixth Amendment: When Is a "Civil" Penalty Criminal in Effect?*, 5 HASTINGS CONST. L.Q. 1013 (1978); Comment, *Administrative Civil Money Penalties and the Right to Jury Trial*, 33 WASH. & LEE L. REV. 719 (1976); Comment, *The Imposition of Administrative Penalties and the Right to Trial by Jury—An Unheralded Expansion of Criminal Law?*, 65 J. CRIMINOLOGY L. & C. 345 (1974); Note, *Judicial Review—Defendant Has Right to Trial by Jury and Trial De*

to agencies surely would give rise to arguments under both the non-delegation and separation of powers doctrines.<sup>164</sup>

With congressional enactment of the Occupational Safety and Health Act (OSHA)<sup>165</sup> and other statutes authorizing agencies to assess penalties,<sup>166</sup> litigants raised these issues before the courts. As a result, the constitutional doubts largely have been set to rest. Courts have affirmed that civil penalties are not criminal fines,<sup>167</sup> do not require sixth amendment criminal protections,<sup>168</sup> and do not violate the seventh amendment right to a jury trial.<sup>169</sup> They also have held that legislative delegation of factfinding and adjudicatory functions to an administrative body does not violate the separation of powers doctrine,<sup>170</sup> and have rejected delegation challenges.<sup>171</sup>

Consequently, the courts have now generally approved the constitu-

---

*Novo in Action Seeking Civil Penalties for Violation of Federal Trade Commission Order*, 88 HARV. L. REV. 1035 (1975).

164. See, e.g., B. SCHWARTZ, ADMINISTRATIVE LAW 52 (1984) ("Many state judges adopt a stricter attitude toward delegations than do their federal confreres.").

165. Occupational Safety and Health Act of 1970 (OSHA), Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-678 (1982)).

166. See, e.g., Surface Mining Control and Reclamation Act § 518, 30 U.S.C. § 1218 (Supp. 1986).

167. See, e.g., *United States v. Ward*, 448 U.S. 242 (1980). The Court held that a penalty provision of the Clean Water Act authorizing administrative imposition of penalties was civil. Thus, it did not call for the constitutional protections afforded to criminal defendants; and *Nickelson v. People*, 607 P.2d 904 (Wyo. 1980). The court rejected a claim that a civil action to assess a \$10,000 penalty for violations of the Wyoming Environmental Quality Act was criminal in nature. The court reasoned that the penalty carried no collateral consequences except a possible injunction, served a significant deterrent purpose and did not include arrest and pre-trial detention. *Id.* at 909-10. See also Tundermann, *Constitutional Aspects of Economic Law Enforcement*, 4 HARV. ENVTL. L. REV. 41, 53 (1980) (economic penalties appear to be civil, rather than criminal penalties).

168. See, e.g., *Mohawk Excavating Inc. v. Occupational Safety & Health Review Comm'n*, 549 F.2d 859 (2d Cir. 1977) (rejecting due process and sixth amendment challenges); *Clarkson Const. Co. v. Occupational Safety & Health Review Comm'n*, 531 F.2d 451 (10th Cir. 1976) (same).

169. See, e.g., *Atlas Roofing Co. v. Occupational Safety Health & Review Comm'n*, 430 U.S. 442, 460-61 (1977) (holding that absence of a provision for de novo judicial review does not violate seventh amendment right to jury trial).

170. See, e.g., *McLean Trucking Co. v. Occupational Safety & Health Review Comm'n*, 503 F.2d 8, 11 (4th Cir. 1974) (reasoning that under OSHA, fact that agency exercised initial adjudicative function did not render delegation invalid). As this Article goes into publication, the Supreme Court has before it a case raising important separation of powers and delegation issues. *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986), *prob. juris. noted*, *Bowsher v. Synar*, 54 U.S.L.W. 3561 (U.S. Feb. 10, 1986) (No. 85-1377).

171. See, e.g., *City of Waukegan v. Pollution Control Bd.*, 57 Ill. 2d 170, 311 N.E.2d 146 (1974) (upholding constitutional validity of civil penalty provisions administered by Pollution Control Board). The delegation challenge has been rejected in non-environmental areas as well. See *Thomas J. Peck & Sons v. Public Serv. Comm'n*, 700 P.2d 1119 (Utah 1985).

tional proposition that a statute may empower an agency to assess civil penalties. The choice is a legislative one.

## 2. Statutory uncertainty over assessment power

Given the procedural ramifications of the decision whether an agency or a court should impose the penalty, and that decision's importance to the enforcement process, one would expect the statutes clearly to place the penalty power in one institution or the other. In fact, most statutory schemes meet this expectation, leaving no doubt where the power lies. North Carolina's air pollution control law, for example, sets out a civil penalty limit and establishes the acts that constitute violations of the law.<sup>172</sup> The act then states that "[i]n determining the amount of the penalty, The Commission shall consider" three specific factors.<sup>173</sup> Plainly, the statute authorizes the Commission to assess the penalty.

In contrast, the Missouri Hazardous Waste Management Law invests a court with this power. If the Department of Natural Resources or the Hazardous Waste Management Commission determines that a violation has occurred or is in imminent danger of occurring, those agencies may bring suit. The complaint can request injunctive relief or "the assessment of a . . . penalty not to exceed ten thousand dollars per day for each day, or part thereof, the violation occurred and continues to occur, or both, as the court deems proper."<sup>174</sup> Once again, the statute unquestionably allocates the penalty authority.

A third possibility exists. The statutes may provide for both administrative and judicial assessment authority, as does the California Water Code.<sup>175</sup> These types of statutes typically are explicit about the circumstances under which each body sets the penalty.<sup>176</sup>

Surprisingly, however, a number of statutes on their face do not definitively allocate the authority to assess penalties.<sup>177</sup> Two examples from state hazardous waste legislation illustrate this situation:

—The Rhode Island Hazardous Waste Act includes a civil penalty

---

172. N.C. GEN. STAT. § 143-215.114(a)(1)(a)-(f) (1983).

173. *Id.* § 143-215.114(a)(3).

174. MO. REV. STAT. § 260.4251 (Supp. 1986).

175. CAL. WATER CODE §§ 13261, 13265, 13268, 13350 (West Supp. 1986). These statutes authorize both administrative and judicial penalties, with the latter available in higher dollar amounts. For example, sections 13268(c) and (d) authorize an administrative penalty of up to \$5000 per day and a judicial penalty of up to \$25,000 per day for discharging hazardous waste, refusing to furnish certain reports or knowingly falsifying information. *Id.* § 13268(c)-(d).

176. *See also* R.I. GEN. LAWS § 23-24.3-6 (1985) (violators "shall be subject to a civil penalty to be assessed by the court or the director").

177. *See* STATE CIVIL PENALTY AUTHORITIES, *supra* note 16, at 43, also noting this statutory confusion.

provision declaring: "Any person who shall violate the provisions of this chapter, or of any rule, regulation, or order issued pursuant thereto, shall be subject to a civil penalty, of not more than ten thousand dollars . . . ." <sup>178</sup> The statute is silent about whether the agency or the court imposes the penalty, unlike other provisions of the act that require filing of a complaint in court requesting penalties for unauthorized disposal. <sup>179</sup>

—Nevada hazardous waste law makes violators "liable to the department for a civil penalty of not more than \$10,000 for each day on which the violation occurs." <sup>180</sup> The statute does not specify how the penalty is to be imposed or collected; however, it authorizes the department to "recover, in the name of the State of Nevada, actual damages which result from a violation, in addition to the civil penalty." <sup>181</sup> Since this language concerning damage recovery seems to refer to a judicial action for damages, the different terminology used for the civil penalty may imply that the agency has the power to assess that penalty. But this interpretation is far from certain. <sup>182</sup>

Of course, questions over penalty authority raised by the face of a penalty statute do not necessarily have significant consequences. The uncertainty may be cleared up by reference to other statutes or to a judicial

---

178. R.I. GEN. LAWS § 23-19.1-17 (1985). Each day of a continuing violation is deemed a separate offense. *Id.*

179. *See, e.g., id.* § 23-19.1-22 (authorizing filing of a complaint requesting court to order liability for the cost of containment, clean-up, restoration and removal of hazardous wastes).

180. NEV. REV. STAT. § 444.774 (1979).

181. *Id.*

182. The penalty provisions of the Montana Hazardous Waste Act seem to present a similar problem. The act states that Montana's Department of Health and Environmental Sciences "may institute and maintain in the name of the state any enforcement proceedings." MONT. CODE ANN. § 75-10-417(2) (1985). This authorization could be read to imply administrative assessment authority, since "proceedings" may refer to administrative rather than judicial authority. *See Athlone Indus. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1492 (D.C. Cir. 1983) (making distinction between "action" and "proceeding" in finding that statute authorizing commission to "commence an action" did not authorize it to administratively assess penalties).

But the Montana statute then declares that, "upon request of the department, the attorney general or county attorney . . . shall petition the district court to impose, assess, and recover the civil penalty." MONT. CODE ANN. § 75-10-417(2) (1985). Conceivably, this language could be interpreted in three different ways: (1) the agency has no authority to initially impose a penalty; (2) the agency initially assesses the penalty, but that assessment is subject to de novo review in the district court; or (3) the district court is to impose the penalty, perhaps according some deference to the amount initially assessed by the agency.

*See also* MASS. ANN. LAWS ch. 111F § 3(a) (Michie/Law. Coop. 1984) (giving the court the power to levy penalties for violation of hazardous substance disclosure provisions, but also allowing the commission to request the attorney general to "enforce any order issued or any fine or penalty authorized by this section," thus perhaps indicating that the agency may first impose a penalty).

decision. However, commentators have observed that federal statutes often exhibit the same type of ambiguity,<sup>183</sup> and this uncertainty over penalty authority can affect enforcement. For example, environmental agencies almost always follow a policy of attempting to resolve penalty actions by negotiating with the violator before taking formal action to recover a penalty.<sup>184</sup> If the alleged violator questions the agency's authority to impose penalties, the agency may decide to compromise the penalty amount rather than risk litigation that might reject the agency's position.<sup>185</sup>

### B. Agency Penalty Assessment Procedures

If the court is to assess penalties under the statute, with limited exceptions the litigation will proceed in much the same fashion as in other civil cases.<sup>186</sup> In contrast, if the agency is to impose the penalties, penalty procedures must be established. To meet this need, state penalty statutes contain an array of procedural requirements, including methods for issuing compliance orders, notice requirements, assessment mechanisms, hearing procedures and appeal processes.

