Environmental Penalties: Discretion and Disparity

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Uniformity in the treatment of environmental violators helps achieve the system's goals of deterrence and fairness. In 1984, the Environmental Protection Agency (EPA) adopted a general penalty policy that sought to promote uniformity in federal environmental enforcement while still providing necessary discretion to account for individual circumstances. However, the EPA then delegated most of the enforcement of these laws to the states, which have a wide range of statutory penalty authorizations. Even when the EPA takes the lead, regional offices use penalty policies that allow a remarkable degree of discretion, creating significant potential for disparate treatment. This study is the first to analyze data from the EPA's public database to determine whether this potential has resulted in actual significant penalty disparity. Data from the last 10 years indicates that the EPA is not achieving its uniformity goals. Significant disparities exist in the median penalties imposed from state to state, between the states and the EPA, and among the various EPA regional offices. We recommend changes to the EPA's delegation regulation and to its penalty policies to reduce this disparity and the potential for unfairness.

I. INTRODUCTION

The ultimate goal of the government's enforcement approach to environmental law violations, as it is in every enforcement context, is to achieve greater compliance through deterrence. Enforcement also aims to level the playing field, ensuring that violators do not obtain an unfair economic advantage over those who comply. In instances of deliberate transgression, regulators also seek to punish. To achieve those goals, regulators must balance the desire for uniformity with the need for individualized discretion.

Uniformity in the treatment of violators serves important purposes. On one side, unchecked discretion can lead to excessively high penalties, offending our sense of fundamental fairness and equality. Aberrational high penalties also suffer from

due process concerns, as they do not put potential offenders on notice as to the potential consequences of their actions. In an analogous context, the Supreme Court held in *BMW of North America, Inc. v. Gore* that punitive damages can violate the Due Process Clause when they become so excessive as to be arbitrary.[1] The Court noted that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[2] Excessively high environmental penalties transgress due process notions in a similar manner.

Conversely, low penalties fail to promote the goal of deterrence. Consistent tepid enforcement sends a clear signal to potential violators that the risk is worth it because the consequences will be minor. Moreover, treating some violators leniently is unfair to those who have to pay more. Uneven enforcement consequences also lead to the potential for unfair competition among jurisdictions as the regulated community seeks out states perceived as "friendly" to business.[3] Of course, consistent lax enforcement will likely also result in adverse health and welfare consequences for the public living in those areas. Moreover, the failure to enforce uniformly could exacerbate environmental justice concerns.[4]

After the "environmental decade" of the 1970s, which saw Congress enact a series of major pollution control acts to better

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1. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568–86 (1996).

2. *Id.* at 574.

3. *See* Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 375 (1997) (noting that "states engaged in interstate competition for industry are also engaged in a race-to-the-bottom in environmental standard-setting, and that the general direction of the race is toward more lax standards").

4. In 1992, a study found that some types of federal environmental penalties were substantially lower in communities of color. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law: A Special Investigation*, 15 NAT'L L.J. S2 (1992). Some studies have questioned those findings. *See, e.g.*, Evan J. Ringquist, *A Question of Justice: Equity in Environmental Litigation, 1974-1991*, 60 J. POL. 1148, 1163 (1998) (finding that the evidence does not show that "minorities and the poor are disadvantaged by civil penalties in environmental protection"). For further analysis, see CLIFFORD VILLA ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 250–253 (3d ed. 2020). Our data analysis does not attempt to discern environmental justice impacts of disparate penalties. For an excellent discussion of how enforcement could better address issues of environmental justice, see Sara Colangelo, *Forging Complete Justice: Equitable Relief in Environmental Enforcement*, 46 HARV. ENV'T. L. REV. 315 (2022).

control the contamination of our air, water, and land,[5] the Environmental Protection Agency (EPA) had to come to terms with how it would exercise the enormous enforcement authority it newly possessed. In 1984, the agency produced its general policy regarding environmental penalties, which still governs the basic approach today.[6] The policy identified three major goals of the EPA's enforcement approach: deterrence, fair and equitable treatment of the regulated community, and the swift resolution of environmental problems.[7]

