Chapter 7

Clean Water Act Compliance and Enforcement: EPA Targets the Coal Industry

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§ 7.01. Introduction.

The United States Environmental Protection Agency (EPA) typically engages in focused enforcement activity under the Clean Water Act (CWA), 33 U.S.C. §§ 1251, et seq., on an industry sector basis, starting with the largest companies in a particular sector. For example, the United States Department of Justice (DOJ) and EPA recently filed consent decrees in the Eastern District of Virginia resolving alleged violations of EPA’s storm water management program against four of the largest homebuilders in the United States. Those enforcement actions were a direct outgrowth of a nationwide enforcement initiative against big box retailers and high production homebuilders designed to coax the construction industry into enhanced compliance with EPA’s storm water program. Like other major CWA enforcement initiatives, it appears that EPA may now have its sights set on the coal industry and that industry’s compliance with the National Pollutant Discharge Elimination System (NPDES) permit program.

In May 2007, EPA filed a complaint in federal district court against Massey Coal Company, alleging widespread noncompliance with Massey’s numerous NPDES permits governing wastewater discharges from its coal mining operations. The alleged violations totaled nearly $2 billion in potential civil penalties. The parties negotiated a settlement, which was filed in January 2008, for a $20 million civil penalty payment and additional injunctive relief and supplemental environmental projects. The court approved the agreement in early April 2008.

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5 In addition to paying the civil penalty, Massey must implement various environmental auditing programs, such as an electronic tracking system for its numerous discharge monitoring reports (DMRs), and undertake supplemental environmental projects, including 20 stream remediation projects and conservation easements for 200 acres of land. United States v. A.T. Massey Coal Co., 2008 WL 1744630 (S.D. W.Va. April 9, 2008).
6 Id.
It is expected that EPA will target additional coal companies for further NPDES investigations and enforcement actions, and indeed, there are indications that it already has done so. The purpose of this chapter, therefore, is to provide the coal industry with an overview of what to expect should EPA come knocking on the door.

This chapter will provide an outline of federal CWA enforcement actions, starting with EPA information requests under CWA section 308. It will discuss EPA’s internal administrative enforcement options (administrative penalties and administrative compliance orders), as well as the expected chain of events should an enforcement case be referred to DOJ. The limited protection offered by state settlements will also be reviewed. Finally, for those companies who want to proactively manage potential CWA liabilities, this chapter will summarize environmental auditing practices and the benefits and risks of EPA’s voluntary disclosure policy.

In short, the goal of this chapter is to better arm companies potentially subject to CWA enforcement actions and help them grasp the exposure they face by explaining the phases and factors that guide EPA and DOJ decision-making, which in turn may help companies craft strategies to minimize that exposure and the potential financial and public relations impacts associated with CWA enforcement actions.

§ 7.02. Initiation of Enforcement Inquiry – CWA Section 308 Requests.

Most CWA enforcement actions begin with an innocuous letter from EPA requesting compliance information from a company. Such requests need to be analyzed carefully and taken seriously, as they are the first indication that a company has fallen within EPA’s enforcement sights. Those requests should also be analyzed for compliance with CWA section 308. As explained below, while EPA’s authority under section 308 is broad, it is by no means unlimited.


Section 308 provides in relevant part:
Whenever required to carry out the objective of this chapter, including but not limited to . . . determining whether any person is in violation
[of the Act] . . . the Administrator shall require the owner or operator of any point source to 
(i) establish and maintain such records, 
(ii) make such reports, 
(iii) install, use, and maintain such monitoring equipment or methods . . . , 
(iv) sample such effluents . . . , and 
(v) provide such other information as he may reasonably require . . . .

Section 308 grants the EPA Administrator broad authority to require the owner or operator of a point source to maintain records, make reports, perform monitoring and sampling, and provide information to EPA as is “reasonably” required to carry out the purposes of the Act. Section 308 also gives EPA the ability to enter and inspect facilities of an “effluent source,” along with its records.


Courts have interpreted EPA’s section 308 authority broadly: “The breadth of this statutory grant of authority is obvious. In our view, the statute’s sweep is sufficient to justify broad information disclosure requirements relating to the Administrator’s duties, as long as the disclosure demands which he imposes are ‘reasonable.’” In NRDC, the D.C. Circuit upheld EPA’s ability under section 308 to require NPDES permit applicants to list all toxic pollutants currently used or manufactured as an intermediate or final product or byproduct. Thus, EPA was not limited to information related to toxic pollutants in a facility’s effluent discharge – it could obtain information under section 308 on all toxic pollutants at a facility, because they could be discharged from the facility.