#### 1. Initiating the assessment process

##### a. compliance procedures

Once an agency discovers a violation, it faces certain choices. The agency could, of course, immediately initiate an administrative proceeding to recover a penalty. However, the agency's primary goal will be to ensure that the violation is swiftly corrected. Negotiating with the alleged violator rather than starting an adversary proceeding may attain this goal more efficiently, particularly if the violation is relatively minor and does not involve a discharge of pollutants at levels exceeding regulatory requirements. At the same time, if the violator proves willing to remedy the problem quickly, the agency must determine how this remedial action will affect any penalty assessment.

Because these considerations make the initial step of the penalty

---

183. See Goldschmid, *supra* note 14, at 906 (observing that "[t]here has been a great deal of confusion about which, if any, federal agencies have the power to adjudicate under a true administrative imposition scheme"); *EPA Judicial Officer Says Agency Cannot Assess Fines for Fuel Violations*, 12 [Current Developments] Env't Rep. (BNA) 1393 (Mar. 5, 1982).

184. See Goldschmid, *supra* note 14, at 919 (as of 1972, federal agencies "now settle well over 90% of cases by means of a compromise, remission or mitigation device.").

185. See, e.g., *Athlone Indus. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485 (D.C. Cir. 1983) (rejecting the commission's authority to impose penalties administratively); *Advance Mach. Co. v. Consumer Prod. Safety Comm'n*, 666 F.2d 1166 (8th Cir. 1981) (same).

186. See *infra* text accompanying notes 262-67.

process an important one, a number of state statutes contain procedures that govern the agencies' conduct in this area. The statutes either authorize or require agencies to take certain actions that are intended to facilitate a rapid resolution of the matter at the outset of the penalty process.<sup>187</sup>

One statutory choice would have the agency withhold any assessment of penalties until after the agency has requested the violator to correct the problem, and the violator has failed to act.<sup>188</sup> For example, in Delaware the Secretary of the Department of Natural Resources and Environmental Control may issue a thirty day notice to comply instead of immediately seeking penalties. If the recipient does not comply within that period, the Secretary can issue an order requiring compliance within a specified time. Upon failure to meet that deadline, the violator "shall be liable" for a civil penalty of up to \$25,000 for each day of continued noncompliance.<sup>189</sup>

Other methods link compliance to the penalty assessment in a more direct fashion. Under the Idaho Hazardous Waste Management Act of 1973, the Director of the Idaho Department of Health and Welfare may commence an enforcement action by sending a written notice to the violator. The notice must specify the nature of the violation and the likely actions the recipient should take to remedy the problem. It also must state that the agency may impose a civil penalty if the violation is not remedied within thirty days.<sup>190</sup> At the respondent's request, the parties will hold a compliance conference within twenty days after the recipient receives notice. If the parties agree on a plan to bring the recipient into compliance, they may enter into a voluntary compliance agreement that can include "monetary assessments in lieu of civil penalties."<sup>191</sup> For more serious violations, the statute authorizes the Director to prosecute a civil enforcement action in court without previously engaging in the compliance discussions.<sup>192</sup>

Several states provide agencies with the enforcement authority to

---

187. While provisions for cease-and-desist orders are common, *see supra* note 8, the types of procedures discussed here differ from those orders because they are directly linked to the civil penalty procedure.

188. Wisconsin has enacted a statute that facially seems to fit into this category. WIS. STAT. ANN. § 144.74(2) (West Supp. 1985) (declaring that for specified violations, "[t]he time elapsed prior to the expiration of a compliance order shall not constitute a violation").

189. DEL. CODE ANN. tit. 7, § 6309(a)(1)-(2) (1983).

190. IDAHO CODE § 39-4413(1)(a) (1985).

191. *Id.* *See also* MD. HEALTH-ENVT'L. CODE ANN. § 2.610.1(b) (Supp. 1985) (requiring the agency to provide the alleged violator "with written notice of the proposed action and an opportunity for an informal meeting" before taking action).

192. IDAHO CODE § 39-4413(2) (1985).

issue a compliance order with a conditional penalty. If the person fails to take action within the specified period, the penalty would have to be paid. This type of statute is usually silent about whether any penalty is required if the order is complied with in a timely manner.<sup>193</sup>

These types of mechanisms emphasize the importance of achieving swift compliance without penalty assessment in appropriate situations, such as when the regulatory transgression or the environmental harm is minimal. However, they also raise disturbing questions about whether they send the proper signal to regulated entities. If a statute requires that a violator receive notice and a grace period in which to correct the violation prior to penalty assessment, some violators would view this requirement as an incentive to save compliance costs until the violation is discovered. Thus, this type of compliance requirement can subvert the purpose of the law it enforces.

The same problem exists, albeit in slightly altered form, with those statutes that condition the penalty on compliance within a specified period. Once again, the regulated entity may perceive a chance to avoid penalties by taking quick action to remedy the violation. If that result occurs, the statute weakens the deterrent effect of the penalty structure by excusing any penalty for the violation that occurred during the period before notice.

To avoid sending out the wrong signal, compliance procedures should be more specific about whether a penalty remains appropriate if the violator remedies the problem within the specified period. Rapid compliance is a sign of the violator's good faith, a factor often included in penalty criteria. That good faith may deserve a lessened penalty; it does not, however, argue for no penalty whatsoever.

Finally, those statutes that make the use of such procedures mandatory should at least preserve the agency's regulatory options to deal with serious violations by immediately seeking penalties. For example, under the Delaware scheme this compliance procedure is an alterna-

---

193. Alabama's hazardous waste legislation declares that the compliance order shall state the nature of the violation and the time period within which compliance is required. ALA. CODE ANN. § 22-30-19(d) (Supp. 1981). The statute goes on to state that if a person fails to take the corrective action within the time period, "he shall be liable for civil monetary penalties of not more than \$25,000.00 each day for the violation complained of in such order." *Id.* Arizona's low-level radiation legislation has a similar procedure: "The agency may in lieu of imposing a civil penalty prescribe a time for elimination of the violation and assessment of a civil penalty if the violation is not eliminated within the time prescribed by the order." ARIZ. REV. STAT. ANN. § 30-687A (West Supp. 1985). *Cf.* WIS. STAT. ANN. § 144.74(1) (West Supp. 1985) ("The time elapsed prior to the expiration of a compliance order shall not constitute a violation.").

tive to be used at the discretion of the Secretary; the Secretary may seek civil penalties in court “[i]n lieu of the compliance order procedure.”<sup>194</sup>

*b. notice of violation*

If the agency chooses to begin an assessment proceeding, it must notify the responding party of the alleged violation.<sup>195</sup> The state penalty statutes vary widely on the type of notice required and on hearing procedures generally. Some statutes prescribe no notice whatsoever; they simply state that the enforcing officer or agency “may . . . cause a hearing to be conducted.”<sup>196</sup> Other statutes declare only that the alleged violator is to be “notified.”<sup>197</sup>

Appropriately, most statutory provisions prescribe something more. Notice is, of course, a central part of the alleged violator’s due process rights.<sup>198</sup> Accordingly, the notice minimally must inform that party of the penalty amount sought and of the alleged violations. However, the penalty figure, while important, is not of paramount practical significance to the alleged violator. Agencies often file formal penalty requests for the statutory maximum while fully expecting to settle at a much lower figure.<sup>199</sup>

The critical information needed to begin preparing a response is the factual basis for the alleged violation, and many statutes emphasize inclusion of these facts in the notice. For example, a statute typically will require the agency to “describ[e] such violation with reasonable particularity.”<sup>200</sup> A recent Arkansas radiation statute calls for more elaboration in the notice, mandating the agency to set forth “the date, facts, and

---

194. DEL. CODE ANN. tit. 7, § 6309(b) (1983). For similar procedures, see also D.C. CODE ANN. § 6-711 (1985).

195. Agencies often must give notice by certified mail. See, e.g., TENN. CODE ANN. § 68-46-114(b)(2)(A) (Supp. 1985) (alleged violator “shall receive notice of such assessment by certified mail, return receipt requested”). Personal service is, of course, an acceptable alternative. See, e.g., N.Y. ENVTL. CONSERV. LAW § 71-1709(4) (McKinney 1984) (authorizing either personal service or service by registered or certified mail for notice of hearing issued by commissioner).

196. GA. CODE ANN. § 12-9-23(b) (1981).

197. R.I. GEN. LAWS § 23-25-28 (1985) (notice and opportunity for hearing required prior to imposition of civil penalty for pesticide violation).

198. Professor Schwartz has summarized the notice requirement as follows: “The right to be heard includes the right to notice. Notice reasonably calculated to apprise parties of the pendency of the proceeding and afford them an opportunity to present their case is an elementary requirement of due process.” B. SCHWARTZ, ADMINISTRATIVE LAW 280-81 (1984).

199. See *infra* notes 287-95, discussing agencies’ propensity to settle cases. Because of this factor, the amount may be only a starting point for negotiations with little practical significance.

200. WASH. REV. CODE ANN. § 90.48.350 (Supp. 1986).



nature of each act or omission with which the person is charged" as well as to identify specifically "the particular provision, or provisions of the section, rule, regulation, order, license, or registration certificate involved in the violation."<sup>201</sup> An interesting Texas statute instructs the agency to prepare a "preliminary report" stating the factual basis for the allegation that a violation occurred and the recommended penalty.<sup>202</sup>

A number of states have established formal adjudicative hearing processes. In those states, either the statute<sup>203</sup> or the regulations<sup>204</sup> require the agency to give substantial notice to the responding party. The agency will initiate the case by a complaint or similar document that must contain allegations similar to those in judicial complaints.

Several reasons should encourage agencies to include a more complete description of the factual basis for the penalty in the notice. A skeletal notice can lead to demands for discovery, thus impeding swift deterrence, a primary goal of the penalty process. Second, the content of the notice might influence the recipient's decision whether to seek a quick settlement or to contest the penalty by requesting a hearing. For example, if the penalty was a small one and the notice stated that the penalty was being imposed pursuant to a settled penalty policy, resisting the penalty might not be an attractive option. The content of the notice also would be important where the agency has adopted a penalty policy or specific rules establishing penalty criteria and amounts. If the notice explained the assessment in sufficient detail, a respondent would know that the penalty sought was in line with penalties sought in similar situations. That knowledge might spur quick resolution of the matter.

Requiring a detailed notice is particularly important in states that make the penalty assessment effective prior to any hearing.<sup>205</sup> In those states, the responding party will have a limited period in which to request a hearing to contest the assessment. If no hearing is sought, the assessment will become a final order, and the allegation in the notice must serve as the factual findings of that order.

