

APPENDIX K
ANALYSIS OF FINES AND PENALTIES ASSESSED AGAINST DoD,
FY 1995 THROUGH FY 2001

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INTRODUCTION

The Department of Defense (DoD) works hard to comply with all environmental laws and regulations to maintain mission readiness, to protect the health and safety of DoD employees and their families, and to promote environmental stewardship in communities where DoD facilities are located. The Federal government, including DoD, generally is held to the same environmental compliance standards as non-Federal entities. Therefore, DoD facilities that do not comply with environmental laws and regulations may be subject to enforcement actions, including the assessment of fines and penalties. One of the purposes of enforcement actions is to deter facilities from failing to comply with environmental regulations.

The Senate Report accompanying the Fiscal Year (FY) 2001 Defense Authorization Act required that the Secretary of Defense submit a report to Congress analyzing all environmental compliance fines and penalties assessed against DoD facilities from FY 1995 through FY 2001. The analyses of these fines and penalties address the criteria or methodology that enforcement agencies use in assessing each penalty, and current and historical trends regarding the use of these criteria and methodologies. There are five main methods that regulators use to calculate fines and penalties—

- Economic Benefit—based on the financial gains that a violator allegedly accrues by delaying or avoiding pollution control measures. Key to the concept is the assumption that polluters who do not spend money on environmental compliance divert those funds to support projects with an expected direct economic benefit.
- Gravity—based on the seriousness of the compliance failure; considers the actual or possible harm the violation caused and the importance of the requirement violated to the overall regulatory scheme
- Size of Business—based on the “net worth” or “net current assets” of the violator

- Other—the regulator(s) used a method for assessing a fine other than those previously defined, or the circumstances under which the fine was assessed required further explanation
- Regulator Did Not Specify—the regulator(s) who assessed the fine or penalty did not include in their assessment the method used to calculate the fine or penalty.

FINES AND PENALTIES ASSESSED IN FY 1995

The U.S. Environmental Protection Agency (EPA) assessed seven fines and penalties totaling \$277,750 against DoD facilities in FY 1995. Of the Federal penalties assessed the regulator did not specify the method of calculation for 4 of these fines (57 percent). One fine was issued based on gravity and economic benefit (14 percent), and another was based on gravity and one other issue (14 percent). One penalty was assessed using gravity (14 percent). All of the fines except 1 (86 percent) were less than \$100,000.

State agencies assessed 32 fines and penalties totaling \$858,481 against DoD facilities in FY 1995. Of the state penalties assessed the regulator did not specify the method of calculation for 17 of these fines (53 percent). Six of the fines were issued based on gravity and economic benefit (19 percent), and 7 were based on gravity (22 percent). One penalty was assessed using an unknown methodology (three percent), and one fine was negotiated (three percent). All of the fines except 3 (91 percent) were less than \$100,000.

Local agencies assessed 29 fines and penalties totaling \$132,736 against DoD facilities in FY 1995. Of the local penalties assessed the regulator did not specify the criteria for 4 of these fines (14 percent). Thirteen of the fines were issued based on gravity (45 percent), and 1 was based on economic benefit (3 percent). One penalty was assessed using an unknown methodology (3 percent), and 10 were assessed using other criteria (34 percent). All of the fines except 3 (90 percent) were less than \$50,000.

In summary, Federal, state, and local regulators assessed \$1,268,967 in fines and penalties against DoD facilities in FY 1995. Federal authorities issued 10 percent of the total number of fines, state authorities issued 47 percent, and local authorities issued 43 percent. Of the 68 fines and penalties assessed in FY 1995, the regulator did not specify the criteria for 25, or 37 percent. Seven of the fines were

issued based on gravity and economic benefit (10 percent), 21 were based on gravity (31 percent), 1 was based on gravity and another issue (1 percent), and 1 was based on economic benefit (1 percent). Two penalties were assessed using an unknown methodology (3 percent), and 10 were assessed using other criteria (15 percent). One fine was negotiated (1 percent). Two penalties were administrative fees (3 percent). The majority of fines, 71 percent, assessed against DoD were less than \$10,000.

FINES AND PENALTIES ASSESSED IN FY 1996

EPA assessed 10 fines and penalties totaling \$1,268,537 against DoD facilities in FY 1996. Of the Federal penalties assessed the regulator did not specify the method of calculation for 2 of these fines (20 percent). Two fines were issued based on gravity and economic benefit (20 percent), and 6 were based on gravity (60 percent). All of the fines except 1 (90 percent) were less than \$100,000.