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7 33 U.S.C. § 1318 (emphasis added).
8 Id.
9 Id.
11 See Ackels v. EPA, 7 F.3d 862 (9th Cir. 1993) (requiring monitoring based on discharge from mining operations, rather than based on sluicing, was reasonable and within the scope
While EPA enjoys broad authority to make a wide variety of requests from regulated entities, those requests must pass the threshold test of reasonableness. For example, is it reasonable for EPA to demand that a company not only turn over all its discharge monitoring reports, but also analyze, synthesize, and summarize the data for EPA in an easy-to-read spreadsheet? Arguably, a company should only be required to turn over the data it maintains in the ordinary course of business and not be required to create EPA’s enforcement work product. That argument is untested thus far in the courts, and a company will have to balance the costs of complying with EPA’s onerous request with the risks of litigating whether EPA has overstepped section 308’s limit on reasonableness.

There are three other aspects of section 308 requests that warrant mention. First, EPA will not disclose confidential business information submitted under section 308 to third parties.\(^\text{12}\) This is valuable protection for companies that have been targeted by private organizations that seek to delay or halt regulated commercial activity. Second, section 308 is not self-enforcing. “Upon a company’s refusal to comply with a request for information, the EPA must seek a court enforcement order under section 1319(a)(3)(b).”\(^\text{13}\) Thus, should a company refuse to comply with certain unreasonable portions of EPA’s request, EPA must balance whether to acquiesce or expend its resources on litigating the issue as it has no automatic enforcement option in section 308. Finally, EPA has authority under section 308 to seek and act upon an \textit{ex parte} administrative search warrant.\(^\text{14}\)

\(^{13}\) Trustees for Alaska v. EPA, 749 F.2d 549, 560-61 (9th Cir. 1984).
§ 7.03. \textbf{Administrative Enforcement Actions Within EPA.}

Not all CWA enforcement matters become civil or criminal cases involving DOJ, as occurred with Massey’s civil action. On many occasions, EPA chooses to handle enforcement internally, utilizing the tools and authority granted in CWA section 309. Those tools include administrative compliance orders and administrative penalties, both discussed below.

[1] \textbf{Administrative Compliance Orders.}

Under 33 U.S.C. § 1319(a), EPA has discretion to issue an administrative compliance order (“ACO”) for violations of the Act. ACOs are orders that declare a CWA violation has occurred, demand compliance with the Act, and require various forms of injunctive relief, which on many occasions include costly compliance initiatives. Failure to comply with an ACO can trigger civil penalties of up to $25,000 per day per violation.\footnote{33 U.S.C. § 1319(d)(the maximum administrative and civil penalties enumerated in the CWA have been adjusted over time to account for inflation through congressionally-mandated agency rulemaking; the next upward adjustment is expected by the end of 2008).}

There is a fundamental legal flaw in the ACO statutory scheme – ACOs are issued without adjudication or meaningful judicial review. In other words, the liability determination lies solely with EPA, and there is no opportunity for a company to contest the facts or the law underlying the allegations of a violation. What’s more, ACOs can be issued on the basis of “any information” available to EPA – from the media, anonymous tips, or other sources.\footnote{\textit{Id.}} This standard is less rigorous than probable cause. If a company disagrees with whether a CWA violation occurred or whether EPA has CWA jurisdiction over the matter set forth in the ACO, there is no opportunity for judicial review of the legal or factual underpinnings of the order. In fact, if a company decides to disobey the ACO and subject itself to further civil penalties and enforcement litigation, the resulting adjudication over penalties will only
review whether the ACO was violated, not whether the ACO was properly issued in the first instance.

The constitutional infirmities here are obvious – companies are denied full due process before having to incur substantial penalties for violating an ACO. While courts have not yet had the opportunity to rule on the legality of the CWA ACO scheme, the ACO scheme under the Clean Air Act (CAA), which is nearly identical to the CWA in this regard, has been ruled unconstitutional.\textsuperscript{17} In \textit{TVA v. Whitman}, the U.S. Court of Appeals for the Eleventh Circuit held that the ACO scheme in the CAA is unconstitutional to the extent that severe civil and criminal penalties can be imposed for noncompliance with the terms of such an ACO. The scheme is “repugnant to the Due Process Clause of the Fifth Amendment.”\textsuperscript{18}“Before the Government can impose severe civil and criminal penalties, the defendant is entitled to a full and fair hearing before an impartial tribunal ‘at a meaningful time and in a meaningful manner.’”\textsuperscript{19} The Eleventh Circuit held that EPA had to prove the existence of a CAA violation through an enforcement action in federal district court, and until that occurred, TVA was free to ignore the ACO without risking penalties for noncompliance.\textsuperscript{20}