First, the policy sought to deter both the violator (specific deterrence) and the public (general deterrence) by removing any economic benefit gained by the violation, to ensure that the violator would be placed in a worse position vis-à-vis those who complied with the law.[8] Second, the EPA wanted to ensure fair and equitable treatment, believing it should strive for a consistent application of its enforcement power to avoid arbitrary penalties.[9] Fairness also required sufficient flexibility, the policy explained, to account for "legitimate differences between similar violations."[10] The agency noted that equitable treatment helped to conserve scarce agency resources because it would lead to less litigation over penalty amounts.[11] Third, the EPA sought to achieve compliance and remediation quickly, which the agency believed would result in greater protection of the environment and public health.[12] The agency furthers this goal by establishing policies that reward quick remedial action and penalize delays in compliance.[13]

The 1984 General Enforcement Policy has never been superseded. Although the agency has tweaked its enforcement approach over the intervening 40 years, the basic goals remain the same. Therefore, at this point it seems appropriate to measure the EPA's success in achieving its stated enforcement objectives.

This article will focus on the goal of uniformity: whether the

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5. *See generally*, Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 396–97 (1995).

6. ENV'T PROT. AGENCY, GM-21, POLICY ON CIVIL PENALTIES: EPA GENERAL ENFORCEMENT POLICY (1984) [hereinafter *General Civil Penalty Policy*].

7. *Id.* at 1.

8. *Id.* at 3.

9. *Id.* at 4–5.

10. *Id.* at 4.

11. *Id.*

12. *Id.* at 5.

13. *Id.* at 6.

EPA is achieving a consistent application of environmental penalties sufficient to promote both deterrence and equitable treatment of the regulated community. Examining this issue necessarily also includes a discussion of state agency enforcement, because the majority of environmental enforcement authority has been delegated to state authorities, as explained below, which creates challenges for the goal of consistency. We also hope that an examination of how environmental penalties are imposed may be useful in other administrative enforcement contexts.

We will begin in Section II with a recent case illustrating the perils of unrestrained penalty discretion. Section III then outlines the various statutory penalty authorities in environmental law and how they have been interpreted in EPA policy and applied in judicial decisions. In Section IV, we analyze the data on Clean Water Act penalties, both state and federal, and find significant disparities in median penalties imposed in various jurisdictions. Section V identifies areas of discretion in federal environmental penalty policies that might enable these wide disparities in treatment. Section VI identifies possible constitutional limitations on untrammeled penalty discretion.

The article will conclude that environmental penalties suffer from consistency issues, which have gotten worse over time. Our analysis of available data reveals significant disparities in penalties, which can be traced to several major gaps in the EPA's policies that leave enormous discretion in the hands of enforcement authorities. This disparate treatment significantly undermines the objectives of fairness and deterrence. The article suggests several measures that would improve uniformity in the enforcement system while still preserving necessary discretion.

II. A CASE STUDY IN THE SHORTCOMINGS OF PENALTY DISCRETION: CALIFORNIA COASTAL COMMISSION

In order to achieve the goals of deterrence and fairness, regulators must balance uniformity with the discretion necessary to tailor the penalty to individual circumstances. As noted in the introduction above, too much discretion can lead to problems on both the high and low ends of the scale. Unless regulators are adequately tethered to a system that ensures equality of treatment, significant issues of fairness can arise.

Although not classified as a traditional environmental case, the

recent $4.185 million penalty imposed by the California Coastal Commission ("the Commission") on Warren and Henny Lent illustrates the pitfalls of administrative penalty discretion.[14] The Lent property, situated between the beach and the Pacific Coast Highway in Malibu, was subject to a vertical public-access easement acquired by the Commission in 1978 as a condition of a coastal development permit. A previous owner violated the encumbrance by installing a wooden deck that encroached on the easement and by erecting a fence and gate that blocked off access.

In 2007, the Commission requested that the Lents remove the deck and gate. Among other defenses, the Lents claimed that laches prevented the Commission from requiring the removal of the structure. After many years of fruitless negotiation, the Commission notified the Lents in 2014 that it had the authority to impose penalties of $11,250 per day for the violation of the public access provisions of the Coastal Act,[15] meaning a penalty of up to $8.37 million was possible ($11,250 per day for 744 days, beginning on the date the Commission advised the Lents that penalties could be imposed).[16] The Commission's staff, however, opted against recommending the statutory maximum penalty and instead recommended what it termed a "very conservative" penalty of $950,000.[17] Nevertheless, after a hearing, the Commission concluded that a higher penalty was warranted, finding that the Lents' conduct was "particularly egregious."[18] The penalty selected—$4,185,000—was exactly half of the statutory maximum and over four times the amount recommended by staff. The penalty imposed exceeded two-thirds of the property's estimated total value of $6 million.[19]

The Coastal Act provided that the imposition of civil penalties should be based on five factors:

> (1) The nature, circumstance, extent, and gravity of the violation.