State agencies assessed 17 fines and penalties totaling \$394,607 against DoD facilities in FY 1996. Of the state penalties assessed the regulator did not specify the method of calculation for 6 of these fines (35 percent). One of the fines was issued based on gravity and economic benefit (6 percent), and 7 were based on gravity (41 percent). One penalty was assessed using an unknown methodology (6 percent), and 2 were assessed using other criteria (12 percent). All of the fines except 1 (94 percent) were less than \$100,000.

Local agencies assessed 13 fines and penalties totaling \$23,631 against DoD facilities in FY 1996. Of the local penalties assessed the regulator did not specify the criteria for 3 of these fines (23 percent). Three of the fines were issued based on gravity (23 percent). Three penalties were assessed using an unknown methodology (23 percent), and 4 were assessed using other criteria (31 percent). All of the fines except 3 (77 percent) were less than \$13,000.

In summary, Federal, state, and local regulators assessed \$1,686,775 in fines and penalties against DoD facilities in FY 1996. Federal authorities issued 25 percent of the total number of fines, state authorities issued 43 percent, and local authorities issued 33 percent. Of the 40 fines and penalties assessed in FY 1996, the regulator did not specify the criteria for 11, or 28 percent. Three of the fines were issued based on gravity and economic benefit (8 percent) and 16 were based on gravity (40 percent). Four penalties were assessed using

an unknown methodology (10 percent), and 6 were assessed using other criteria (15 percent). More than half of fines assessed against DoD were less than \$10,000, and 95 percent of the fines were less than \$100,000.

FINES AND PENALTIES ASSESSED IN FY 1997

EPA assessed five fines and penalties totaling \$153,200 against DoD facilities in FY 1997. Of the Federal penalties assessed the regulator did not specify the method of calculation for 3 of these fines (60 percent). One fine was issued based on gravity (20 percent), and another was assessed using other criteria (20 percent). All of the fines were less than \$100,000.

State agencies assessed 22 fines and penalties totaling \$2,452,206 against DoD facilities in FY 1997. Of the state penalties assessed the regulator did not specify the method of calculation for 9 of these fines (41 percent). Four of the fines were issued based on gravity and economic benefit (18 percent), and 9 were based on gravity (41 percent). All of the fines except 2 (91 percent) were less than \$100,000.

Local agencies assessed 14 fines and penalties totaling \$22,422 against DoD facilities in FY 1997. Of the local penalties assessed the regulator did not specify the criteria for 5 of these fines (36 percent). Four of the fines were issued based on gravity (29 percent). Three penalties were assessed using an unknown methodology (21 percent), and 2 were assessed using other criteria (14 percent). All of the fines were less than \$20,000.

In summary, Federal, state, and local regulatory agencies assessed \$2,627,828 in fines and penalties against DoD facilities in FY 1997. Federal authorities assessed 12 percent of the total number of fines, state agencies issued 54 percent, and local authorities issued 34 percent. Of the 41 fines and penalties assessed in FY 1997, the regulator did not specify the criteria for 17, or 41 percent. Four of the fines were issued based on gravity and economic benefit (10 percent), and 14 were based on gravity (34 percent). Three penalties were assessed using an unknown methodology (seven percent), and three were assessed using other criteria (seven percent). The majority of fines, 95 percent, assessed against DoD were less than \$100,000.

FINES AND PENALTIES ASSESSED IN FY 1998

EPA assessed 11 fines and penalties totaling \$2,234,633 against DoD facilities in FY 1998. Of the Federal penalties assessed the regulator did not specify the method of calculation for 3 of these fines (27 percent). Four fines were issued based on gravity and economic benefit (36 percent), and 2 were based on gravity and size of business (18 percent). Two penalties were assessed using gravity (18 percent). All of the fines except 2 (82 percent) were less than \$500,000.

State agencies assessed 22 fines and penalties totaling \$663,424 against DoD facilities in FY 1998. Of the state penalties assessed the regulator did not specify the method of calculation for 13 of these fines (59 percent). Three of the fines were issued based on gravity and economic benefit (14 percent), and 3 were based on gravity (14 percent). Three penalties were assessed using other criteria (14 percent). All of the fines except 1 (95 percent) were \$100,000 or less.