No case has yet been decided that definitively extends the \textit{TVA} analysis to the CWA ACO scheme. In one attempt, plaintiffs sought to invoke \textit{TVA} to invalidate a preliminary jurisdictional determination by the Corps regarding various wetlands on plaintiffs’ property.\textsuperscript{21} The court rejected plaintiffs’ arguments because as an initial matter “there has been no claim that a jurisdictional determination itself had the kinds of consequences that an ACO was to have” in \textit{TVA}.\textsuperscript{22} The court was quick to note, however, that the CWA

\begin{itemize}
\item \textsuperscript{17} TVA v. Whitman, 336 F.3d 1236 (11th Cir. 2003).
\item \textsuperscript{18} \textit{Id.} at 1258.
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{Id.} at 1259.
\item \textsuperscript{21} See St. Andrews Park, Inc. v. Army Corps of Eng’rs, 314 F. Supp. 2d 1238 (S.D. Fla. 2004).
\item \textsuperscript{22} \textit{Id.} at 1243.
\end{itemize}
did have identical language to the CAA language invalidated in TVA, but plaintiffs’ case suffered from a fatal omission – no enforcement orders had yet been issued, so the TVA rationale could not support plaintiffs’ premature claim. The court found that the preliminary jurisdictional determination did not amount to a reviewable “final agency action” and dismissed plaintiffs’ claim for lack of jurisdiction.

In April 2008, a case was filed in Idaho district court that may provide the proper framework for a parallel CWA decision on the constitutionality of ACOs. In Sackett v. EPA, EPA determined that plaintiffs’ wetlands were subject to CWA jurisdiction, that plaintiffs violated the CWA by filling those wetlands, and that plaintiffs must immediately begin “substantial and costly restoration work, including removal of the fill material, replanting, and a three-year monitoring program during which the property must be left untouched.” Plaintiffs filed suit seeking a declaration that their wetlands are outside CWA jurisdiction and that the ACO violates plaintiffs’ procedural and substantive due process rights for failing to give plaintiffs an opportunity to contest the factual and legal basis for the ACO. This case may produce the result akin to TVA that CWA regulated entities have been seeking.


For relatively minor violations, EPA typically invokes its administrative penalty authority and collects civil penalties with internal resources and without elevating a matter to DOJ. Under 33 U.S.C. § 1319(g), EPA may assess Class I or Class II civil penalties for violations of the CWA.

A Class I penalty may not exceed $25,000. In a Class I proceeding, EPA must provide written notice and an opportunity to request a hearing. The

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23 Id. at 1242.
24 Id. at 1245.
25 Sackett v. EPA, 2008cv00185, Complaint at ¶ 2 (D. Idaho, April 28, 2008). In August, 2008, the district court dismissed the complain for lack of jurisdiction, rejecting the plaintiff’s argument under TVA v. Whitman. The decision is on appeal at the time of publication.
CLEAN WATER ACT COMPLIANCE AND ENFORCEMENT § 7.04

hearing, however, is not subject to the Administrative Procedure Act, “but shall provide a reasonable opportunity to be heard and to present evidence.”27 A Class II penalty may not exceed $125,000.28 In this proceeding, EPA must provide notice and an opportunity for a hearing “on the record” in accordance with Section 554 of the Administrative Procedure Act.29

Class I and II proceedings under CWA section 309(g) are conducted in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Correction Action Orders, Revocation, Termination or Suspension of Permits.”30 Unless there is a fundamental jurisdictional defense or a factual error underlying the allegation of violation, it is usually more cost effective for a company to negotiate an administrative settlement with EPA under Class I or II proceedings than go through an administrative litigation. Such settlements will usually protect a company from private citizen suit litigation for the same violations.

§ 7.04. Referral to DOJ – Road to a Consent Decree or Trial.

If EPA determines based on its review of the section 308 information and other evidence that there have been significant violations of the CWA at a facility, it may refer the case to DOJ for civil or criminal enforcement. EPA is more likely to refer a case if it detects a pattern of significant noncompliance at multiple facilities. Most CWA enforcement cases take the civil route, as criminal cases usually involve intentional discharges, serious environmental harm, or the intentional falsification of records. A further key distinguishing factor between typical criminal and civil CWA enforcement cases is a finding by EPA in criminal cases that environmental compliance was intentionally sacrificed in an effort to improve financial performance.

27 Id.
28 Id. § 1319(g)(2)(B).
29 See id.

The first step in a civil enforcement case involving DOJ is usually the issuance of a notice letter to the company outlining the alleged violations and the potential civil penalty the government could seek if the case goes to trial. The letter will invite the company to negotiate a settlement, usually under a compressed schedule.

At this point, the company needs to assess its potential liability, any defenses it may have, and whether it wants to aggressively defend the allegations or earnestly seek a settlement. It is usually best to assume a litigation-based posture at this point regarding document retention policies, privilege and confidentially issues, and engagement of counsel and other consultants, even if the ultimate strategy is to settle.

If the parties enter serious settlement negotiations, the government will be looking to establish a compliance program that it will embody in a consent decree to ensure that CWA compliance improves in the future. This is referred to as the injunctive relief component of the consent decree. The government will also seek to establish stipulated penalties for future violations of the consent decree and a civil penalty component. The amount of the civil penalty will be based in part on EPA’s CWA Civil Penalty Policy, discussed below.