---

201. ARK. STAT. ANN. § 82-1525(b)(4)(A)-(B) (Supp. 1985).

202. TEX. CODE ANN. art. 4477-5 § 4.041(d) (Vernon Supp. 1986).

203. *See, e.g.*, CAL. WATER CODE § 13323(a) (West Supp. 1986) (complaints issued by the executive officers of Regional Boards "shall allege the act or failure to act that constitutes a violation of law, the provision of law authorizing civil liability to be imposed pursuant to this article, and the proposed civil liability").

204. *See, e.g.*, 25 PA. ADMIN. CODE § 21.57 (1986) (setting forth the "form and content" of a complaint); *id.* § 21.64 (establishing general rules for pleading and stating that, except where the rules provide otherwise, the various pleadings described in the Pennsylvania Rules of Civil Procedure apply before the Pennsylvania Board). *See also* N.J. ADMIN. CODE tit. 7, § 14-8.4 (1984) (establishing notice requirements for the assessment of civil administrative penalties).

205. *See infra* note 214.

*c. requests for hearings and immediately effective assessments*

Statutes commonly call for the notice to inform a respondent of the right to a hearing on the violation.<sup>206</sup> In some instances, the statute seems to require a hearing whether the violator requests it or not.<sup>207</sup> In others, the agency must only afford an "opportunity for hearing"; if the party does not affirmatively request that hearing, it is waived and the penalty will take effect.<sup>208</sup> In that event, the penalty will be subject to collection in a court action in which the defendant cannot contest the merits of the penalty assessment.<sup>209</sup> A Texas statute stakes out a middle ground. If the alleged violator consents to the penalty or fails to respond to the notice, the commission may either "assess that penalty or order a hearing to be held on the findings and recommendations in the executive director's report."<sup>210</sup>

Washington's hazardous waste law provides a slight twist on the normal process governing assessments made prior to hearing. In that state, the penalty becomes payable unless the recipient applies for review by the hearing board *or* applies for "remission or mitigation."<sup>211</sup> This provision bifurcates the available appeals. If the respondent applies only for remission or mitigation and does not request a full hearing, only the amount of the penalty, not the fact of the underlying violation, would remain at issue.

Some states impose strict time limits on the period in which the respondent must request the hearing. The period usually is not longer than thirty days<sup>212</sup> and may be as short as twenty<sup>213</sup> or even fifteen days.<sup>214</sup>

---

206. See, e.g., KAN. STAT. ANN. § 65-171s(c) (1985) (written order to state "the right of the person . . . to appeal to the secretary for a hearing on the matter").

207. See, e.g., GA. CODE ANN. § 12-8-41(b) (1982) ("The director, after a hearing, shall determine whether or not any person has violated any provision . . ."). While the statute may require a hearing even if the alleged violator does not request it, due process is not violated if the hearing is waived. See B. SCHWARTZ, ADMINISTRATIVE LAW § 5.4, at 206 (2d ed. 1984) ("As a general proposition, hearings are not required when no disputed issues are raised.").

208. LA. REV. STAT. ANN. § 30:4.1F(2) (West Supp. 1986) ("No penalty shall be assessed until the person charged shall have been given notice and an opportunity for a hearing on such charge . . ."); TEX. NAT. RES. CODE ANN. § 131.2662(a) (Vernon Supp. 1986) (alleged violator must be "given an opportunity for a public hearing").

209. See, e.g., CONN. GEN. STAT. § 22a-6b(e) (1985) (if no hearing is requested or request is later withdrawn, notice becomes final order of commissioner and matters asserted or charged in notice deemed to be admitted unless modified by consent order).

210. TEX. WATER CODE ANN. § 28.067(g) (Vernon Supp. 1986).

211. WASH. REV. CODE ANN. § 70.105.080(3) (West Supp. 1986).

212. See, e.g., KAN. STAT. ANN. § 65-170d(c) (1985).

213. See, e.g., CONN. GEN. STAT. § 22a-6b(e) (1985) ("[t]he person to whom the notice is addressed shall have twenty days from the date of receipt of the notice in which to deliver to the commissioner written application for a hearing"); HAW. REV. STAT. § 340E-8 (1976)

This requirement of a prompt response from the alleged violator illustrates the swiftness of the agency assessment procedure. If the respondent is unsophisticated, his or her rights easily could be waived.

In contrast to states that use the notice merely to initiate the proceeding, under a number of statutory schemes the penalty is made effective immediately rather than after a hearing or opportunity for hearing.<sup>215</sup> Other states are silent, but their statutory language indicates a later effective date.<sup>216</sup> Whether the assessment is effective immediately or becomes effective only after a hearing may have practical importance. At least two states follow the model established by the federal Surface Mining Control and Reclamation Act (SMCRA)<sup>217</sup> requiring that a violator place the amount of a fine in escrow or file a bond before it can appeal.<sup>218</sup> Given the significant monetary amounts in statutes authorizing the enforcing agency to set penalties,<sup>219</sup> the escrow or bond requirement likely discourages frivolous requests for hearings.<sup>220</sup>

---

("[t]he order shall become final twenty days after service unless within those twenty days the alleged violator requests in writing a hearing before the director").

214. See, e.g., KAN. STAT. ANN. § 65-3446(b) (1985) ("[a]ny person may appeal an order of the director of the division of environment by making a written request to the secretary for a hearing within 15 days of receipt of such order").

215. See, e.g., N.C. GEN. STAT. § 143-215.91(a) (1983) (oil pollution or hazardous substance penalty "shall become due and payable when the person incurring the penalty receives a notice in writing from the Environmental Management Commission").

216. KAN. STAT. ANN. § 65-3419(c) (1985), part of the Kansas Solid Waste Management Act, reads as follows:

No penalty shall be imposed pursuant to this section except upon the written order of the director of the division of environment to the person who committed the violation. Such order shall state the violation, the penalty *to be imposed* and the right of such person to appeal to the secretary of health and environment. Any such person may, within thirty (30) days after notification make written request to the secretary for a hearing thereon.

*Id.* (emphasis added). While the statute does not say when the penalty is effective, the language "to be imposed" may indicate that it becomes effective after the hearing or only after the time for requesting a hearing has passed.

217. See SMCRA § 518, 30 U.S.C. § 1268(c) (1982) (escrow requirement).

218. See WYO. STAT. § 35-11-901(d) (Supp. 1985). The Wyoming statute requires a person against whom a penalty is assessed to pay the proposed penalty in full or petition the council for review of the penalty. If the aggrieved individual files a petition, he or she must submit a bond or, if the bond is not approved, the proposed amount of the assessment which will be placed in escrow. *Id.* See also 35 PA. CONS. STAT. ANN. § 691.605(b)(1) (Purdon Supp. 1985). These types of provisions, while unusual in hazardous waste, and air or water pollution statutes, are common in surface mining laws administered by state agencies. See, e.g., ALASKA STAT. § 27.21.250(b) (1983); KAN. STAT. ANN. § 49-405c(c) (1983); TEX. NAT. RES. CODE ANN. § 131.2663(b) (Vernon Supp. 1986).

219. See *supra* notes 42-49.

220. Whether this type of requirement is a useful enforcement tool outside the strip mining context has not been extensively analyzed. Some have suggested that the process may significantly enhance the enforcement ability of the agency, particularly if, upon review, the agency

## 2. Agency hearing procedures

As with the statutory requirements for notice,<sup>221</sup> the state statutes vary widely in specifying procedures that the agency must follow at a hearing on a penalty assessment. Some statutes are quite explicit in establishing procedures that the agency must use. In other states, the agencies have complete discretion—subject to due process constraints<sup>222</sup>—in formulating their procedures.

At one extreme, the legislation may be entirely silent on the subject. The South Carolina Hazardous Waste Management Act merely states that the Department of Health and Environmental Control “may . . . invoke civil penalties,” and that a violator may appeal the Department’s decision in court.<sup>223</sup> The Department is left to establish its own rules.<sup>224</sup>

Some penalty statutes that do specify procedures emphasize that the hearing is not to take on rigid judicial trappings. The Kansas Hazardous Waste Act warns that “[n]othing in this act shall require the observance of formal rules of evidence or pleading at any hearing.”<sup>225</sup> And a state act regulating radiation purports to afford even less formality; the respondent may show only in writing why a penalty should not be imposed.<sup>226</sup>

Yet, while informality may seem appealing when compared to judicial procedures, it is probably an illusory goal in most civil penalty cases. The technical nature of environmental laws,<sup>227</sup> the significant liabilities

---

affords some type of deference to the original assessment. *See* STATE CIVIL PENALTY AUTHORITIES, *supra* note 16, at 47.

221. *See infra* notes 195-204.

222. Due process requires that, before an agency may impose a penalty or otherwise adversely affect individual rights and obligations, the affected individual must be given an opportunity to present its case. That hearing will require many of the elements of a trial-type hearing. *See* *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970). Many of the recent due process decisions have focused on the procedures required when the agency hearing occurs *after* agency action as opposed to before that action is undertaken. *See, e.g.*, *Blackhawk Mining Co., Inc. v. Andrus*, 711 F.2d 753 (6th Cir. 1983); *B & M Coal Corp. v. Office of Surface Mining Reclamation and Enforcement*, 699 F.2d 381 (7th Cir. 1983); *United States v. Hill*, 533 F. Supp. 810 (E.D. Tenn. 1982); *United States v. Crooksville Coal, Inc.*, 560 F. Supp. 141 (S.D. Ohio 1982). The issue also has arisen under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9657 (1982). *See, e.g.*, *Wagner Elec. Corp. v. Thomas*, 612 F. Supp. 736 (D. Kan. 1985).

223. S.C. CODE ANN. § 44-56-140A (Law. Co-op. 1976).

224. The Act gives general rulemaking authority to the South Carolina Board of Health and Environmental Control, the body charged with implementation of the Act, but apparently no direct rulemaking authority to the Department. *See id.* § 44-5b-30.

225. KAN. STAT. ANN. § 65-3446(b) (1985).

226. ARK. CODE ANN. § 82-1525(b)(5) (Supp. 1985).

227. *See, e.g.*, *Commonwealth v. Pennsylvania Power Co.*, 34 Pa. Commw. 546, 548 n.2, 384 A.2d 273, 275 n.2 (1978) (noting that the issue of treatment given to energy-producing

at stake,<sup>228</sup> due process requirements,<sup>229</sup> and the public interest in environmental protection add pressure to formalize the process. Further, if the agency has adopted a penalty policy to guide its penalty imposition actions, it will undoubtedly seek to have that policy and its factual findings in penalty cases accorded deference on judicial review. A court will be more likely to extend that deference if the agency's procedures provide an extensive opportunity for the alleged violator to present its case before the agency.