Local agencies assessed 15 fines and penalties totaling \$17,141 against DoD facilities in FY 1998. Of the local penalties assessed the regulator did not specify the criteria for 4 of these fines (27 percent). Ten of the fines were issued based on gravity (67 percent). One penalty was assessed using other criteria (seven percent). All of the fines except 3 (80 percent) were \$10,000 or less.

In summary, Federal, state, and local regulatory agencies assessed \$2,915,198 in fines and penalties against DoD facilities in FY 1998. Federal authorities assessed 23 percent of the total number of fines, state authorities issued 46 percent, and local authorities issued 31 percent. Of the 48 fines and penalties assessed in FY 1998, the regulator did not specify the criteria for 20, or 42 percent. Seven of the fines were issued based on gravity and economic benefit (15 percent), 15 were based on gravity (31 percent), and 2 were based on gravity and size of business (4 percent). Four penalties were assessed using other criteria (eight percent). The majority of fines, 83 percent, assessed against DoD were less than \$100,000.

FINES AND PENALTIES ASSESSED IN FY 1999

In September of 1999, EPA signed out a memo that directs EPA regions to include economic benefit penalties in all federal agency enforcement actions. EPA asserts that economic benefit is the wave of the future for federal agencies. EPA assessed six fines and penalties totaling \$471,450 against DoD facilities in FY 1999. Of the Federal penalties assessed the regulator did not specify the method of calculation for 2 of these fines (33 percent). One fine was issued based on gravity and economic benefit (17 percent), and 1 was based on gravity and size of business (17 percent). Two penalties were assessed using gravity (33 percent). All of the fines except 2 (67 percent) were less than \$50,000.

State agencies assessed 16 fines and penalties totaling \$469,175 against DoD facilities in FY 1999. Of the state penalties assessed the regulator did not specify the method of calculation for 10 of these fines (63 percent). Five of the fines were issued based on gravity (31 percent). One fine included an administrative fee and the regulator did not specify the method of calculation for the remainder of the penalty (six percent). All of the fines except 2 (88 percent) were less than \$100,000.

Local agencies assessed 32 fines and penalties totaling \$41,599 against DoD facilities in FY 1999. Of the local penalties assessed the regulator did not specify the criteria for 14 of these fines (44 percent). Eighteen of the fines were issued based on gravity (56 percent). All of the fines were \$10,000 or less.

In summary, Federal, state, and local regulatory agencies assessed \$982,224 in fines and penalties against DoD facilities in FY 1999. Federal authorities assessed 11 percent of the total number of fines, state authorities issued 30 percent, and local authorities issued 59 percent. Of the 54 fines and penalties assessed in FY 1999, the regulator did not specify the criteria for 26, or 48 percent. One fine was issued based on gravity and economic benefit (2 percent), 1 was based on gravity and size of business (2 percent), and 25 were based on

gravity (46 percent). One fine included an administrative fee and the regulator did not specify the method of calculation for the remainder of the penalty (two percent). The majority of fines, 71 percent, assessed against DoD were less than \$100,000.

FINES AND PENALTIES ASSESSED IN FY 2000

EPA assessed eight fines and penalties totaling \$29,427,426 against DoD facilities in FY 2000. Among these was the \$27,000,000 fine EPA Region X calculated against Fort Wainwright, Alaska, based on gravity, economic benefit, and size of business. (EPA later reduced the Wainwright fine to \$16,000,000 based on “other matters as justice may require,” recognizing that the Wainwright case is “the first case of this magnitude against a federal facility under the Clean Air Act since the July 16, 1997, Office of Legal Counsel memorandum clarifying EPA’s authority to pursue administrative penalties against federal facilities). All cases, except the Wainwright case, are included in the following trend analysis for FY2000. Because the dollar amount of the Wainwright fine is so high in comparison to all other fines assessed during the reporting period, it is discussed separately in the later section entitled “Summary of Fines and Penalties Assessed from FY 1995 to FY 2001.

Of the Federal fines and penalties assessed the regulator did not specify the method of calculation for 2 of these fines (29 percent). Three fines were issued based on gravity and economic benefit (43 percent), and another was based on gravity, economic benefit, and size of business (14 percent). One penalty was assessed using gravity (14 percent). All of the fines except one (86 percent) were under \$500,000.