If the parties reach a settlement, the government will file a complaint and lodge the proposed consent decree in a U.S. district court. Once the complaint is filed and the consent decree lodged, DOJ will publish the proposed settlement in the Federal Register and will give the public 30 days to comment. DOJ will instruct the court not to take action on the complaint until after the public comment period has expired. After the comment period has ended, DOJ will file a statement with the court summarizing those comments and will move for entry of the consent decree as an order of the court.


As noted, a key element in determining the penalty amount the federal government will accept in settlement of a CWA enforcement matter is how EPA’s CWA Civil Penalty Policy applies to the alleged violations. That policy establishes a framework for calculating a “bottom line” settlement.
amount it will accept in CWA enforcement actions. The minimum penalty generally seeks to recapture the violator’s economic benefit of noncompliance plus an additional gravity-based component to serve as a deterrent for future behavior. The principal factors that EPA will consider in calculating the minimum settlement amount include: (1) the economic benefit of noncompliance, (2) the significance of the violations, (3) whether the violations present actual or potential harm to human health or the environment, and (4) any history of recalcitrance. EPA will also consider the strengths and weaknesses of the case and will adjust the penalty amount depending on what a court or administrative judge would likely award at trial.

If an enforcement action proceeds to trial, however, EPA will not use its penalty policy as the basis for the penalty amount it seeks. EPA will instead seek penalties that are higher than what it would have accepted in settlement. More importantly, the federal courts will not rely on EPA’s penalty policy as the basis for calculating penalties under CWA section 309(d), but they may use it as guidance.


In assessing a civil penalty in a CWA enforcement case, courts typically begin by calculating the maximum penalty available under the CWA by multiplying $32,500 (as of March 2004) times the number of days of

32 Id. at 3.
33 Id. at 4-13.
34 Id. at 13.
35 Id. at 22.
36 Id.
37 See Atl. States Legal Found. v. Tyson Foods, Inc, 897 F.2d 1128, 1142 & n.23 (11th Cir. 1990)(“While the court may find the EPA’s Penalty Policy helpful in determining the appropriate fines, the court’s primary focus should be on the statutory language of section 1319(d).”.

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violation for each category of violation.\textsuperscript{38} Courts then use the following six statutory factors to calculate an actual penalty given the specific facts and circumstances of each case:

- The seriousness of the violation;
- Any economic benefit gained through noncompliance with the law;
- The defendant’s history of CWA violations;
- Good faith efforts at compliance;
- The potential economic impact of the penalty on the defendant; and
- “Such other matters as justice may require.”\textsuperscript{39}

The federal courts are granted substantial discretion when imposing civil penalties under the CWA,\textsuperscript{40} which allows them to select their own method of calculating the actual penalty.\textsuperscript{41} But each court must consider the CWA statutory factors regardless of the method it employs.\textsuperscript{42}

Courts typically use one of two principal techniques to calculate penalties under the CWA: (1) a “top down” method or (2) a “bottom up” method.” The “top down” method uses the statutory maximum penalty as the “departure point” and then usually reduces the civil penalty based on the six statutory factors.\textsuperscript{43} The “bottom up” method uses the economic benefit factor to


\textsuperscript{39} 33 U.S.C. § 1319(d).


\textsuperscript{41} United States v. Mun. Auth. of Union Twp., 150 F.3d 259, 265 (3d Cir. 1998).

\textsuperscript{42} Tyson Foods, 897 F.2d at 1141.

establish a baseline penalty and then usually adjusts that penalty upward based on the five remaining factors.44

If a CWA violation is proven, most courts have determined that some minimum civil penalty is required.45 The amount of the assessed penalty, however, is “wholly within the discretion of the court.”46 And as demonstrated by the overwhelming majority of CWA enforcement cases, the final civil penalty assessment bears little resemblance to the statutory maximum. For example, in the Avatar case, the court began its penalty analysis by multiplying daily violations for three different sites by $25,000 to calculate a statutory maximum penalty of $53,300,000.47 The court used this figure as its “departure point” and then reduced the penalty after considering the application of the six statutory factors in relationship to the facts of the case.48 The court ultimately imposed a penalty of $309,710.49 Such a significant reduction, in fact, is the norm in CWA cases.50

A court’s assessment of the statutory factors enumerated in section 309(d) clearly plays a key role in determining an appropriate civil penalty amount, but the devil is usually in the factual details for each individual case.51 A court may consider, for example, any fact that bears upon the defendant’s culpability with regard to each factor and use that fact in making a determination as to the appropriate penalty. Below we provide some

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44 See United States v. Smithfield Foods, 191 F.3d 516, 528 & n.7 (4th Cir. 1999); Allegheny Ludlam, 366 F.3d at 178 n.6.
46 Hawaii’s Thousand Friends, 821 F. Supp. at 1394.
47 Avatar, 1996 WL 479533 at *5.
48 Id.
49 Id. at *16.
50 See, e.g., Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 576 (5th Cir. 1996)($186,070 imposed out of a maximum penalty of $20,225,000); Hawaii’s Thousand Friends, 821 F. Supp. at 1395-97 ($718,000 imposed out of a maximum penalty of $249,350,000).
51 See Gulf Park, 14 F. Supp. 2d at 868 (“Each case must be decided on its own facts.”).
examples of how the courts have applied each statutory factor to various fact scenarios.