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14. *See* Lent v. Cal. Coastal Comm'n., 277 Cal. Rptr. 3d 106, 117 (Cal. Ct. App. 2021).

15. *Id.* at 120 (citing CAL. PUB. RES. CODE § 30821 (2021)).

16. *Lent*, 277 Cal. Rptr. 3d at 120.

17. CAL. COASTAL COMM'N, CCC-16-CD-03/CCC-16-AP-01 (LENT), STAFF REPORT: RECOMMENDATIONS AND FINDINGS FOR CEASE AND DESIST ORDER AND ADMINISTRATIVE CIVIL PENALTY, 34 (2016) [hereinafter STAFF REPORT]; *see Lent*, 277 Cal. Rptr. 3d at 121.

18. *Lent*, 277 Cal. Rptr. 3d at 121.

19. The Commission staff estimated the value "of the Malibu property" from a Zillow search. STAFF REPORT, *supra* note 17, at 38 n.22.

> (2) Whether the violation is susceptible to restoration or other remedial measures.
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> (3) The sensitivity of the resource affected by the violation.
>
> (4) The cost to the state of bringing the action.
>
> (5) With respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits, if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require.[20]

In assessing the factors, the staff emphasized that the gravity of the violation was "significant," primarily because of the lack of public access to the beach, particularly in this coastal area.[21] The staff also indicated, under factor 4, that the costs to the state of the Lents' recalcitrance had been "very significant":

> These efforts should also be compared to cases that rapidly settle, as should be generally encouraged, in which one or a few staffers are able to resolve a violation in a matter of months, rather than a large team of Commission staff working over a period of nearly a decade, as is the case here.[22]

The Commission staff noted, in a footnote, that the Lents purchased the property for about $2 million and that its current worth was $6 million, but the report contained no discussion regarding how a penalty exceeding two-thirds of the property's total value could be justified from a policy standpoint.[23]

The staff penalty recommendation illustrates the dangers of assessing a penalty without first adopting more detailed guidance about how to weigh the various statutory factors. Without such a policy, the staff and ultimately the Commission itself had no real measuring stick to use in applying the factors. The Staff Report's conclusion indicates the gestalt nature of its penalty calculation, saying no more than the conclusory statement that the amount of $950,000 is "below that justifiable in the law and sustainable in public scrutiny" and "reflects a generous weighing of factors and

20. CAL. PUB. RES. CODE § 30820(c).
21. STAFF REPORT, *supra* note 17, at 35–36.
22. *Id.* at 36.
23. *See id.* at 38 n.22.

exercise of discretion."[24]

When the Lents appealed the decision, the California Court of Appeals determined that the absence of certain trial-type procedures in this case did not violate procedural due process protections, either facially or as applied to them, when applying the factors in *Mathews v. Eldridge*.[25] The court noted that these types of decisions rely primarily on documentary evidence rather than the type of facts requiring the evaluation of the credibility of live witnesses.[26] Procedural due process, the court noted, requires adequate notice of the potential penalty and an opportunity to be heard. The court found that the Lents had received notice that the staff penalty recommendation of between $800,000 to $1.5 million was merely a proposal and that they knew the Commission had the authority to issue a penalty of up to $8.37 million. Therefore, the Lents could not claim they were unaware that the Commission could impose a penalty of $4,185,000, which fell within that range.[27] The court distinguished this case from those in which the proposed penalties were increased by administrative agencies without notifying the defendant of that possibility.[28]

The court also considered whether the penalty could be considered "grossly disproportionate to the offense" such that it violated the "excessive fines" clause of the Eighth Amendment or Article 1, Section 17, of the California Constitution.[29] That analysis involves assessing: "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay."[30] In weighing those factors, the court noted that the Lents were culpable because they refused to remove the offending structures for over nine years, despite repeated requests.[31] With regard to the relationship between the harm and the penalty, the court noted that although the harm may be "difficult to quantify," the harm

24. *See id.* at 38–39.