State agencies assessed 22 fines and penalties totaling \$1,085,185 against DoD facilities in FY 2000. Of the state penalties assessed the regulator did not specify the method of calculation for 10 of these fines (45 percent). Six of the fines were issued based on gravity and economic benefit (27 percent), and 5 were based on gravity (23 percent). One fine included an administrative fee and the regulator did not specify the method of calculation for the remainder of the penalty (five percent). All of the fines except 4 (82 percent) were less than \$100,000.

Local agencies assessed 22 fines and penalties totaling \$143,525 against DoD facilities in FY 2000. Of the local penalties assessed the regulator did not specify the criteria for 8 of these fines (36 percent). Fourteen of the fines were issued based on gravity (64 percent). All of the fines except 1 (95 percent) were less than \$12,000.

In summary, Federal, state, and local regulatory agencies assessed \$3,656,136 in fines and penalties against DoD facilities in FY 2000. Federal authorities assessed 14 percent of the total number of fines, state authorities issued 43 percent, and local authorities issued 43 percent. Of the 51 fines and penalties assessed in FY 2000, the regulator did not specify the criteria for 20, or 39 percent. Nine of the fines were issued based on gravity and economic benefit (18 percent); 20 were based on gravity (39 percent); and 1 was based on gravity, economic benefit, and size of business (two percent). One fine included an administrative fee and the regulator did not specify the method of calculation for the remainder of the penalty (two percent). The majority of fines, 80 percent, assessed against DoD were less than \$100,000.

FINES AND PENALTIES ASSESSED IN FY 2001

EPA assessed 12 fines and penalties totaling \$1,106,356 against DoD facilities in FY 2001. Of the Federal penalties assessed 3 fines were issued based on gravity and economic benefit (25 percent) and 2 were based on gravity, economic benefit, and size of business (17 percent). Six fines were assessed using gravity (50 percent). One fine was assessed using other criteria (eight percent). All of the fines except 1 (92 percent) were less than \$200,000.

State agencies assessed 31 fines and penalties totaling \$513,182 against DoD facilities in FY 2001. Of the state penalties assessed the regulator did not specify the method of calculation for 11 of these fines (35 percent). Four of the fines were issued based on gravity and economic benefit (13 percent), and 12 were based on gravity (39 percent). Three penalties were assessed using other criteria (10 percent). One fine included an administrative fee and the regulator did not specify the method of calculation for the remainder of the penalty (three percent). All of the fines were less than \$100,000.

Local agencies assessed 19 fines and penalties totaling \$19,150 against DoD facilities in FY 2001. Of the local penalties assessed the regulator did not specify the criteria for 2 of these fines (11 percent). Sixteen of the fines were issued based on gravity (84 percent). One penalty was assessed using other criteria (five percent). All of the fines were less than \$5,000.

In summary, Federal, state, and local regulatory agencies assessed \$1,638,688 in fines and penalties against DoD facilities in FY 2001. Federal authorities assessed 19 percent of the total number of fines, state authorities assessed 50 percent, and local authorities assessed 31 percent. Of the 62 fines and penalties assessed in FY 2001, the regulator did not specify the criteria for 13, or 21 percent. Seven of the fines were issued based on gravity and economic benefit (11 percent); 34 were based on gravity (55 percent); and 2 were based on gravity, economic benefit, and size of business (3 percent). Five penalties were assessed using other criteria (eight percent). One fine included an administrative fee and the regulator did not specify the method of calculation for the remainder of the penalty (two percent). The majority of fines, 89 percent, assessed against DoD were less than \$100,000.

SUMMARY OF FINES AND PENALTIES ASSESSED FROM FY 1995 TO FY 2001

EPA assessed 58 fines and penalties totaling \$7,939,352 against DoD facilities from FY 1995 through FY 2001. These numbers do not include a \$16,000,000 penalty assessed by EPA Region X against Fort Wainwright in FY 2000. The enforcement action against Fort Wainwright, Alaska represents the single largest penalty for noncompliance with environmental laws against the Department of Defense. This fine alone is almost three and one half times more than all of the other EPA fines combined. In the Wainwright case, the Army argued that because federal facilities receive their funds from appropriations and must spend the money for the purpose for which it was appropriated, a federal facility cannot realize an economic benefit from non-compliance. Similarly, concepts used in the size-of-business penalty, such as "net worth" or "net current assets," when applied to a federal facility, lose their traditional meaning. In April 30, 2002 ruling, however, the presiding EPA administrative law judge rejected the Army's arguments regarding the inapplicability of economic benefit and size-of-business considerations.