[a] — Seriousness of the Violation.

In evaluating the seriousness of violations, courts have considered the number, duration, and degree of the violations as well as actual or potential harm to human health and the environment. In this analysis, some courts have found that the lack of environmental harm is a “significant mitigating factor” while other courts take the view that significant penalties may be warranted even without proof of actual harm.

For example, in Universal Tool, the court noted that “[n]otwithstanding the sheer number of violations by the defendant, the court finds there has been minimal environmental damage as a result of the violations.” The defendant had violated several NPDES effluent limits, but the court found that there was no evidence that the contaminants were actually being carried to a nearby river, and also found that there were other significant point and non-point sources of pollutants that discharged into the water body at issue. “Accordingly, the court will consider the lack of material environmental harm as a significant mitigating factor.”

In contrast, the court in Smithfield Foods found that the defendant’s violations were “frequent and severe” because the defendant violated its permitted discharge limits nearly 50 percent of the time and “excessively exceeded” its permit limits in terms of amounts discharged. In considering the impact of the defendant’s violations on the environment, the court

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53 Id. at 50.
55 Id. at 748.
56 Id. at 749.
wrote that it “may justifiably impose a significant penalty if it finds there is a risk or potential risk of environmental harm, even absent proof of actual deleterious effect.”

[b] — Economic Benefit.

The economic benefit that a “violator enjoys as a result of violating the CWA is a critical component of any penalty analysis under the CWA…” As one court has phrased it, the “purpose of this component of section 1319(d) is obvious. A defendant should not be placed in a better position, due to its failure to comply with the law, than it would be if it had made the necessary expenditures to comply with the law.” Thus, most courts require the civil penalty to exceed the economic benefit of noncompliance to serve as an adequate deterrent for future violations. Where the exact economic benefit cannot be ascertained, the courts will simply estimate the benefit given the facts and testimony available to them.

Courts generally focus on the savings from avoidance or delay to calculate the economic benefit of noncompliance. For example, in *Smithfield Foods*, the court explained that analysis of the economic benefit factor is meant to provide “an approximation of the amount of money a company has gained over its competitors by failing to comply with the law,” and is used “to level the economic playing field and prevent violators from gaining unfair competitive advantage.” The court concluded in that case that the defendant had gained an economic benefit of approximately $4,253,070 as a result of delaying the purchase, installation and construction of equipment that would have allowed it to comply with its NPDES permit. In *Union Township*,

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58 Id. at 344.
59 *Catskill Mountains*, 244 F. Supp. 2d at 50.
60 *Gulf Park*, 14 F. Supp. 2d at 862.
61 See id.
62 See id. at 863-64; *Smithfield Foods*, 972 F. Supp. at 348.
64 Id. at 349.
the court calculated the defendant’s economic benefit based on the earnings that it was able to achieve as a result of processing volumes of material that caused it to exceed its permitted amounts of discharge.\(^{65}\) And the *Avatar* court concluded that because the defendant enjoyed an economic benefit by deferring investment in capital improvements that would have alleviated the discharge problems, it had gained significant economic benefit.\(^{66}\)

[c] — **History of Violations.**

Courts also consider the history of prior violations as a significant factor in the penalty calculus. “In determining the history of such violations, courts consider the duration of defendants’ current violations, whether defendants have committed similar violations in the past, and the duration and nature of all such violations, including whether the violations are perpetual or sporadic.”\(^{67}\) For example, in *Universal Tool*, the court refused to mitigate the maximum penalty based on the history of defendant’s violations because it found that the defendant had been in violation since effluent discharges were first regulated in 1975.\(^{68}\)

Historic noncompliance, however, does not necessarily doom the analysis. In *Bosma*, the defendant had operated his dairy farm for many years without having applied for an NPDES permit, in spite of having been instructed to do so by the state environmental agency.\(^{69}\) However, over time and as the dairy farm grew, the defendant invested in substantial and expensive improvements in the capacity of the farm to contain the wastewater generated.\(^{70}\) Because of that fact, and because the defendant had no verified