25. Lent v. Cal. Coastal Comm'n., 277 Cal. Rptr. 3d 106, 131–38 (Cal. Ct. App. 2021) (citing Mathews v. Eldridge, 424 U.S. 319, 321 (1976)).

26. *Lent*, 277 Cal. Rptr. 3d at 134–35.

27. *Id.* at 131.

28. *Id.* at 130 (citing Tafti v. County of Tulare, 130 Cal. Rptr. 3d 472 (Cal. Ct. App. 2011)).

29. *Lent*, 277 Cal. Rptr. 3d at 143–47.

30. *Id.* at 143 (quoting People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 124 P.3d 408, 421 (Cal. 2005)).

31. *Lent*, 277 Cal. Rptr. 3d at 144.

caused by the lack of public access to the beachfront was substantial.[32] Under the third factor, the court noted that "there are plenty of statutes that impose daily penalties for activity that can cause environmental harm—including undertaking activity without obtaining a required permit—some of which impose maximum penalties higher than the maximum penalty the Commission can impose under section 30821."[33] The court also cited several cases where multimillion-dollar penalties were upheld in court, but did not engage in an analysis of whether the circumstances were comparable.[34] Finally, the court noted that the Lents had submitted no proof of their inability to pay the penalty.[35] The court did not analyze the relationship of the penalty to the property's value.

The *Lent* case demonstrates the dangers of excessive discretion in the assessment of administrative penalties. The penalty can be criticized on several fronts. First, the lack of a clearly articulated penalty policy to guide the Commission's decision in individual cases means there will be a lack of uniformity as well as a lack of notice to potential violators of the severity of the penalties they may face. Given the vast range of potential penalties in this case—$800,000 to $8.37 million—the Lents would have had no real idea of where the Commission might end up in evaluating this penalty.

Second, there was no attempt to place a monetary value on the harm caused by the violation or the benefit derived by the Lents. In environmental cases, as discussed in Section IIIA below, the penalty calculation always begins with an evaluation of the economic benefit derived by the violator from its noncompliance. In *Lent*, evidence indicated that the Lents rented their house for about $1,000/night on VRBO.[36] However, this rental value would have dropped if they had complied with the public easement right beside their house, as more people would have been using the beach in front of their property. Even if it were half of the $1,000/night value, the fact that the "illegal gain" of the Lents

32. *See id.* at 145–46 (noting that "Lent's conduct was inconsistent with the Coastal Act's goal of ensuring public access to the coast and for many years impeded the Conservancy's efforts").

33. *Id.* at 146.

34. *Id.* at 146.

35. *Id.* at 146–47.

36. STAFF REPORT at 3.

amounted to just $372,000[37] would surely be relevant in assessing the deterrence element of the violation. Similarly, in evaluating the harm to the public, some assessment of the value of a public easement would be relevant: for example, how much would the government pay to condemn such an easement?

As discussed below, the case also illustrates the importance of evaluating the purpose of per-day penalties. The maximum penalty may be appropriate in certain situations, such as cases of imminent endangerment, consistent violations that create risks of significant harm, or when the violator resists compliance without reason. However, imposing anywhere near the full penalty value seems unreasonable in the garden-variety case where the agency and violator disagree about the application of the law. In those cases, the ability of the agency to threaten immense per-day penalties serves to unfairly limit the regulated entity's ability to dispute agency edicts.[38]

As we discuss below, the EPA does a much better job of promoting uniformity and transparency in its penalty decisions through the adoption of specific enforcement response policies that outline the way the agency will apply the statutory factors to determine penalty amounts. Without that type of guidance, agencies could easily justify almost any penalty through various applications of fairly vague factors. State agencies such as the California Coastal Commission could benefit from adopting enforcement policies to guide these calculations. In fact, as we discuss in Section VI below, courts should require that agency penalty discretion be more precisely cabined to ensure more uniform and equitable application.

III. PENALTY AUTHORITY: STATUTORY, REGULATORY, AND POLICY PROVISIONS

Although local governments play an important role in environmental protection, this article will focus on the enforcement of environmental laws occurring at the federal and state levels. The cornerstone federal environmental statutes contain significant enforcement authority held by a wide variety of

37. *744 days x $500 = $372,000.*

38. For a similar case discussing the coercive power of pre-review penalties, *see Sackett v. EPA*, 566 U.S. 120 (2012).

agencies. For example, the Marine Mammal Protection Act[39] is enforced by the National Oceanic and Atmospheric Administration (NOAA) or the Department of the Interior (depending on the type of mammal); the United States Department of Agriculture (USDA) enforces laws relating to biological agents and toxins;[40] and the United States Coast Guard handles the prevention of pollution from ships,[41] to name but a few. This article, however, will focus on the enforcement of federal statutes administered by the Environmental Protection Agency, which constitute much of our core protection of air, land, and water in the United States.