These considerations have led some states to mandate the use of formal processes in state administrative procedure acts at the penalty hearing.<sup>230</sup> Even if the penalty statute does not invoke a state administrative procedure act, the right to produce evidence and witnesses, and to cross-examine witnesses may be specified<sup>231</sup> in the statute or offered by the agency without statutory compulsion.<sup>232</sup>

### C. Deciding on a Penalty Amount

#### 1. The decisionmaking authority

If the penalty is to be assessed administratively, a decisionmaker must be named. The statute normally will place authority for deciding

public utilities for technologically unavoidable air pollution "will in all likelihood become one of the most complex issues of contemporary environmental law"), *rev'd*, 490 Pa. 399, 416 A.2d 995 (1980). The *Pennsylvania Power* case involved an appeal by Pennsylvania Power Company from an assessment of civil penalties by the Pennsylvania Hearing Board. *Id.*

228. See *supra* text accompanying notes 42-49.

229. Before an agency may impose a penalty, due process of course affords the respondent a chance to be heard. The amount of process required will vary depending on the situation. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). Where the liabilities are substantial in an agency-imposed civil penalty, the respondent must be accorded significant procedural protections. See *Diver, supra* note 79, at 1487. "Even where statutes do not unambiguously require an evidentiary hearing at some stage, due process requires that a full-scale trial-type hearing be provided before a civil penalty can be exacted." *Id.*

230. See, e.g., GA. CODE ANN. § 12-5-246(b) (1981); MONT. CODE ANN. § 80-8-306(5)(b) (1985); N.C. GEN. STAT. § 130A-22(e) (Supp. 1985); TENN. CODE ANN. § 68-13-714 (Supp. 1985); WYO. STAT. § 35-11-901(f) (Supp. 1985).

231. See, e.g., N.Y. ENVTL. CONSERV. LAW § 71-1709 (McKinney 1984).

232. Under recent statutory amendments authorizing it to assess civil penalties, the California Regional Water Quality Control Board has adopted a policy of informing alleged violators of their right to appear and be heard, either acting for themselves or through a representative. At the hearing, although formal rules of evidence are not followed, the Board accepts any evidence which is reasonable and relevant to the issues. See, e.g., *Agenda Item No. Six, Joe De Mello Dairy—Failure to Submit Annual Self-Monitoring Report*, Reporter's Transcript of Proceedings, Cal. Reg. Water Quality Cont. Bd., Santa Ana Region, at 4 (Apr. 12, 1985). Cross-examination of witnesses is also allowed, followed by a summation statement by the parties. *Id.*

whether a penalty is appropriate and, if so, its amount in the hands of a technocratic agency, board or commission, or an official heading an administrative body.<sup>233</sup> Colorado's water quality law is typical; the Executive Director of the Department of Health or that person's designee determines the penalty.<sup>234</sup> Other statutes call for the department charged with administering the law to make the assessment,<sup>235</sup> often allowing a hearing officer to propose a decision.<sup>236</sup>

If the legislative body opts for administrative assessment of penalties, it also could set up an administrative appeal from the initial agency decision. California's water pollution laws have a fully developed appeal system. Regional water quality control boards render the initial penalty decision after an adjudicatory hearing.<sup>237</sup> Within thirty days after the regional board decides, an aggrieved party may petition the State Water Resources Control Board for review of that regional board decision.<sup>238</sup> The state Board has discretion whether to grant review; however, if it does decide to hear the matter, the statute authorizes what amounts to de novo review.<sup>239</sup> After considering the record before the regional board and any other relevant evidence, the state Board may "affirm, modify, or set aside, in whole or in part" the regional board order.<sup>240</sup>

These types of administrative assessment provisions have two primary benefits that are superior to judicial assessment statutes. First, placing the authority in the administrative body promotes a consistency in penalty application that is impossible at the judicial level. Because the administrative authority imposing the penalty is the sole adjudicatory body, it can treat similar violations in a uniform manner. In contrast, penalty cases filed in court are likely to be heard by different judges, particularly in populous states. Consequently, achieving consistent results in those cases is doubtful.

Second, allowing the agency to impose the penalty accords with the

---

233. See, e.g., TENN. CODE ANN. § 68-25-116(b)(2)(A) (Supp. 1985) (technical secretary issues air pollution assessment).

234. COLO. REV. STAT. § 25-8-608(2) (1982).

235. MD. HEALTH-ENVTL. CODE ANN. § 7-266(b)(1) (Supp. 1985).

236. GA. CODE ANN. § 12-8-81(b) (1982) (Director of Environmental Protection Division may cause a hearing to be conducted by a hearing officer appointed by the Board of Natural Resources).

237. CAL. WATER CODE § 13323(e) (West Supp. 1986).

238. *Id.* § 13324(a). The state Board also may grant review on its own motion. *Id.*

239. *Id.* § 13324(b).

240. *Id.* § 13324(c). This review system makes an important contribution to consistent administrative decisionmaking on penalty matters in California. Without review by a California agency with statewide authority, the specter of conflicting decisions by regional boards in various areas of the state is a real one.

reason why the agency was authorized to regulate the particular environmental area in the first place—its expertise in the subject matter. Even if explicit penalty criteria will guide the penalty decision, using those criteria may present difficult technical questions. For example, the authority imposing the penalty may have to determine the seriousness of the violation or the harm caused in order to decide on an appropriate penalty amount. An environmental enforcement agency, which can draw on staff expertise, is better suited than a court to address those issues.

## 2. Mandatory or discretionary penalties

One interesting question is whether the decisionmaking body must assess a penalty if it finds a violation. The statutes generally fall into two categories, those using mandatory language and those containing wording that is directory. The first group of statutes has language that seems to require a penalty. Under those enactments, the violator "shall pay an administrative fine levied by the commission,"<sup>241</sup> the penalty is "to be assessed and levied" by the body<sup>242</sup> or the violator "shall incur" a penalty.<sup>243</sup> In the second group, an official "may invoke"<sup>244</sup> or "may assess"<sup>245</sup> a penalty, or is "authorized" to assess the penalty.<sup>246</sup>

Statutory language can clearly intend a difference between mandatory and discretionary assessment powers. For example, one part of a statute could declare that the agency "shall" impose a penalty under specified circumstances, while another part of the same statute provides that the agency "may" impose a penalty under other circumstances.<sup>247</sup> The difference in language emphasizes the legislative intent that penalties

241. NEV. REV. STAT. § 445.6011 (1979).

242. MISS. CODE ANN. § 17-17-29(1) (Supp. 1985).

243. N.C. GEN. STAT. § 143-215.91(a) (1983).

244. S.C. CODE ANN. § 44-56-140A (Law. Co-op. 1976).

245. 35 PA. CONS. STAT. ANN. § 7110.308(e) (Purdon Supp. 1985).

246. N.J. STAT. ANN. § 58-10A-10d (West Supp. 1985).

247. For example, a Louisiana penalty statute declares that a person "may be liable for a civil penalty" for specified violations, but that a person "shall be liable for a civil penalty" if the person fails to take corrective action in a timely manner after being served with a compliance order or cease and desist order. LA. REV. STAT. ANN. § 30:1073E(1)-(2) (West Supp. 1986). Similarly, Department of the Interior regulations under the federal Surface Mining Control and Reclamation Act make assessment of a penalty discretionary for certain violations, but mandatory for violating a cessation order. See 30 C.F.R. § 723.12 (1985). This regulation provides:

- (a) The Office [of Surface Mining] shall assess a penalty for each cessation order.
- (b) The Office shall assess a penalty for each notice of violation if the violation is assigned 31 points or more under the point system . . . .
- (c) The Office may assess a penalty for each notice of violation assigned 30 points or less under the point system . . . .

*Id.*

in some instances are mandatory. However, absent similar statutory wording that makes the legislative intent for mandatory penalties obvious, whether a statute may be interpreted to require a penalty will depend on the case law in the particular state.

In any event, because of other statutory provisions that affect penalty assessment, the question whether the language is mandatory has less practical significance than might be apparent at first glance. As discussed above, many state statutes give the agency express authority to mitigate or remit penalties.<sup>248</sup> Indeed, in one statute the mitigation authority is included in the very same paragraph that seems to make issuance of the penalty mandatory.<sup>249</sup> A broad legislative grant of authority like this allowing an agency to remit or mitigate penalties casts doubt on whether the agency must issue a penalty in a particular case. Additionally, the civil penalty statutes usually authorize the agency to assess a penalty within very broad dollar limits,<sup>250</sup> even if the statute makes a penalty mandatory. The agency could choose to assess a *de minimis* penalty—which would effectively make the penalty discretionary in its impact.

Finally, if the statute is mandatory but the agency nonetheless refuses to assess a penalty in a particular case, that decision is unlikely to be challenged. The alleged violator would accept the decision, and the only other check on the agency's refusal to assess would be political pressure. However, that pressure almost surely will not arise, since the public is only rarely involved in civil penalty proceedings.<sup>251</sup>

Thus, for a variety of reasons, even if issuance of a penalty was deemed mandatory under the statute, that provision is unlikely to have much practical effect.

### 3. Findings and reasons

From the standpoint of ensuring consistent agency decisions in assessing penalties, the most important procedural protection in the deci-

---

248. *See infra* notes 143-44.

249. N.C. GEN. STAT. § 143-215.91(a) (1983). This statute, after stating that a violator "shall incur" a penalty, gives the Environmental Management Commission authority to mitigate or remit a penalty in broad language: "The Environmental Management Commission may . . . when deemed in the best interest of the State in carrying out the purposes of this Article, remit or mitigate any penalty provided for in this section . . ." *Id.*

250. *See supra* text accompanying notes 54-55.