\(^{65}\) *Union Twp.*, 929 F. Supp. at 805.
\(^{66}\) *Avatar*, 1996 WL 479533 at *8.
\(^{67}\) *Gulf Park*, 14 F. Supp. 2d at 864.
\(^{68}\) *Universal Tool*, 786 F. Supp. at 751.
\(^{69}\) CARE v. Bosma Dairy, 2001 WL 1704240 at *13 (E.D. Wash. 2001), aff’d, 305 F.3d 943 (9th Cir. 2002).
\(^{70}\) *Id.*
violations since those improvements were made, the court allowed for a modest reduction in the maximum penalty.\textsuperscript{71}

**[d] — Good Faith Efforts at Compliance.**

Under the good faith factor, courts generally review the record for evidence that the violator took action to reduce the number of violations or mitigate the impact of their noncompliance, resulting in a mitigation of civil penalties.\textsuperscript{72} For example, the defendants in \textit{Avatar} had explored methods for improving compliance, although their efforts were prolonged over the course of several years due to concerns about the cost of improvements.\textsuperscript{73} Despite these delays, the court allowed for a small mitigation of the maximum penalty based on the improvements considered by the defendants, and the few efforts made to come into compliance with the CWA.\textsuperscript{74} In the \textit{Bosma} case, the court found that despite the fact that Mr. Bosma had “disrespected” the CWA over the years, he had hired consultants and made improvements to his operations to try to prevent wastewater discharges, which warranted a modest reduction in the maximum penalty that was otherwise available.\textsuperscript{75}

In considering good faith efforts in the \textit{Union Township} case, however, the court found that because the defendant’s permit required it to submit monitoring reports on a monthly basis, the defendant must have been aware of its violations, but still took no meaningful action to remedy the situation.\textsuperscript{76} The defendant was “essentially indifferent to its violations of the Clean Water Act.”\textsuperscript{77} While the defendant had made various efforts to address its permit violations, none proved successful until it ultimately installed an

\textsuperscript{71} Id.; see also \textit{Avatar}, 1996 WL 479533 at *9 (penalty mitigation was allowed because the defendant had few prior violations).

\textsuperscript{72} \textit{See Smithfield Foods}, 191 F.3d at 531.

\textsuperscript{73} \textit{Avatar}, 1996 WL 479533 at *9-10.

\textsuperscript{74} Id.

\textsuperscript{75} \textit{Bosma}, 2001 WL 1704240 at *13-14.

\textsuperscript{76} \textit{Union Twp.}, 929 F. Supp. at 803-04.

\textsuperscript{77} Id. at 808.
expensive pretreatment system. The court found that the defendant’s delay in committing itself to a serious solution did not “speak highly of its good faith in this manner.”

[e] — Potential Economic Impact of the Penalty on the Violator.

Courts also consider the financial health of the violator to determine the appropriateness of the size of the civil penalty. For example, the court in Avatar found that the cost of capital improvements to come into compliance with the CWA would exhaust the defendant’s credit. Therefore, the court considered the ability to pay as a mitigating factor in setting the civil penalty amount. However, the burden is on the defendant to prove that the “penalty would be ruinous or otherwise disabling.” That is because the “main purpose of the penalty is to deter the violator and others from committing future violations,” a factor that courts must take into account when considering the economic impact of a possible penalty on the defendant.

In Union Township, the court looked to the parent corporation of one of the defendants (Dean Dairy) to determine whether the civil penalty would impose a significant economic impact. The court found that because the parent (Dean Foods) receives the profits of its subsidiaries and provides its subsidiaries with funding for expenses through annual capital budgets, the court could consider the assets of Dean Foods in making its determination of the potential economic impact on the violator.

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78 Id. at 804.
79 Id. at 808.
80 Avatar, 1996 WL 479533 at *11.
81 Id.
82 Gulf Park, 14 F. Supp. 2d at 868 (rejecting arguments that the defendant did not have the ability to pay substantial penalties).
83 Smithfield Foods, 972 F. Supp. at 352 (finding that a $16 million penalty, representing 6.4 percent of defendants’ stockholders’ equity, would have a “material, but not detrimental effect on the company’s financial condition.”).
84 Union Twp., 929 F. Supp. at 805 (finding that Dean Foods could absorb the substantial fine levied against Dean Dairy in the case).
[f] — “Such Other Matters as Justice May Require.”

This final statutory factor has been characterized as an opportunity for courts to “either increase or decrease the penalty in light of other matters, such as bad-faith conduct of the violator, a violator’s attitude toward achieving compliance, and the violator’s ability to comply with the Act.” 85 For example, in 
*Catskill Mountains*, the court allowed some mitigation of the civil penalty where the defendant thought it was in compliance and was never informed by the regulatory authorities that it was not. 86 It was not until a citizen suit was filed that the nature of the violation even became known. 87

§ 7.05. Settlements with State Regulators – Not a Full Defense.