A. *Federal Statutory Enforcement Authority*

The core environmental acts considered in this article include: the Federal Water Pollution Prevention and Control Act, referred to popularly as the Clean Water Act (CWA);[42] the Clean Air Act (CAA);[43] the Federal Insecticide Fungicide and Rodenticide Act (FIFRA);[44] the Resource Conservation and Recovery Act (RCRA);[45] the Emergency Planning and Community Right-to-Know Act (EPCRA);[46] the Safe Drinking Water Act (SDWA);[47] and the Toxic Substances Control Act (TSCA).[48] Each of these statutes contains enforcement provisions, which enable the EPA to take enforcement actions against violators.[49] Although there are some differences in these statutes, they typically give the agency the authority to require the submission of information or reports, conduct inspections, impose administrative penalties, and issue administrative orders to achieve compliance. The agency also usually has the option to file a civil or criminal action in federal court, and the court has statutory authority to issue injunctions and impose civil or criminal penalties.

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39. 16 U.S.C. § 1377.
40. 7 U.S.C. § 8401.
41. 33 U.S.C. § 1907.
42. 33 U.S.C. §§ 1251–1389.
43. 42 U.S.C. §§ 7401–7671.
44. 7 U.S.C. §§ 136–136y.
45. 42 U.S.C. §§ 6901–6992k.
46. 42 U.S.C. §§ 11001–11050.
47. 42 U.S.C. §§ 300f–300j.
48. 15 U.S.C. §§ 2601–2629.
49. *See, e.g.,* CWA §§ 308–309, 33 U.S.C. § 1319; CAA §113, 42 U.S.C. §7413; RCRA §3008, 42 U.S.C. §6928.

The EPA's Office of Enforcement and Compliance Assurance (OECA) oversees enforcement and issues enforcement policy.[50] The EPA's ten regional offices handle the day-to-day enforcement responsibility, under OECA's oversight. While the agency handles most cases administratively, the EPA refers more serious cases to the Department of Justice when a civil or criminal court action needs to be filed.[51]

Complicating the enforcement picture, most of these federal laws allow the EPA to delegate enforcement to a state that enacts its own adequate statutory authority.[52] States have been quick to accept this opportunity; one study estimates that states undertake about 95% of enforcement actions for federal environmental laws.[53] Some statutes, such as EPCRA and TSCA, do not contain delegation provisions and are therefore enforced exclusively at the federal level.

Each statute specifies the maximum penalty that may be imposed for various categories, such as administrative civil penalties, judicial civil penalties, and criminal penalties.[54] For example, the CWA provides the EPA with the authority to issue administrative penalties of up to $10,000 per day, up to a total of $125,000, for class II civil penalties.[55] In addition, the CWA empowers a court to impose a civil penalty of up to $25,000 per day per violation, with no maximum total amount.[56] The court may also impose higher criminal penalties for negligent or knowing violations, with knowing endangerment convictions carrying penalties of up to $1 million for organizations and up to 15 years imprisonment for individuals.[57]

Because of the impact of inflation, the relative severity of these

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50. EPA, *About the Office of Enforcement and Compliance Assurance (OECA*), https://www.epa.gov/aboutepa/about-office-enforcement-and-compliance-assurance-oeca [https://perma.cc/5XPH-Z7QZ] (last visited Nov. 7, 2022).

51. Under 5 U.S.C. § 106, agencies must refer any matter involving litigation to the Department of Justice. *See* Memorandum of Understanding Between Department of Justice and Environmental Protection Agency, 42 Fed. Reg. 48942 (Sept. 26, 1977).

52. *See, e.g.*, CWA § 402, 33 U.S.C. § 1342.

53. *See The Environmental Council of the States (ECOS) Testimony before the House Transportation and Infrastructure Committee on the Clean Water Act: 37 Years of Environmental Protection*: *Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 93–98 (2009) (statement of R. Steven Brown, Executive Director, ECOS).