251. *But see* LA. REV. STAT. § 30:1073E(5) (West 1986) (providing that after submission of a penalty for determination at a hearing, opportunity for public comment on the penalty must be provided). At the federal level, EPA regulations provide that state programs certified under federal legislation, such as the Clean Water Act, must provide for public comment on proposed settlements of *court* litigation. *See* 40 C.F.R. § 123.27(d)(2)(iii) (1985).



sionmaking process is whether the agency explains its reasoning. Since many state civil penalty statutes contain no criteria to guide the assessment of penalties, and others setting out criteria do not indicate how to balance them, a statement of reasons will explain what penalty factors the agency thought determinative. Further, the statement can provide a precedential basis for later penalty decisions,<sup>252</sup> even if the nature of environmental penalties renders the precedent less useful than it would be in other adjudicatory systems of justice.<sup>253</sup>

Despite the usefulness of a fully developed statement of reasons, state penalty statutes do not unduly encourage them. In many instances the statutes are silent, declaring only that the penalty may be "assessed" or "imposed," or that the agency is to issue an "order."<sup>254</sup> Of course, if the agency must follow the formal adjudication procedures of a state administrative procedure act, findings are likely to be needed.<sup>255</sup> Some states require the decisionmaker to make a "finding" of violation<sup>256</sup> or to "make appropriate determinations and issue an order in accordance therewith."<sup>257</sup> Texas has one of the most explicit provisions, mandating not only findings of fact but "a written decision as to the occurrence of the violation and the amount of the penalty that is warranted."<sup>258</sup>

But these requirements are limited. Generally, the statutes on their face provide insufficient stimulus for disclosing the agency's reasoning.

252. See Diver, *supra* note 79, at 1494. "Preparation and retention of written decisions enables the agency to build an empirical base from which to generate a body of general standards." *Id.*

253. For example, to the extent that the penalty must attempt to quantify environmental harm from a discharge or take into account the ability to pay of a respondent, the penalty process perhaps allows for less use of precedent than other systems of case-by-case adjudication.

254. See MISS. CODE ANN. § 17-17-29(1) (Supp. 1985) ("such penalty to be assessed and levied by the commission after a hearing"); MD. HEALTH-ENVTL. CODE ANN. § 2-610.1(a) (Supp. 1985) ("after a hearing at which a violation is found to exist, the Department may impose a penalty").

255. See, e.g., GA. CODE ANN. § 12-5-246(b) (1982) ("A hearing officer appointed by the board after a hearing conducted in accordance with Chapter 13 of Title 50, the 'Georgia Administrative Procedure Act,' shall determine whether or not any person has violated any provision . . ."); TEX. WATER CODE ANN. § 28.067(h) (Vernon Supp. 1986) ("All proceedings under this subsection are subject to the Administrative Procedure and Texas Register Act . . .").

256. KAN. STAT. ANN. § 65-170d(b) (1985).

257. N.Y. ENVTL. CONSERV. LAW § 71-17097 (McKinney 1984).

258. TEX. NAT. RES. CODE ANN. § 131.2662(b) (Vernon Supp. 1986).

## V. JUDICIAL IMPOSITION OF PENALTIES OR REVIEW OF AGENCY PENALTY ASSESSMENTS

The court's role in the penalty process varies substantially depending on the authority that the penalty statute gives the agency to assess a penalty. If the agency initially imposes the penalty, the statute may set forth the scope of review that the court is to follow or remain silent on that subject, in which case the court must fall back on general administrative law principles. Normally, if the legislature expressly authorizes agency assessment of penalties and the agency accords respondent the full due process right to be heard, courts will review that assessment with deference to the agency's factual findings and choice of penalty.

At the other extreme, if the agency lacks power to formally assess penalties, the agency nonetheless will make an initial penalty determination for purposes of settlement discussions with the alleged violator. If those settlement discussions fail, the agency will file suit to recover a penalty, but the court will not defer to the agency's conclusion that a penalty is warranted. Thus, the judicial role in the assessment process turns on the particular civil penalty statute under which the agency operates and on the hearing that the agency has accorded to the respondent.

### A. Agency Procedures for Judicially Imposed Penalties

When the court assesses the penalty,<sup>259</sup> as opposed to reviewing an agency-imposed assessment, the procedures it employs are straightforward. State penalty statutes may affect certain aspects of the case by altering the burden of proof,<sup>260</sup> specifying venue,<sup>261</sup> or expressly establishing a right to trial by jury.<sup>262</sup> Other than this kind of minor tinkering, however, the penalty statutes usually contain nothing that is procedurally inventive. The action will be tried in the same manner as

---

259. For examples of cases where the agency files initially in court seeking civil penalties, see *People ex rel. Younger v. Superior Court*, 16 Cal. 3d 30, 544 P.2d 1322, 127 Cal. Rptr. 122 (1976) (penalty for sewage discharge); *State ex rel. Brown v. Dayton Malleable*, 1 Ohio St. 3d 151, 438 N.E.2d 120 (1982) (civil penalty for violation of National Pollution Discharge Elimination System permit); *State ex rel. Brown v. Howard*, 3 Ohio App. 3d 189, 444 N.E.2d 469 (1981) (penalties for alleged illegal disposal of solid waste); *State ex rel. Pollution Control Coordinating Bd. v. Kerr-McGee Corp.*, 532 P.2d 1386 (Okla. 1975) (penalties for discharge into creek).

260. See, e.g., UTAH CODE ANN. § 26-13-18(1) (1984) (requiring proof beyond a reasonable doubt).

261. See, e.g., TEX. STAT. ANN. art. 4477-7 § 9(a) (Vernon Supp. 1986) (establishing venue requirements for hazardous waste actions).

262. See, e.g., S.D. CODIFIED LAWS ANN. § 34A-1-39 (1977) ("An action for the recovery of a civil penalty shall, upon demand, be tried to a jury.").

other civil litigation.<sup>263</sup>

In most states, the state attorney general files the action at the request of the state agency involved.<sup>264</sup> As a practical matter, this relationship between the agency and the attorney general means that the latter often undertakes an independent review of whether to bring the action,<sup>265</sup> unless the statute mandates him or her to initiate litigation.<sup>266</sup> The attorney general also exercises considerable control over how the litigation is managed, a mixed blessing from a regulatory perspective.

On the positive side, the attorney general's oversight has a salutary effect on the penalty process. Given the significant penalty amounts that often are involved, agency arbitrariness in seeking penalties where they are unwarranted will have significant economic repercussions. Even if the court refuses to assess a penalty,<sup>267</sup> litigation defense costs for all parties can be substantial. The attorney general's oversight authority thus provides a useful second opinion on the agency's decision to seek the penalty. Centralizing the state's litigation in the attorney general's office also greatly reduces the likelihood that various state regulatory agencies will assume inconsistent positions in litigation, a real possibility if they are represented by their own counsel.

However, significant drawbacks to this arrangement exist. Friction between the attorney general's office and the agency staff can impact the agency's attainment of consistent penalty enforcement policy.<sup>268</sup> The at-

---

263. See, e.g., OHIO REV. CODE ANN. § 6111.09 (Page Supp. 1984) (declaring that the civil penalty action "is a civil action, governed by the Rules of Civil Procedure and other rules of practice and procedure applicable to civil actions").

264. ARIZ. REV. STAT. ANN. § 36-2825.01 (1984) ("The attorney general may bring a civil or criminal action to enforce the [hazardous waste] provisions . . ."). In some instances the state statute authorizes additional public officials to bring the action as well. See, e.g., CAL. HEALTH & SAFETY CODE § 42403 (West 1979) ("The civil penalties [for air pollution violations] shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, or by the attorney for any district in which the violation occurs . . .").

265. North Dakota air pollution legislation emphasizes that the choice of whether to bring the action is the attorney general's, not the agency's. The department of health is to "make all of its evidence and findings available to the attorney general for use in any remedial action his office deems to be appropriate." N.D. CENT. CODE § 23-25-10 (1978).

266. Some statutory language seems to require the attorney general to act. See, e.g., VA. CODE § 32.1-186A (1984) (all civil penalties "shall be recovered in a civil action brought by the Attorney General in the name of the Commonwealth"). Whether language like this actually constitutes a legal mandate that the attorney general must bring all actions is a question of state constitutional and statutory law. In any event, attorneys general are normally elected officials, and their offices will exercise considerable control in coordinating state litigation even if the statute seems to be mandatory.

267. See, e.g., *People v. Mobil Oil Co.*, 143 Cal. App. 3d 261, 192 Cal. Rptr. 155 (1983) (affirming trial court's dismissal of civil penalty complaint at close of plaintiff's case).

268. The same friction, of course, often has been the subject of discussion with respect to

torney general will have considerable input into any settlement agreements<sup>269</sup> and may disagree with the agency's viewpoint on the worth of the case. If the agency has adopted a penalty policy, that disagreement may affect the implementation of the policy.

Most important, however, is the prospect of substantial delay when the agency refers the case to the attorney general to institute litigation. Inevitably, coordinating the case between two bureaucratic offices is not a simple task. Since one purpose of a civil penalty is to achieve swift deterrence, the delay undermines the penalty function. This reason alone provides support for allowing the agency to assess the penalty administratively, with the attorney general representing the agency in court if the violator challenges the assessment.

### B. *Judicial Review of Agency Penalty Assessments*

If the agency has assessed the penalty in the first instance, judicial review will be available.<sup>270</sup> However, state statutes often do not clearly address either the scope of judicial review or the mechanics for review of agency assessments, a situation also common at the federal level.<sup>271</sup> In the absence of explicit guidance, state courts will review the case under principles established by state administrative procedure acts or similar state laws governing review of administrative agency decisionmaking.<sup>272</sup> If a statute does address judicial review, the parties will be most concerned with two factors: limitations on the availability of review and the scope of judicial inquiry into the agency's decision.

Statutory limitations on how a party may seek review of a penalty

---

federal enforcement. *See, e.g., Solid Waste Disposal Act Amendments of 1983: Hearings on S. 757 Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Pub. Works, 98th Cong., 1st Sess. 16 (1983)* (statements of Carol Dinkens, Ass't Att'y Gen., Land & Nat. Resources Division, Dep't of Justice, and Sen. Chafee).

269. Some statutes are explicit on this point. *See, e.g., LA. REV. STAT. ANN. § 30:4.1(I)* (West Supp. 1986) (assistant secretary with concurrence of attorney general may settle suits for penalty); *N.Y. ENVTL. CONSERV. LAW § 71-17074* (McKinney 1984) (civil penalty may be released or compromised by commissioner before the matter has been referred to attorney general; where matter has already been referred, attorney general may release or compromise any penalty or discontinue any action with consent of commissioner).

270. If the agency has no statutory authority to assess the penalty, then any action taken by the agency prior to initiating litigation will have no more effect than any other pre-litigation settlement discussions.

271. *See Schmeltzer & Kitzes, supra* note 14, at 864 ("The majority of [federal] civil penalty statutes contain no clear indication of congressional intent concerning review procedures.").