In the wake of the Massey settlement, some companies have entered into consent settlement agreements with their state regulators, asserting that such settlements will protect them from EPA and citizen suit enforcement. Unfortunately, those settlements do not provide complete protection. In 33 U.S.C. § 1342(i), EPA retains authority to enforce permits in states that administer their own delegated or approved NPDES programs – “Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.” EPA’s regulations shed further light on its authority, as follows:

A civil penalty assessed, sought, or agreed upon by [the State] shall be appropriate to the violation. Note – to the extent that State judgments or settlements provide penalties in amounts which EPA believes to be *substantially inadequate* in comparison to the amounts which EPA would require under similar facts, EPA, when authorized by the applicable statute, may commence separate actions for penalties. 88

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86 *Catskill Mountains*, 244 F. Supp. 2d at 54.
87 *Id.*
88 40 C.F.R. § 123.27(c)(emphasis added).
Thus, it is critical when negotiating a settlement with a state regulator to be sure that the penalty amount is substantially adequate in light of the scope of violations subject to the settlement. If EPA perceives a “sweetheart deal” in the penalty paid, it will not hesitate to pursue its own action for penalties, particularly in an industry sector subject to an enforcement initiative.

Moreover, while it is true that citizens are barred from enforcing violations that have been diligently prosecuted by EPA or the states, and courts will work from a strong presumption of diligence, a consent settlement agreement with a state will not always qualify as “diligent prosecution” if the court finds the negotiated penalties and/or injunctive relief inadequate. It is critical that companies analyze the adequacy of settlement agreements against the standards that both EPA and the courts will utilize, paying particular attention to the relationship between the penalty paid and the economic benefit enjoyed from the CWA violations.

§ 7.06. Auditing and Environmental Management System Considerations.

When faced with a potential industry-wide enforcement initiative, it may be worthwhile for coal companies to assess their current CWA compliance records and make corrections if noncompliance is found. The goal would be to enhance compliance before EPA’s enforcement branch knocks on the company’s door. This effort cannot resolve past liability, but it minimizes future liability and reduces the injunctive relief options for the government in potential future litigation.

If a company decides to perform an environmental audit, it should perform those audits as soon as possible at all facilities subject to the CWA violations.

89 33 U.S.C. § 1365(b)(1)(B)(“No action may be commenced…if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action…”) 90 See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 890 F. Supp. 470 (D.S.C. 1995)(state enforcement action via consent order did not constitute “diligent prosecution” and therefore did not bar citizen suit; inter alia, economic benefit to the defendant exceeded the negotiated penalty).
or state-equivalent program. The goal should be to ensure that all facilities have permits if one is required and that those permits and permit conditions are being implemented.

The audit should be performed by a reputable third-party environmental auditor, unless the company has a sophisticated internal environmental auditing program. The auditor should establish a protocol for assessing CWA compliance at all facilities subject to or potentially subject to the CWA or state-equivalent program, and then conduct the audit focusing on technical compliance with all permitting conditions, effective monitoring of all effluent discharges, and organized recordkeeping. The auditor should then prepare an audit report with detailed findings of potential violations with references to the permit conditions and/or underlying regulatory provisions being violated, and make recommendations for improvement. The company should then ensure that a program is in place to address any compliance deficiencies identified in the audit report.

If an audit is performed, the company should attempt to cloak the audit under the attorney-client communication and attorney-work product privileges if possible. If the audit is being conducted in house, run the audit through the general counsel’s office or an outside law firm to try to protect communications between the lawyers and company auditors regarding audit strategies and results. If the audit is being conducted by a third-party consulting firm, run the consulting contract through the general counsel’s office or an outside law firm as work product prepared in anticipation of possible enforcement litigation. In addition, be sure to check the applicable state law on whether an environmental audit report is privileged as a matter of state law and comply with any applicable procedures necessary to ensure those protections.

It is important to remember, however, that most compliance data generated in the ordinary course of business such as laboratory data and sampling results are not protected under the attorney-client or attorney work product privileges. Gathering that information and including it in an audit report does not make it privileged information. Furthermore, if noncompliance is identified during the course of an audit, a company must
report that noncompliance to a federal or state regulatory agency if there is an independent legal obligation to do so regardless of whether the audit report itself is privileged.

If the audit identifies significant noncompliance or turns up a pattern of noncompliance across many facilities, the company may want to consider developing and implementing an environmental management system ("EMS"). These management tools help integrate environmental and regulatory compliance efforts into everyday corporate operations by: (1) integrating EMS methods in all strategic and operational planning efforts, (2) training employees in responsible environmental management practices and developing operational structures to implement those practices, (3) monitoring their environmental performance on a regular basis, and (4) ensuring that management systems are in place to take corrective action when noncompliance is identified.

§ 7.07. EPA’s Voluntary Disclosure Policy.