54. *See, e.g.*, 33 U.S.C. § 1319.

55. 33 U.S.C. § 1319(g).

56. 33 U.S.C. § 1319(d).

57. 33 U.S.C. § 1319(c).

penalties has tended to erode over time, motivating Congress to enact legislation requiring agencies to periodically adjust the statutory penalties to account for inflation.[58] The EPA now annually adjusts the statutory penalties in accordance with this mandate.[59] So, for example, the $25,000 maximum civil penalty per day per violation specified in the Clean Water Act has been adjusted by rule to $56,460 for violations occurring after November 2, 2015, where penalties are assessed on or after December 23, 2020.[60]

Most of these penalty statutes indicate the factors that courts should consider in determining the penalty amount. For example, the CWA factors include:

1. Seriousness of violation;
2. Economic benefit resulting from violation;
3. History of such violations;
4. Good-faith efforts to comply with the applicable requirements;
5. Economic impact of the penalty on the violator; and
6. Such other matters as justice may require.[61]

Similarly, the CWA provides guidance for the EPA in determining the amount of administrative penalties, indicating that the EPA shall "take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."[62]

Although they do provide some guidance, these factors are very

58. Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 (amended by Debt Collection Improvement Act of 1996, 31 U.S.C. §§ 3701–3718 and Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Publ. L. 114–74, § 701).

59. Civil Monetary Penalty Inflation Adjustment, 40 C.F.R. pt. 19 (2020).

60. This penalty maximum applies to violations occurring after November 2, 2015, where penalties are assessed on or after December 23, 2020. *Id.* at 83820 (amending Table 1 of Civil Monetary Penalty Inflation Adjustment, 40 C.F.R. § 19.4 (2020)).

61. 33 U.S.C. § 1319(d); *see also* JOEL A. MINTZ, CLIFFORD RECHTSCHAFFEN & ROBERT KUEHN, ENVIRONMENTAL ENFORCEMENT: CASES AND MATERIALS 138 (2007) [hereinafter MINTZ ET AL.].

62. 33 U.S.C. § 1319(g)(3).

vague; they do not specify what should be considered when analyzing each factor, how much weight to give them, or which are most important.[63] Should exceeding a Clean Water Act permit limitation for total suspended solids (TSS) by 5% be penalized more than disposing of a lesser amount of TSS without a permit at all? Does the TSS permit exceedance merit a $1,000 penalty or a $5,000 penalty? How does it compare to an exceedance involving a much more dangerous chemical, such as chlorine?

In many ways, the situation is similar to the discretion and resulting disparities in federal criminal sentences that led Congress to empower the United States Sentencing Commission to develop the federal sentencing guidelines in the Sentencing Reform Act of 1984.[64] As the Introduction to the original Sentencing Commission Guidelines Manual indicated, by more specifically guiding judicial discretion, "Congress sought uniformity in sentencing by narrowing the wide disparities in sentences imposed by different federal courts for similar criminal conduct committed by similar offenders."[65] As discussed in the next section, the EPA similarly has provided some additional guidance on how it will apply the statutory penalty factors in guidance and policy documents.

B. *EPA Penalty Policies*

The EPA has fleshed out the general statutory authorizations set out above with policy and guidance documents. In 1984, as noted above, the EPA adopted a General Policy on civil penalties, seeking to achieve greater consistency and to establish a single set of goals: deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems.[66] The policy explains that deterrence includes both general deterrence, directed at persuading others not to violate the law, as well as specific deterrence, directed at the particular violator.[67]

At the same time, the agency also promulgated a "Framework" to guide statute-specific policies that implement its general

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63. MINTZ ET AL., *supra* note 61, at 139.

64. 28 U.S.C. § 994(a).

65. THE U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, INTRODUCTION AND GENERAL APPLICATION PRINCIPLES (1987).

66. *General Civil Penalty Policy, supra* note 6, at 1.1.