272. *See Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n*, 452 So. 2d 1152, 1158 (La. 1984) (although state's Administrative Procedure Act (APA) was inapplicable to review of decisions under Environmental Affairs Act, standards in the APA apply by analogy).

decision are not usually significant.<sup>273</sup> Most state review statutes require that the aggrieved party request review within a limited period or waive rights to attack the penalty. Under those statutes, if a party does not seek judicial review of a penalty assessment order within the allotted time, the validity of that order probably cannot be contested in a later action by the agency to collect the penalty.<sup>274</sup> Also, in rare instances a statute will require the appellant to post a bond.<sup>275</sup>

The parties' primary concern will be the scope of review. The party seeking review of the penalty assessment would prefer *de novo* review,<sup>276</sup> including the right to present additional evidence, while the agency will argue that its penalty assessment should receive judicial deference through a standard of limited review. Often the statutes are vague about the standard the court is to apply,<sup>277</sup> leaving fertile ground for litigation.

Statutes in many instances contain language traditionally found in administrative procedure acts that refers to the "substantial evidence" standard of judicial review.<sup>278</sup> For example, the Pennsylvania Administrative Agency Law establishes the scope of review of Environmental Hearing Board decisions in Pennsylvania.<sup>279</sup> Under that law, the Board's penalty decision will be upheld unless the adjudication violates appellant's constitutional or statutory rights, or a finding of fact "made by the

---

273. A Texas statute contains an interesting provision that apparently is intended to require aggrieved parties to specify the ground on which they seek review. The statute declares that a party may seek judicial review of "either the amount of the penalty or the fact of the violation or of both the fact of the violation and the amount of the penalty." TEX. CODE ANN. art. 4477-5 § 4.041(j)(2) (Vernon Supp. 1986).

274. See ILL. REV. STAT. ch. 111 1/2 § 1041(c) (West Supp. 1985) (no challenge to validity of order by Illinois Pollution Control Board may be made in an enforcement proceeding if party could have raised that issue in a timely petition for review of order under provisions of this section).

275. See MISS. CODE ANN. § 17-17-29(1) (Supp. 1985) (Mississippi Solid Waste Act requires appellant desiring to stay execution of civil penalty to post a bond "in an amount equal to double the amount of any civil penalty assessed by the commission"); MISS. CODE ANN. § 49-17-43(a) (Supp. 1985) (same).

276. Montana expressly accords *de novo* review in pesticide cases. MONT. CODE ANN. § 80-8-306(6) (1985) (appeal to district court by trial *de novo*, with jury trial granted if requested).

277. See KAN. STAT. ANN. § 65-170d(d) (1985) (authorizing any aggrieved party to apply to district court within 30 days for review of order or decision; statute does not expressly establish standard of review).

278. Under the substantial evidence standard of review, the agency's decision is upheld if supported by "substantial evidence." Substantial evidence is " 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

279. *A.H. Grove & Sons v. Commonwealth*, 70 Pa. Commw. 34, 34, 452 A.2d 586, 587 (1982).

agency and necessary to support its adjudication is not supported by substantial evidence."<sup>280</sup> Other standards of review established in state penalty statutes accord similar deference to the agency's fact-finding and penalty powers. In Illinois the agency decision may be found invalid only if it is "against the manifest weight of the evidence."<sup>281</sup> An Alabama court must sustain the agency's finding of a violation and assessment of a civil penalty if those actions are "supported by fair preponderance of the evidence."<sup>282</sup>

These standards of review obviously place a heavy burden on a party challenging the agency assessment. If the agency has decided conflicting factual assertions after a hearing, a court is likely to affirm that decision under a substantial evidence-type review.<sup>283</sup> Further, although courts could construe even these types of statutes as limiting the scope of the agency's discretion in setting the penalty,<sup>284</sup> courts normally will respect

---

280. 2 PA. CONS. STAT. ANN. § 704 (Purdon Supp. 1985). See also TEX. WATER CODE ANN. § 28.067(I) (Vernon Supp. 1986) ("Judicial review of the order or decision of the commission assessing the penalty shall be under the substantial evidence rule . . .").

281. ILL. REV. STAT. ch. 111 1/2 § 1041(b) (West Supp. 1985).

282. ALA. CODE ANN. § 22-30-19(f) (1984).

283. For a recent example of how the substantial evidence standard of review is applied to an environmental penalty assessment, see *Yaffe Iron & Metal Co. v. EPA*, 774 F.2d 1008 (10th Cir. 1985). In reviewing a decision to impose penalties under the federal Toxic Substances Control Act, the court of appeals observed: "[T]he possibility of drawing two inconsistent conclusions from the evidence does not mean that they are not supported by substantial evidence. The agency's findings as to facts . . . must be accorded due deference . . ." *Id.* at 1014.

284. For example, a long line of cases under the Illinois Environmental Protection Act carefully scrutinizes penalty assessments by the Illinois Pollution Control Board. The first case placing a judicial gloss on § 1041, the review provision of the Illinois Act, was *City of Monmouth v. Pollution Control Bd.*, 57 Ill. 2d 482, 313 N.E.2d 161 (1974). The court reversed the Board's imposition of a civil penalty because the record indicated that the city had cooperated with the agency and that technological means of abating the pollution at issue did not exist. The court relied on the legislative declaration of purpose in the Illinois Environmental Protection Act to conclude that the principal reason for imposing civil penalties must be to aid in the enforcement of the Act. *Id.* at 490, 313 N.E.2d at 166. Applying this legislative purpose to the record, the court concluded that the Board erred in imposing the penalty. *Id.*

The court relied on its reasoning in *City of Monmouth* to overturn the agency's assessment of civil penalties in *Southern Ill. Asphalt Co. v. Pollution Control Bd.*, 60 Ill. 2d 204, 326 N.E.2d 406 (1975). While the court did not find that the agency had not considered the statutory criteria, it concluded that because the record "contains substantial evidence . . . which indicates that the imposition of the penalty would not aid the enforcement of the Act," the Board had erred in imposing the penalties. *Id.* at 209, 326 N.E.2d at 409. Later cases also addressing the Board's penalty discretion include: *Mystik Tape v. Pollution Control Bd.*, 60 Ill. 2d 330, 328 N.E.2d 5 (1975) (upholding a \$3500 civil penalty); *City of East Moline v. Pollution Control Bd.*, 136 Ill. App. 3d 687, 483 N.E.2d 642 (1985) (affirming a modified \$10,000 penalty); *Wasteland, Inc. v. Pollution Control Bd.*, 118 Ill. App. 3d 1041, 456 N.E.2d 964 (1983) (upholding a \$75,000 civil penalty against a solid waste landfill operator violating its permit and ignoring abatement orders); *Harris-Hub Co. v. Pollution Control Bd.*, 50 Ill.

the agency's penalty choice.<sup>285</sup>

On balance, therefore, these statutes discourage casual litigation over penalty assessments, since a party seeking review of a penalty determination faces an uphill battle to succeed. The result strengthens the agency's enforcement hand, because its penalty decisions are less likely to be overturned.

## VI. IMPLICATIONS OF THE PENALTY STATUTES FOR ENVIRONMENTAL ENFORCEMENT

The statutes discussed in this Article strongly influence state enforcement of environmental laws. They authorize a civil penalty, set forth criteria for determining the amount of the penalty and establish the procedural rules for the penalty process. Most importantly, they also designate a court or agency to impose the penalty.

Based on the analysis above, the remainder of this Article draws several conclusions about the implications of the state civil penalty statutes. Some caution is necessary, because the statutes are not the only influence on state environmental enforcement through imposition of civil penalties. Definitive conclusions about the efficacy of the enforcement framework can be drawn only after analyzing the bureaucratic organization of state enforcement agencies, informal practices and procedures used by the agencies, including any settlement policies,<sup>286</sup> and the actual penalty decisions made in specific cases. Analysis of these factors is not a part of this Article. Nonetheless, the statutes themselves clearly have noticeable effects on environmental enforcement.

---

App. 3d 608, 365 N.E.2d 1071 (1977) (vacating a \$500 civil penalty for failure to obtain a permit).

Detailed analysis of judicial decisions such as these that impose or review penalty assessments is beyond the scope of this Article. However, this brief summary of the Illinois cases indicates that, despite a statute embodying a limited scope of review, courts can closely scrutinize agency penalty decisions for consistency with statutory purposes.

285. Courts may view penalty assessments on judicial review differently than the underlying factual determinations they rest upon. *See, e.g.,* Panhandle Coop. Ass'n v. EPA, 771 F.2d 1149, 1151 (8th Cir. 1985) (affirming penalty imposed by EPA under Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1982)). The court noted that if substantial evidence supports an order, the court must uphold it. *Id.* at 1151-52. However, the court observed that "the assessment [of a penalty] is not a factual finding but the exercise of a discretionary grant of power." *Id.* at 1152.

286. Some states have adopted informal, written penalty policies not found in adopted rules; others have unwritten procedures for settling cases. *See* STATE CIVIL PENALTY AUTHORITIES, *supra* note 16, at 70-93. The policies listed in many instances are only very informal guidelines, sometimes merely repeating statutory phrases.

*A. The Prevalence of Settlements*

Two characteristics of the state penalty statutes are particularly important in encouraging the enforcing agency and the alleged violator to settle the case when the agency seeks penalties. The first characteristic is the inordinately large amount of charging discretion that the penalty statutes place in the agency. With possible penalties commonly set at \$25,000 per violation and separate penalties allowed for each day of violation,<sup>287</sup> the mere availability of these penalties gives agencies significant bargaining leverage. For the smallest violation, the statutes authorize a potential liability that must concern even large corporate violators.

A second feature of the statutory structure is its failure to allow parties to predict monetary outcomes of penalty cases. Many statutes contain no criteria for the court or agency to use in imposing a penalty, and those that do often have standards which are not helpful. While penalty criteria cannot by themselves supply complete or even substantial predictability to penalty cases, they at least can give responding parties a sense of the important factors that are relevant in a penalty assessment. Where a statute does not set forth with any precision the factors that the court or agency is to consider, the result is a penalty process that lacks sufficient structure.