Of the Federal penalties assessed, the regulator did not specify the method of calculation for 16 of these fines (28 percent). Fourteen fines were issued based on gravity and economic benefit (24 percent), and another was based on gravity and one other issue (two percent). Nineteen fines were assessed based on gravity (33 percent), and 2 fines were assessed using other criteria (three percent). Three fines were issued based on gravity and size of business (five percent) and three were based on gravity, economic benefit, and size of business (five percent).

State agencies assessed 162 fines and penalties totaling \$6,436,260 against DoD facilities from FY 1995 through FY 2001. Of the state penalties assessed the regulator did not specify the method of calculation for 76 of these fines (47 percent). Twenty-four of the fines were issued based on gravity and economic benefit (15 percent), and 48 were based on gravity (30 percent). Two penalties were assessed using an unknown methodology (one percent), and eight were assessed using other criteria (five percent). Three fines included an administrative fee and the regulator did not specify the method of calculation for the remainder of the penalty (two percent). One fine was negotiated (one percent).

Local agencies assessed 144 fines and penalties totaling \$400,204 against DoD facilities from FY 1995 through FY 2001. Of the local penalties assessed the regulator did not specify the criteria for 40 of these fines (28 percent). Seventy-eight of the fines were issued based on gravity (54 percent), and 1 was based on economic benefit (one percent). Seven penalties were assessed using an unknown methodology (five percent), and 18 were assessed using other criteria (12 percent).

In summary, Federal, state, and local regulatory agencies assessed \$14,775,816 in fines and penalties against DoD facilities from FY 1995 through FY 2001. EPA issued 16 percent of these fines, state authorities issued 45 percent, and local authorities issued 40 percent.

Of the 364 penalties assessed from FY 1995 through FY 2001, the regulator did not specify the criteria for 132, or 36 percent.

Thirty-eight of the fines were issued based on gravity and economic benefit (ten percent), 145 were based on gravity (40 percent), one was based on gravity and another issue (0.2 percent), and 1 was based on economic benefit (0.2 percent). Nine penalties were assessed

using an unknown methodology (two percent), and 28 were assessed using other criteria (eight percent). Three fines were issued based on gravity and size of business (one percent) and three were based on gravity, economic benefit, and size of business (one percent). One fine was negotiated (0.2 percent). Three fines included an administrative fee and the regulator did not specify the method of calculation for the remainder of the penalty (one percent). The majority of fines, 89 percent, assessed against DoD were less than \$10,000.

Six fines were rescinded or closed by the regulators (two percent). Twelve fines were negotiated or reduced (three percent). Seven fines were based on contractor violations (two percent). Five of the fines and penalties assessed were fees (one percent), and three were partially fees (one percent). Twenty-four fines that included economic benefit as a method of calculation had an economic benefit value of \$0 or the amount was not indicated (seven percent of all fines, or 57 percent of those fines that included economic benefit in the method of calculation). Regulatory agencies considered economic benefit or size of business when calculating the fine for 20 Federal penalties (34 percent), 24 state penalties (15 percent), and one local penalty (one percent). As a percent of the total number of fines assessed, Federal regulators appear to have used economic benefit and size of business for more fines and penalties than state or local regulators. For eight penalties, the calculation records were unavailable due to base closure (two percent).

DoD continues to work to comply with all environmental laws and regulations and to reduce the fines and penalties it incurs for noncompliance. In order for DoD to continue improving compliance, it is helpful to the Department to know how fines and penalties assessed against its facilities are calculated. If the method of calculation for a fine assessed against DoD is unspecified or unclear, resources that could be used to improve mission readiness may be used instead to address penalty issues.

The Department is committed to working with regulators, communities near DoD facilities, and DoD personnel to improve compliance at all of its facilities. Pollution prevention remains the preferred method of complying with environmental laws and regulations. By investing in pollution prevention, including source reduction, hazardous substance replacement, and related technologies, DoD will be able to reduce the number and amount of compliance fines or penalties assessed against its facilities. While DoD continues to budget for ensuring compliance with environmental laws, these efforts allow the Department to spend more funds on mission-critical activities rather than compliance penalties.