EPA encourages regulated entities to voluntarily discover and disclose violations of federal environmental laws in part to avoid the time and expense of enforcement actions. To do that, EPA developed a voluntary disclosure policy that provides safe harbors to regulated entities who voluntarily report violations to EPA, including significant penalty reductions for disclosed violations.91

The penalty policy establishes nine conditions that regulated entities must meet to obtain protections under the policy:

1. Systematic discovery – the violation must be discovered through an environmental audit or implementation of an EMS;

2. Voluntary disclosure – the violation cannot be detected through legally required monitoring or sampling;

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3. Prompt disclosure – the violation must be reported to EPA within 21 days of discovery;

4. Independent discovery and disclosure – the violation must have been discovered by a regulated entity before it was or would have likely been identified by EPA or another regulator;

5. Correction and remediation – the violation must be corrected within 60 days of discovery, if practical;

6. Prevent recurrence – steps must be taken to ensure that the violation will not happen again;

7. No repeat violations – similar violations that occurred within the past three years at the same facility, or within five years at multiple facilities if part of an overall pattern and practice, are not eligible for penalty mitigation (the limitation, however, does not apply to recently acquired facilities);

8. No serious environmental harm – violations that result in serious actual harm or imminent and substantial endangerment are not eligible for penalty mitigation; and

9. Cooperation – the regulated entity must cooperate with EPA throughout the disclosure process and subsequent investigations by the agency.

If these conditions are met, EPA will waive all gravity-based civil penalties associated with the self-disclosed violations. But because it is quite common for violations to be discovered outside a formal environmental audit or EMS process, EPA will also reduce gravity-based civil penalties up to 75 percent if the other eight conditions of the policy are met. For example, if a plant manager at a facility that does not have a formal environmental audit or EMS program discovers that sampling data or other records have not been maintained in accordance with applicable NPDES permit conditions, that facility can still self-report under the disclosure policy as long as it complies with the other eight policy conditions. In addition, EPA will not
make a recommendation for criminal prosecution if entities disclose criminal violations as part of the self-disclosure process. As long as the company is acting in good faith and adopts a systematic approach for preventing recurring violations, EPA does not require the criminal violations to be discovered through a formal environmental audit or EMS. However, EPA will never waive penalties associated with the economic benefit of noncompliance. That is, any savings that are realized – if they can be quantitatively measured – for failing to comply with all applicable environmental laws and regulations will have to be forfeited to EPA in the form of a civil penalty payment.

There are some significant advantages to using EPA's self-disclosure policy, particularly if a company knows that EPA is likely ramping up enforcement efforts for the industry in which the company operates. In addition to the obvious financial benefits (i.e., the elimination of all or substantially all civil liability associated with the disclosed violations), companies can develop a positive working relationship with their regulators which may pay dividends in other program areas or in future enforcement actions. A company can also achieve some positive public relations depending on the circumstances of the violations and the market in which the company operates. The goal would be to promote the fact that the company, as an environmentally-conscious actor, is doing the right thing and self-reporting its own violations while making sure that similar violations will not happen again in the future.

There are, however, some significant disadvantages that companies should consider before preparing a submission under the self-disclosure policy. For one, if the company had enjoyed significant economic savings by failing to comply with the applicable regulatory requirements, those savings must be repaid. The disclosure also puts the company or facility on the enforcement radar by drawing the attention of federal compliance officials where that attention may have been lacking in the past. In addition, those officials are granted substantial discretion when evaluating whether the company has fully complied with the nine self-disclosure policy conditions. For example, whether or not a company is “cooperating” with agency officials during the investigation is entirely subjective. Moreover, self-disclosure is a one-time play. If similar violations reoccur in the next few years, those
violations could not be self-disclosed again with impunity. This is a serious consideration because, as mentioned, the facility will now be on EPA’s enforcement radar. Finally, while self-disclosure could achieve positive public relations depending on the circumstances, the disclosure could just as easily generate negative exposure. If a facility is located near neighbors with a “not-in-my-backyard” mentality, for example, the public disclosure of environmental violations may not be well received.

§ 7.08. Conclusion.

The civil complaint filed against Massey in May 2007 alleged over 60,000 separate violations of the Act and the underlying NPDES permits, which totaled nearly $2 billion in potential penalties. That public filing immediately affected Massey’s stock price and brought other negative public relations impacts.92 Companies working through the CWA enforcement process with EPA and DOJ should be mindful of Massey’s experience and the increased difficulties an enforcement target faces once a public complaint is filed. Strategies can be crafted to minimize and resolve any environmental liabilities outside the public glare of civil litigation. It is crucial for a company to achieve a thorough understanding of its exposure through the prism of all the factors that guide EPA and DOJ decision-making and to craft settlement offers that will appeal to the motivations and personalities of the particular enforcement personnel. This chapter has attempted to provide the foundational knowledge of CWA enforcement necessary to achieve that goal.

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