In short, these features of the penalty statutes inject a large measure of uncertainty into environmental enforcement proceedings. This uncertainty largely explains one of the most striking aspects of state environmental enforcement law: the small number of appellate cases addressing penalty imposition. The resources poured into state environmental law enforcement over the last fifteen years lead one to expect that some small but significant percentage of civil penalty enforcement cases would result in appellate decisions. That thesis has not proved true.<sup>288</sup> Instead, the

---

287. See *supra* text accompanying note 41.

288. The annotations under state civil penalty statutes indicate that few civil penalty cases have reached the appellate stage. For example, Article 71 of New York's Environmental Conservation Law contains a series of statutes authorizing civil penalties as a means of enforcing environmental laws. See, e.g., N.Y. ENVTL. CONSERV. LAW §§ 71-0507, 71-1127, 71-1929, 71-1941, 71-2103, 71-2113, 71-2303, 71-2503, 71-2703, 71-2705, 71-2907, 71-3103, 71-3703, 71-3803, 71-3903, 71-3905, 71-4003, 71-4103 (McKinney 1984 & Supp. 1986). The annotations under these statutes list only nine cases decided since 1970. Similarly, California has some of the most sophisticated environmental laws in the United States. See C. DUERKSEN, ENVIRONMENTAL REGULATION OF INDUSTRIAL PLANT SITING 218-29 app. A (1983) (ranking California as having the second strictest set of environmental standards in the country). Yet the annotation to the principal water pollution enforcement statute authorizing civil penalties, Water Code § 13350, lists only three reported cases decided since 1970. CAL. WATER CODE § 13350 (West 1971 & Supp. 1986). The principal air pollution enforcement statutes, Health and Safety Code §§ 42403 and 43016, have spawned only one reported case since their



parties settle almost all cases, a result that the structure of the penalty statutes encourages.<sup>289</sup>

The statutory uncertainty over important legal questions affects the enforcing agency and the responding party. Both may view an adverse court decision as so potentially disruptive that they determine to avoid this possibility. From the agency's perspective, it will be concerned that an adverse precedent in a reported decision will cripple its entire enforcement efforts, perhaps requiring legislative intervention in order to reverse the decision. For example, an appellate court might affirm a trial court's refusal to assess penalties despite its finding of a statutory violation, thereby casting doubt over what the agency previously had thought were routine enforcement actions.<sup>290</sup> A decision like this also would have the effect of devaluing the maximum penalty in the statute, since in the future violators might not take its threat as seriously. Alternatively, an appellate decision might increase the agency's already considerable enforcement capability by resolving uncertainty in the statutory scheme adversely to the defendant.<sup>291</sup> In a particular case, that decision could

---

respective enactments in 1975 and 1976. CAL. HEALTH & SAFETY CODE §§ 42403, 43016 (West 1979 & Supp. 1986).

Other states, particularly those that have authorized administrative assessment of civil penalties for a long period of time, have more reported decisions. Illinois, for example, lists 29 reported cases under the civil penalty enforcement provision of the Illinois Environmental Protection Act. ILL. REV. STAT. ch. 111 1/2 § 1042 (West 1977 & Supp. 1985). Nonetheless, the annotations of state penalty statutes reveal that very few of the enforcement cases brought reach the appellate level. Since enforcement agencies clearly have been active at the state level during this period, the conclusion is inescapable that almost all the cases settle.

For informal confirmation of this conclusion, see Olnier, *Polluters Settling for the 'Letter' of the Law*, L.A. Times, July 6, 1984, pt. II, at 1, col. 1. The article discusses the program for settling air pollution cases instituted by the South Coast Air Quality Management District, the air pollution enforcement agency for the Los Angeles metropolitan area.

In addressing the District's switch from criminal to civil enforcement, the article states: Before the out-of-court settlement program was established, 95% of the pollution cases were sent to criminal court. Now a mere 5% wind up there. The remaining 10% of the violators are routed to civil court, although the district's five lawyers and seven investigators have never yet had to take one to trial. They always settle.

*Id.*

289. Federal environmental agencies also settle most penalty cases. See Comment, *supra* note 13, at 462 n.186 ("The EPA currently settles the vast majority of civil penalty cases for substantially less than the statutorily permitted maximum.").

290. See State *ex rel.* Ashcroft v. Church, 664 S.W.2d 586 (Mo. Ct. App. 1984), in which the Missouri Court of Appeals affirmed a trial court's refusal to impose civil penalties for admitted violations of the state Clean Water Law. A decision like this would have ramifications beyond the parties to the litigation itself; it could seriously weaken the agency's bargaining position in subsequent settlement negotiations.

291. For example, in State v. City & County of San Francisco, 94 Cal. App. 3d 522, 156 Cal. Rptr. 542 (1979), the court construed a civil penalty provision to place the burden on the violator to demonstrate that the pollution damage was such that the penalty should be less

prove very costly to the violator.

Additional reasons peculiar to the agency and the respondent reinforce this tendency toward settlement. Agencies accept settlements because they maximize use of the limited bureaucratic resources available to them,<sup>292</sup> and perhaps because they may wish to avoid referring the matter to a state prosecutor, with the attendant delay and loss of control involved. Alleged violators, on the other hand, may prefer settlement to avoid publicity<sup>293</sup> or to secure favorable tax treatment.<sup>294</sup>

Bargained settlements, of course, are not to be discouraged. They can constitute an efficient way of using an agency's limited enforcement resources. The prevalence of settlement, however, does raise at least a question about the effect of the state penalty statutes. The lack of criteria for courts or agencies to use in setting penalties means that, in reaching a settlement, the agency has few standards to guide it. The possibility exists that settlements are too low to fully deter violators, or that agencies' settlements are not consistent.

Agency settlements always will require the exercise of a large amount of discretion. But greater precision in statutory penalty criteria and more structure in agency rules or policies concerning penalties would improve the settlement process by increasing its consistency.<sup>295</sup>

### B. Agency or Court Assessments?

A trend has emerged over almost the last two decades toward

---

than the maximum provided for in the statute. Because environmental damages are difficult to quantify, that burden could be substantial.

292. At the federal level, agencies investigate and prosecute only a small percentage of violations. *See* Diver, *supra* note 35, at 351 ("Most agencies concede that they investigate and prosecute only a fraction of all the violations that occur. The 'technology' of detection and investigation imposes relatively inflexible limits on the caseload they can generate."). There is little reason to believe that state agency enforcement is any different.

293. State agencies and attorneys general routinely issue press releases when filing actions against polluters. Even though settlement discussions will likely focus on amounts far lower than the maximum authorized by statute, when an agency cannot settle the case, the complaint usually will seek the maximum penalty authorized by statute. The attendant publicity generated by that total figure often receives substantial press coverage. *See, e.g.,* Rainey, *\$30,050 in Fines Urged for City in Sewer Spills*, L.A. Times, Aug. 9, 1985, pt. II, at 1, col. 1 (discussing proposed civil penalty against City of Los Angeles for sewage spill).

294. A penalty is not deductible if it is intended to punish. 26 U.S.C. § 162(f) (1982). *But see* True v. United States, 603 F. Supp. 1370, 1374 (D. Wyo. 1985) (holding a penalty under the Clean Water Act to be deductible).

295. Legislatures also could stress the importance of uniform and consistent decisionmaking in statutory statements of legislative intent, thereby emphasizing the importance of consistency in penalty assessments and settlements. *See* LA. REV. STAT. ANN. § 30:1073(A)(2) (West Supp. 1986) ("Violations shall be addressed in a formal and consistent manner in accordance with consistent procedures . . .").

agency rather than court-assessed civil penalties.<sup>296</sup> The Administrative Conference of the United States encouraged this practice in 1972 when it recommended increased use of civil monetary sanctions, asserting that the benefits of civil penalties could best be achieved through an administrative imposition system.<sup>297</sup> A 1979 report submitted to the Administrative Conference noted that the number of administratively imposed penalties at the federal level had grown.<sup>298</sup> The state civil penalty statutes mirror this trend; increasingly, those statutes authorize state agencies to assess civil penalties as a means of enforcing environmental laws.<sup>299</sup> The trend is particularly notable in the hazardous waste field, which has been the subject of substantial legislative efforts in recent years.<sup>300</sup>

Federal environmental statutes authorize both judicial and administrative assessment of penalties. Interestingly, however, little indication exists that Congress paid much attention to the choice between these two methods,<sup>301</sup> even though agency assessment enhances environmental en-

---

296. The beginning of the trend was the passage of the federal Coal Mine Health and Safety Act of 1969 (CMHSA), Pub. L. No. 91-173, 83 Stat. 742 (codified as amended at 30 U.S.C. §§ 801-962 (1971 & Supp. 1985)). The Act contained a section authorizing the Secretary of the Interior to impose civil penalties administratively. CMHSA § 109, 30 U.S.C. § 819. This act was followed quickly by the Occupational Safety and Health Act of 1970, which also authorized agency-imposed civil penalties. Pub. L. No. 91-596, § 17, 84 Stat. 1590, 1606-07 (codified at 29 U.S.C. § 666(j) (1985)).

297. See Goldschmid, *supra* note 14, at 896-902.

298. Diver, *supra* note 35, at 205.

299. See, e.g., CAL. WATER CODE § 13350(f)(1) (West Supp. 1986); OKLA. STAT. ANN. tit. 63, § 2012.1 (West Supp. 1985).

300. For example, since 1976 the following states have authorized administrative agencies to assess penalties in enforcing hazardous waste laws: Arkansas (ARK. STAT. ANN. § 82-4213(b) (Supp. 1985)); Delaware (DEL. CODE ANN. tit. 7, § 6309(a)(2) (1983)); Georgia (GA. CODE ANN. 12-8-81(b) (1981)); Idaho (IDAHO CODE § 39-4413 (1985)); Maryland (MD. HEALTH-ENVTL. CODE § 2-610.1 (Supp. 1985)); Montana (MONT. CODE ANN. § 75-10-417 (1984)); Nevada (NEV. REV. STAT. § 444.740 (1981)); New York (N.Y. ENVTL. CONSERV. LAW § 71-2705 (McKinney 1984 & Supp. 1986)); North Carolina (N.C. GEN. STAT. § 130A-22 (Supp. 1985)); Oklahoma (OKLA. STAT. ANN. tit. 63, § 1-2012.1 (West Supp. 1985)); Pennsylvania (35 PA. CONS. STAT. ANN. § 6018.605 (Purdon Supp. 1985)); Rhode Island (R.I. GEN. LAWS § 23-19.1.17 (1985)); Tennessee (TENN. CODE ANN. § 68-46-215 (Supp. 1985)); Washington (WASH. REV. CODE ANN. § 70.105.080 (Supp. 1986)). However, see *supra* text accompanying notes 178-82 for a discussion of the uncertainty in the Montana, Nevada and Rhode Island laws.

