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The Price of Procrastination

Dear Advice & Counsel,

My company is currently evaluating a variety of equipment for compliance with the Chromium Emission Standards you have been writing about. The problem is that the owner of our company feels no urgency to meet the January 25, 1997 deadline. He says that we don't need to comply until July 25, 1997. He also says it's no big deal if we don't comply after that date, because there are no penalties written into the law. Is he right?

Signed, Just a Grunt

Dear Grunt,

The owner of your shop is in for a rude awakening!

The compliance date is January 25, 1997. You have until July 25, 1997 to perform your compliance test, but your O&M manual and all other compliance monitoring must be in place by January 25, 1997. Also, you need to notify your control authority (State EPA, or Regional Office of EPA) **six months before** your compliance test is run. Further, if your initial test shows you are out of compliance, your company is subject to fines, beginning with the date of testing. Your control authority may then calculate a fine based on a number of factors that we will cover.

It is not wise, therefore, to wait until the last minute to run the compliance test.

As for the owner's assumption that there are no penalties for non-compliance, fines and penalties are covered under the Clean Air Act. Just because specific penalties are not prescribed in the Chromium Emission Standards does not mean there won't be penalties associated with non-compliance. To give you and your boss a taste of what the penalty situation might be, EPA developed the *Clean Air Act Stationary Source Civil*

Penalty Policy way back on October 25, 1991. What follows is a summary of the provisions of this act.

To establish the level of penalty for non-compliance, EPA typically utilizes three calculated components:

1. Gravity Component; Actual or Possible Harm

This factor focuses on whether (and to what extent) the activity of the defendant actually resulted in, or was likely to result in, the emission of a pollutant in violation of the level allowed by an applicable State Implementation Plan, federal regulation or permit. Details considered in assessing the magnitude of the imposed fine include:

a. Level of Violation

% above Standard	Dollar Amount
1-30%	\$5,000
31-60%	\$10,000
61-90%	\$15,000
91-120%	\$20,000
121-150%	\$25,000
151-180%	\$30,000
181-210%	\$35,000
211-240%	\$40,000
241-270%	\$45,000
271-300%	\$50,000
More than 300%	\$50,000+\$5,000 for each 30% or fraction of 30% increment above the standard.

b. Toxicity of the Pollutant

Violations involving toxic pollutants regulated by a NESHAP, or listed under Section 112(b)(1) of the Clean Air Act, are more serious and should result in larger penalties. These violations yield \$15,000 for each hazardous air pollutant for which there is a violation.

c. Sensitivity of the Environment to the Violation

This factor is used in cases of violations other than NESHAP violations,

so it would not apply here. In Clean Air Act violations where it would apply, however, the EPA considers whether the violation took place in a non-attainment area, and adds additional penalty accordingly.

d. Length of Time of Violation

Generally, the longer a violation continues uncorrected, the greater the risk of harm.

Time of Violation (Months)

Time of Violation (Months)	Fine
0-1	\$5,000
2-3	\$8,000
4-6	\$12,000
7-12	\$15,000
13-18	\$20,000
19-24	\$25,000
25-30	\$30,000
31-36	\$35,000
37-42	\$40,000
43-48	\$45,000
49-54	\$50,000
55-60	\$60,000

2. Importance to the Regulatory Scheme

This factor focuses on the importance of the requirement to achieving the goals of the Clean Air Act and its implementing regulations. Chromium emission violations under this component are very important to the regulatory scheme. Violations under this component include: Reporting and notification violations, record-keeping violations, testing violations, permitting violations, emission control equipment violations, monitoring violations, violations of U.S. EPA Orders and Requests for Information.

3. Size of Violator

A corporation's size is indicated by its stockholders' equity or "net worth." This value, which is calculated by adding the value of capital stock, capital surplus, and accumulated

retained earnings, corresponds to the entry for "worth" in the Dunn and Bradstreet reports for publicly traded corporations. The gravity component is increased, in proportion to the size of the violator's business. The net worth can also be calculated by conventional means.

Net Worth	Fine
Under \$100,000	\$2,000
100,001–1,000,000	\$5,000
1,000,001–5,000,000	\$10,000
5,000,001–20,000,000	\$20,000
20,000,001–40,000,000	\$35,000
40,000,001–70,000,000	\$50,000
70,000,001–100,000,000	\$70,000
More than \$100,000,000	\$70,000 + \$25,000 for every additional \$30,000,000 or fraction thereof.

Economic Benefit To the Violator

By remaining out of compliance, the violating company is presumed to enjoy an economic benefit over its competition. To level the playing field, the economic benefit the company experienced by being out of compliance is calculated, using a computer model called BEN. Inputs for the BEN calculation include profit status, compliance dates and first date of noncompliance.

How does all of the above come together? Sarah Miller of Region V, U.S. EPA, presented the following scenario at a compliance workshop last June:

Sample Penalty Calculation

An unannounced inspection takes place at Mythical Metals, Inc. (a fictional company) in December of 1997. The inspector notes that an emission test was performed in September 1996 and the results show an average emission rate of .042 mg/dscm. After receiving the results from the test, the company decided to replace its emission control device to comply with its .030 mg/dscm emission limit.

The facility has completed all engineering studies and plans to have the control equipment installed, operational and tested by October 1998. The cost of the equipment has been quoted at \$275,000. Mythical Metals has a net worth of \$2 million.

Mythical Metals did not contact the Small Business Technical Assistance Program, U.S. EPA, nor the state EPA or control authority. Because of the timely manner in which they evaluated and planned to install the appropriate control equipment, however, this may be considered a "good faith" effort to comply.

Calculating the "Bad News"

(a) Level of Violation

Mythical Metals has average emissions of 0.042 mg/dscm. In comparison to the regulation, the emissions are approximately 40 percent above the standard.

This corresponds to a fine in the amount of \$10,000.

(b) Toxicity of the Pollutant

Mythical Metals has a violation involving pollutants listed in Section 112(b)(1) of the Clean Air Act, which includes chromium. Mythical Metals has no other Clean Air Act regulated violations.

This corresponds to a fine in the amount of \$15,000.

(c) Sensitivity of Environment

This factor does not apply to Mythical Metals because it is not violating a State Implementation Plan or any New Source Performance Standards.

This corresponds to a fine in the amount of \$0.

(d) Length of Time of Violation

Until pollution control devices are installed, the violation is considered to be continuous, unless the company plans to shut the facility down or has some other plan to ensure compliance with the standard. Otherwise, the length of time of the violation is fifteen months—dated from the date of the stack test.

This corresponds to a fine in the amount of \$20,000.

Importance to the Regulatory Scheme

This component does not factor into this case.

This corresponds to a fine in the amount of \$0.

Size of Violator

Mythical Metals' net worth of \$2 million results in an additional fine of \$10,000.

The indicated fines add up to \$55,000.

Economic Benefit

The total annual expense for the newly installed controls was taken to be 15 percent of the capital costs. The first date of noncompliance was taken as the date of the emission test. The BEN model used standard values for the useful life of control equipment, income rates and annual inflation rates to calculate an economic benefit of **\$65,548**.

The total penalty for Mythical Metals amounts to **\$125,548**.

There were, however, mitigating circumstances in this case. Because there was a "good-faith" effort to comply, the gravity component may be reduced somewhat, thereby reducing the final penalty amount, but even a 50-percent reduction would still have a significant impact on the bottom line of Mythical Metals. *P&SF*

Note: *The above sample was changed slightly by this author for ease of interpretation. Our thanks to Thomas Miles, general manager of Conserve Engineering Company, Luguna Beach, CA, for alerting us to Ms. Miller's presentation.*