67. *Id. See generally,* Barnett M. Lawrence, *EPA's Civil Penalty Policies: Making the Penalty Fit the Violation*, 22 Env't L. Rep. 10529 (1992) (explaining the role of the EPA's civil penalty policies).

enforcement approach.[68] This framework indicates that penalty calculations should initially be based on a "preliminary deterrence" amount, which comprises an economic benefit component and a gravity component.[69] The economic benefit component, which will be explored further below, attempts to take away any economic gain the violator derived from the failure to comply.[70] The gravity component focuses on how serious the violation was, in terms of actual or potential harm or the importance of compliance to the statutory scheme.[71] After calculating this preliminary deterrence figure, the policy should provide for adjustment based on a variety of factors, such as culpability, history of violations, and ability to pay.[72] The resulting penalty figure is the initial penalty target figure, which can then be adjusted in negotiations.[73]

Following this framework, the EPA has developed an "enforcement response policy" (also known as a "penalty policy") for individual environmental penalty statutes that attempts to guide enforcement officials in determining the appropriate type and level of response.[74] Each policy represents a specific application of the two-step process set out in the framework. Ideally, if each region follows these policies, greater uniformity will be achieved.

Although the agency generally follows these policies in determining the penalty, they do not have the force of law because they have not been adopted pursuant to Administrative Procedure Act notice-and-comment rulemaking procedures.[75] Accordingly,

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68. EPA, EPA GENERAL ENFORCEMENT POLICY #GM-22, A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS: IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES (1984).

69. *Id.* at 2.

70. *Id.*

71. *Id.* at 3.

72. *Id.* at 3–4.

73. *Id.* at 4.

74. *See* EPA, FIFRA ENFORCEMENT RESPONSE POLICY, at 4 (2009); *see also* EPA, ENFORCEMENT RESPONSE POLICY FOR SECTIONS 304, 311, AND 312 OF THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT AND SECTION 103 OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT 3 (1999); *see also* JOHN P. SUAREZ, EPA, REVISIONS TO THE 1990 RCRA CIVIL PENALTY POLICY 1 (2003).

75. EPA, ENFORCEMENT RESPONSE POLICY FOR SECTIONS 304, 311, AND 312 OF THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT AND SECTION 103 OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT 3 (1999) ("The policies and procedures set forth herein are intended solely for the guidance of employees of the EPA. They are not intended to, nor do they, constitute a rulemaking by

they do not bind Administrative Law Judges (ALJ), the Environmental Appeals Board, or courts. While an ALJ must consider the applicable penalty policy, he or she has the "discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant."[76]

All EPA enforcement policies start by considering the economic benefit of noncompliance. At a minimum, the penalty must ensure that the violator does not benefit from its failure to comply with the law. Although the EPA has discretion to adjust other elements of the penalty in a settlement context, the policies specify that the agency generally must ensure that a penalty is at least equal to the economic benefit component.[77] Since 1984, the EPA has considered that the economic benefit calculation should be based on consideration of the violator's delayed costs, avoided costs, and illegal competitive advantage.[78]

The EPA has developed a computer model, called BEN, to assist its staff in calculating economic benefit.[79] The EPA has explained that its model is based on calculating opportunity cost savings: the costs a violator delays and avoids by noncompliance. Complying with environmental regulations typically involves some kind of initial investment (e.g., in a treatment system) followed by continuing operation and maintenance costs (e.g., labor expenditures or disposal costs). A violator that is able to avoid those costs can invest that money elsewhere and get a financial return. "This concept of alternative investment—that is, the amount the violator would normally expect to make by investing in something other than pollution control—is the basis for calculating the economic benefit of noncompliance."[80]

The EPA noted that the BEN model "focuses exclusively on the

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the EPA.").

76. MINTZ ET AL., *supra* note 61, at 88.

77. The general civil penalty policy provides that any settlement imposing less than the economic benefit must contain a memorandum of explanation and must be approved by a higher agency official. EPA, POLICY ON CIVIL PENALTIES, at 3 (Feb. 16, 1984), epapolicy-civilpenalties021684.pdf.

78. *Id.* at 7–11.

79. Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, 70 Fed. Reg. 50326, 50344 (Aug. 26, 2005). The EPA states that the BEN model is intended primarily to assist staff in assessing economic benefit for settlement purposes, although it may be used by expert witnesses in the litigation context as well.