301. With the exception of noncompliance penalties for major stationary sources under Clean Air Act § 120, 42 U.S.C. § 7420 (1982), the legislative history of federal environmental laws provides little indication of congressional reasons for choosing between courts and agencies. For example, the Toxic Substances Control Act (TSCA) expressly provides for agency assessments of civil penalties after opportunity for an adjudicatory hearing. TSCA § 16(a), 15 U.S.C. § 2615(a) (1982). The legislative history of TSCA indicates that both the Senate and House versions of the bill provided for administrative assessment, but no explanation for the choice appears. H.R. REP. NO. 1679, 94th Cong., 1st Sess. 92-93, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 4539, 4577-78. Similarly, the Marine Protection, Research, and Sanc-

forcement in several important ways. First, it allows the agency to act swiftly, an important enforcement objective that is often given insufficient weight.<sup>302</sup> Agency assessment avoids the long delays necessarily associated with seeking judicial relief; the agency can set the matter for hearing in a matter of weeks, thus forcing alleged violators to decide quickly how they will respond. Second, agency assessment maximizes use of bureaucratic resources, since agency decisionmakers with expertise in the field will consider the often technical facts that can arise in the enforcement proceeding. For example, if the violation concerns a breakdown in air pollution control equipment, the appropriateness of a penalty in that situation may depend on understanding the characteristics and reliability of complex air pollution technology. An agency can be expected to have knowledge on this subject, while the parties in a judicial proceeding would have to educate a court about it.<sup>303</sup>

Administrative assessment also permits agencies to handle minor enforcement problems efficiently. If a monitoring report is late or a vio-

---

tuaries Act of 1972 (MPRSA) provides for agency assessment of penalties, MPRSA § 105, 33 U.S.C. § 1415 (1986), yet the legislative history gives no indication Congress even considered whether penalties should be judicially or administratively imposed. See 117 CONG. REC. 31,156 (1971) (clarification of civil penalty provision of House bill).

However, Congress adopted a different approach in enacting the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.). Section 113 of the Clean Air Act provides for a civil action to assess penalties for violations of the Act. CAA § 113, 42 U.S.C. § 7413 (1982). Section 120, however, authorizes administrative assessment of certain stationary source noncompliance penalties. CAA § 120, 42 U.S.C. § 7420 (1982).

The legislative history indicates that Congress made a conscious choice to allow administrative rather than judicial assessment of these noncompliance penalties. See H.R. REP. NO. 294, 95th Cong., 1st Sess. 72, 75, 78, reprinted in 1977 U.S. CODE CONG. & AD. NEWS at 1150-57. In adopting administrative enforcement, Congress expressly recognized the benefits of such a system: flexibility, no added burden on scarce judicial resources and more effective, expeditious enforcement. *Id.* at 78, reprinted in 1977 U.S. CODE CONG. & AD. NEWS at 1156. See also Perellis, *Noncompliance Penalties Under Section 120 of the Clean Air Act*, 16 NAT. RES. LAW. 499 (1983-84).

302. EPA's civil penalty policy recognizes swift resolution of environmental problems as an important goal: "The Agency's primary mission is to protect the environment. As long as an environmental violation continues, precious natural resources, and possibly public health, are at risk. For this reason, swift correction of identified environmental problems must be an important goal of any enforcement action." POLICY ON CIVIL PENALTIES, *supra* note 40, at 5.

303. Drayton, *Economic Law Enforcement*, 4 HARV. ENVTL. L. REV. 1 n.2. Drayton, a former enforcement chief for the State of Connecticut, observed that:

uncertainty [in determining penalties]—especially when combined with the technical complexities that characterize many environmental cases—encourages judicial procrastination and, more importantly, leads most judges either to defer imposing penalties and/or to order penalties much smaller than the economic benefits the polluter obtains from delaying or avoiding compliance. These savings are larger than most judges intuit; their analogies with other cases are often deceiving.

*Id.* at 1-2 n.2.

lation occurs but does not result in increased emissions or discharges, a small penalty determined quickly is an effective means of responding to the problem, while referral to a court would be excessive. Finally, and most importantly, the agency is in a far better position than a court to develop and apply a consistent penalty policy across different cases. Judicial litigation almost inevitably means a new decisionmaker for each case, with the attendant inconsistencies in penalty decisions,<sup>304</sup> while administrative assessment avoids this drawback. Agencies can adopt and apply a consistent penalty policy, while courts cannot assure that outcome.<sup>305</sup>

Countervailing arguments do exist to support retaining the court as the penalty imposition body. For large-scale violators, the full scope of the violation might be uncovered only after extensive discovery in litigation, and a court is probably better suited than an agency to supervise discovery. Bias is another often discussed problem.<sup>306</sup> Although authorizing an agency both to initiate the administrative proceeding and to decide its merits does not violate due process,<sup>307</sup> the dual functions sit uncomfortably on the agency. Additionally, agencies must receive new bureaucratic resources if they are to exercise the monetary assessment power.

However, the benefits of allowing the agency to assess the penalty outweigh the demerits.<sup>308</sup> If a particular case will require extensive dis-

---

304. "One problem that has continually plagued EPA efforts to discourage polluters through civil penalties is the unevenness of judicially imposed monetary penalties." J. BONINE & T. MCGARITY, *THE LAW OF ENVIRONMENTAL PROTECTION* 912 (1984). The authors cite *United States v. Velsicol Chem. Corp.*, 12 *Env't. Rep. Cas. (BNA)* 1417 (W.D. Tenn. 1978), in which the court imposed only a \$30,000 fine for an illegal discharge of toxic chemicals that lasted for at least 398 days. The fine amounted to less than \$100 per day of violation.

305. See Lawrence, *supra* note 41, at 414 (discussing the weaknesses of the courts' analytical approach in assessing penalties).

306. Discussion of possible bias was a key consideration in the legislative history of the Occupational Safety and Health Act of 1969, the act which set the stage for much wider use of administratively assessed civil penalties at the federal level. See S. REP. NO. 1282, 91st Cong., 2d Sess. 15 (1970). See also Schmelzter & Kitzes, *supra* note 14, at 857 (noting that bias and prejudgment are significant problems, although not grounds for legal reversal).

307. *Withrow v. Larkin*, 421 U.S. 35 (1975).

308. A recent United States General Accounting Office study of efforts to detect or deter illegal disposal of hazardous wastes indicates that state enforcement officials concur with this conclusion. The study observes:

California, Illinois, Massachusetts, and New Jersey environmental agencies do not have administrative authority to issue civil penalties. In those states, such matters must be referred to the state attorney general to bring civil suit. However, state officials believe that administrative penalty authority would expedite enforcement action. The Enforcement Program Manager of the Illinois Environmental Protection Agency said that the length of time, often 3 or 4 years, required to litigate cases is a problem. He believes the time would be much shorter with administrative order

covery, the statute could give the option to an agency to seek the penalty either through an administrative assessment or by filing a lawsuit. The agency could then use the judicial process in instances where it is truly effective. Possible bias is a commonly alleged problem with all adjudicatory agencies; it weighs no greater here than elsewhere. Resources obviously will be needed, but surely at no more societal cost than if courts assess the penalty.

On balance, the agency assessment process is superior to judicial imposition of penalties. It provides swift deterrence that maximizes use of agency expertise. The recent trend of statutes adopting this idea indicates that state legislatures agree.

### C. Structuring the Penalty Decision

The need for standards in agency penalty assessments is unquestioned.<sup>309</sup> They give the primary indication of legislative intent on how the penalty is to be assessed and prevent an agency from engaging in penalty efforts that will reach divergent results in similar cases.<sup>310</sup> One cannot, of course, expect penalty criteria to turn penalty assessments into an absolutely precise science. Because the standards cover a broad range of situations not easily foreseen, they must have flexibility. Nonetheless, many state penalty statutes fall short in this area, giving no guidance or only minimal guidance to the court or the agency in setting the penalty.<sup>311</sup>

Improvements are possible. The statute should clearly specify the locus of penalty authority in the agency, the court, or both. Further, the provision for consideration of "any relevant factors" contained in many

---

authority because it would not necessarily require court proceedings. The Chief of the Massachusetts Attorney General's Environmental Protection Division, the Chief of the Toxic Substances Control Division of the California Department of Health Services, and the Director of New Jersey's Department of Environmental Protection each made similar statements.

U.S. GEN. ACCOUNTING OFFICE, *ILLEGAL DISPOSAL OF HAZARDOUS WASTE: DIFFICULT TO DETECT OR DETER* 41-42 (1985).

309. See, e.g., Marshall, *supra* note 17, at 333 (criteria needed "[t]o protect against arbitrary imposition of the penalty").

310. See Diver, *supra* note 35, at 253 (concluding with respect to a federal oil spill penalty program that the variations in data "tend to confirm one's expectation that the largely open-ended regulatory standards produce widely divergent results in practice").

311. A recent EPA study of enforcement attitudes in five EPA regions and five states concluded that, with the exception of states using EPA's matrix for Resource Conservation and Recovery Act violations, and one state with a written penalty policy, consensus existed among the states that their penalty assessment process was generally "subjective." ENVTL. PROTECTION AGENCY, *EPA/STATE PERCEPTIONS REGARDING PENALTY PRACTICES AND OVERSIGHT OPTIONS*, at 4 (1985).

statutes invites the court or agency to evaluate a variety of criteria that the violator may not even know about. If the statute is specific, no need exists for consideration of these "other relevant factors." Agencies can be directed to use rulemaking powers to further specify how they will apply the statutory penalty criteria.<sup>312</sup> Statutes also should direct agencies to give a complete statement of reasons when issuing any penalty assessment.<sup>313</sup> That statement would indicate the agency's reasoning for assessing a penalty in a particular situation and would constitute a safeguard against inconsistency.

Finally, legislatures should direct agencies to make penalty assessment and settlement data easily available.<sup>314</sup> If a respondent is assured that the penalty proposed for a particular violation is not out of line with other settlements in roughly similar cases, settlement becomes more likely, saving the agency time and resources.

## VII. CONCLUSION

The authorization for state agencies to use civil penalties grew incrementally in the past. Legislators have been more concerned with establishing the substantive regulatory provisions of environmental laws than with specifying how they will be enforced. However, if the states in the future continue to invest state environmental agencies with the ability to seek substantial civil penalties, legislatures will have to consider the issues discussed in this Article more carefully. They are central to the success and fairness of a civil penalty imposition process.

---

312. *See supra* text accompanying notes 151-55.

313. *See supra* text accompanying notes 255-61.

314. *See* N.J. ADMIN. CODE tit. 7:14, § 8.7 (1984) (requiring Department to make a file of each assessment that is available for public inspections).