

The Certainties and Uncertainties of EPA's Civil Penalties Increases

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Recent legislation and an even more recent U.S. Environmental Protection Agency (EPA) rulemaking will cause civil monetary penalties for violations of federal environmental laws to increase significantly, beginning Aug. 1; subsequently, penalties will increase annually to track inflation. President Obama signed the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 on Nov. 2, 2015, (Section 701 of Public Law 114-74). This law created a mandate for all federal agencies to adjust civil monetary penalties upwards to match inflation, both initially in the summer of 2016 and annually thenceforth. Penalty adjustment tracking inflation has been required since 1990, but adjustments have been minor and have not kept pace with the actual rate of inflation. The Improvements Act was passed to give this requirement teeth.

First, the Improvements Act mandates that agencies will now adjust their civil penalties annually, beginning next January. To date, the EPA has been adjusting penalties only every four years pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990. Second, the Improvements Act establishes a "catch-up" period and guidelines for a one-time assessment and recalculation of penalty amounts. Section 5(b)(2)(A) of the Improvements Act provides a formula for this recalculation: penalty amounts should be increased by the same percentage by which the consumer price index for all urban consumers (CPI-U), a measurement of costs of living, has increased between the time the penalty was established or last recalculated—other than to track inflation—and October of 2015. This requirement is tempered, however, by Section 5(b)(2)(C) of the act, which limits any increase to 150 percent of the amount of the penalty on Nov. 2, 2015.

The most immediate change resulting from this legislation and rulemaking is the Aug. 1 increase of civil penalty amounts under federal environmental laws. Though the amounts of the increases vary, maximum penalties for most violations will roughly double. One notable outlier is the Clean Air Act (CAA). Penalties under the CAA's provisions will nearly double, but owners of major emission sources such as power plants will face much greater liability for violations of permits or other emissions limits. 42 U.S.C. Section 7413(b) currently provides for a maximum penalty of \$25,000 per day of violation; this maximum will increase to \$93,750.

As required by the Improvements Act, the EPA promulgated a rule on July 1, to implement the initial "catch-up" adjustments to its statutory civil monetary penalties. The Civil Monetary Penalty Inflation Adjustment Rule establishes a new schedule of penalty increases, to be effective Aug. 1. The rule prescribes a five-step formula for adjusting statutory penalties to match current inflation rates. The formula requires the EPA to compare the CPI-U for October 2015 with that of October of the year the penalty amount was established or most recently adjusted, to determine what the agency refers to as the "cost-of-living multiplier." The current

penalty amount is then multiplied by the cost-of-living multiplier. The EPA must also compare this product to 150 percent of the 2015 penalty and adopt the lesser of the two numbers as the adjusted penalty. Effective Aug. 1, the adjusted penalty amounts will be applied only to violations occurring after Nov. 2, 2015.

The Improvements Act grants agencies no discretion in adjusting penalty rates, as the EPA recognizes in the Inflation Adjustment Rule:

The primary purpose of this rule is to reconcile the real value of current statutory civil penalty levels to reflect and keep pace with the levels originally set by Congress when the statutes were enacted. Because calculation of the increases is formula-driven, the EPA has no discretion in updating the rule to reflect the allowable statutory civil penalties derived from applying the formula.

The EPA must adhere to the requirements established by the act: increase penalties in proportion to the cost-of-living multiplier, but no more than by 150 percent. The act also has no effect on monetary penalties that are not fixed and are based, for example, on the cost of remediating a violation. Because the EPA had no discretion to adjust penalty amounts based on the concerns, views, or suggestions of the public, the agency promulgated the Inflation Adjustment Rule without seeking public comment.

The EPA includes in the Inflation Adjustment Rule a table comparing its current civil monetary penalties with those taking effect in August, (81 Fed. Reg. 43094, Table 2 of Section 19.4.). Although the same formula is applied to all statutory penalty provisions, the actual increases vary depending on past patterns of inflation adjustment. For example, under 15 U.S.C. Section 2615(a)(1), the maximum daily penalty for violations of the Toxic Substances Control Act (TSCA) is \$25,000; pursuant to the Inflation Adjustment Rule, this maximum will increase to \$37,000. The maximum daily penalty for violations of the Resource Conservation and Recovery Act (RCRA), which governs treatment, storage, and disposal of hazardous waste, is also currently \$25,000. On Aug. 1, however, the EPA will be able to seek up to \$70,117 per day of violation. Disparities in the amount penalties will increase are also found within statutes themselves. The current maximum penalty under TSCA's provisions governing asbestos inspections is \$5,000 per day. Although this is much lower than the \$25,000 penalty for violations of TSCA's toxic substances provisions, the penalty for asbestos inspection violations is set to increase to \$10,781—more than double the current maximum. Because of these disparities, the regulated community should familiarize itself with the Inflation Adjustment Rule's Table 2 and be aware of several drastic increases in penalty maximums. It is also important to note that the EPA will not always seek the maximum penalty; though the agency had no discretion in setting the new formula-based penalty amounts, it does retain discretion in prosecution and adjudication. More serious and ongoing violations will continue to be fined more heavily than less serious, and the EPA considers case-specific factors such as the violator's good-faith efforts to comply, ability to pay the applicable penalties, and any economic benefit derived by the violator through its noncompliant conduct.

Recognize that the penalty amounts for continuing violations are maximums for each day. Thus, the total maximum can get quite high when violations continue for months or years. The general scaling of actual penalties assessed begins with the benefits of noncompliance to the violator. The Improvements Act will result in more violations facing maximum penalties that are high relative to those benefits.

While the Inflation Adjustment Rule provides some certainty and clarity through Table 2's established schedule of penalty increases, the unevenness of the increases may lead to regulatory uncertainty. Knowing the adjusted maximum penalties is only the first step. Next, it is important to watch for shifts in EPA's enforcement patterns. One goal of the Improvements Act is to encourage the regulated community's compliance with laws by keeping penalties at levels high enough to have a deterrent effect. Another goal is to encourage agencies to pursue enforcement and not be dissuaded by cost concerns. As civil penalties have lagged farther and farther behind inflation rates, the cost-effectiveness of enforcement has dropped. In addition, some businesses are said by some to see penalty assessments as an acceptable part of the cost of doing business. While it is impossible to know how exactly the catch-up adjustments will affect enforcement, it can be expected that in addition to penalties for violations increasing and in many cases doubling, EPA will have increased resources and incentives to more diligently pursue the prosecution of violations of environmental laws. One thing that is certain is that the calculus of the costs of compliance and noncompliance with environmental laws will change; anyone subject to these laws should closely monitor what form those changes will take.

These changes in civil penalties apply only to violations of federal law. However, private parties may be able to seek these higher penalties under the citizen suit provisions of those federal statutes. Of course, penalties in a citizen suit are paid to the United States, and not to the plaintiff. The Improvements Act does not affect the maximum penalties under Pennsylvania statutes. Those remain, in general, considerably lower than penalties under federal law.

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