80. *Id.* at 50326, 50329 (Aug. 26, 2005).

economic benefit from delayed and/or avoided costs: its analysis encompasses only the cost differential between compliance and noncompliance."[81] Therefore, the EPA recognizes that its model does not account for the competitive advantage or additional profits a violator may obtain by its noncompliance.[82] The agency explains that this focus simplifies the model, "obviating the need for a detailed examination of a violator's business records or competitive market situation."[83] However, in those cases in which illegal competitive advantage appears to be relevant, the EPA's policy is to go beyond the BEN model to recapture that component of economic benefit as well.[84]

A critique of the BEN model is beyond the scope of this article, but other commentators have noted that this method may be too "gentle" on violators given its focus solely on cost savings.[85] So, for example, assume a dairy operation has limitations for Biochemical Oxygen Demand (BOD) in its permit. The dairy has consistently violated the BOD limits for three years. It could have complied by installing an additional storage lagoon, with an aerator, at a cost of $200,000 plus $20,000 per year in operation and maintenance (O&M) costs. Focusing solely on cost avoidance would result in a penalty based on the time value of delaying a $200,000 investment by several years, which would be very minimal, plus three years of O&M costs.[86] On the other hand, the dairy could have also complied by reducing production by 30%, which would have decreased its net revenues by $300,000 per year. A wrongful profit focus would aim to recapture the $900,000 in increased revenues the company gained from failing to comply (plus interest), rather

81. EPA, THE BEN HELP SYSTEM, Version 2021.0.0, at 3–4 (April 2021).

82. Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, 70 Fed. Reg. 50330 (Aug. 26, 2005).

83. *Id.* at 50331.

84. The EPA notes that this may be especially relevant in wetlands cases, in which the violation often enables behavior that would not have been possible absent the violation. *Id.* at n.6.

85. *See* Lynn M. Dodge, *Economic Benefit in Environmental Civil Penalties: is BEN too Gentle?*, 77 U. DET. MERCY L. REV. 543 (2000). *But see* Robert Glicksman & Aimee Simpson, *No Profit in Pollution: A Comparison of Key Chesapeake Bay State Water Pollution Penalty Policies*, Briefing Paper No. 1305, CTR. FOR PROGRESSIVE REFORM, at 18 (April 2013), https://cpr-assets.s3.amazonaws.com/documents/No_Profit_Pollution_1305.pdf [https://perma.cc/AGL4-6C9Z] (calling BEN a "solid tool" for "consistent recovery of the economic benefit of noncompliance.").

86. *See* Dodge, *supra* note 85, at 553. Depending on the fluctuation of prices and interest rates, the benefit of delaying this construction cost could even be zero.

than focusing solely on the avoidance of costs. Again, the agency policy notes that it will pursue this sort of "competitive advantage" calculation when appropriate, but the agency's goal of swift resolution may preclude that in many cases. This choice—whether to pursue increased profits—represents an important discretionary decision that can lead to a significant lack of case-to-case uniformity.

After determining the economic benefit, enforcement response policies then call for the imposition of a gravity-based component. Many of the EPA's statute-specific policies contain a matrix to assign penalty ranges for various degrees of violation. For example, in the RCRA Civil Penalty Policy, the matrix measures the seriousness of the violation by categorizing both the potential for harm (Major/Moderate/Minor) and the extent of deviation from the statutory requirements (Major/Moderate/Minor).[87] Thus, a major deviation with a major potential for harm would be placed in a range of $22,000 to $27,500 per violation, while a minor deviation with a minor potential for harm would merit between $110 to $549 per violation.[88]

Most statutes provide for a penalty "per day" of violation.[89] So, the EPA states in its CWA Penalty policy that the violation of a monthly permit limitation for two pollution parameters in January could result in a maximum penalty of $1,550,000 ($25,000 per day x 31 days x 2 violations).[90] This would obviously be a draconian result; in calculating the gravity-based component, the EPA's CWA penalty policy does not treat a violation of a monthly limitation as a separate violation, but instead uses the per-day calculation as the upper limit on the total penalty calculation. A somewhat different approach is used for the failure to file a report of toxic chemical releases under Section 313 of the Emergency Planning and Community Right to Know Act (EPCRA). While the report can be subject to per-day penalties for each day it is late, the per-day

87. EPA, RCRA CIVIL PENALTY POLICY, at 18 (2003).

88. *Id.* at 19.

89. *See, e.g.*, Clean Water Act § 309(g)(2)(B), 33 U.S.C § 1319(g)(2)(B) (administrative penalty for "$10,000 per day for each day during which the violation continues"); CAA, § 133(b); 42 U.S.C. § 7413(b)(civil penalty "per day of each violation"); RCRA § 3008(g), 42 U.S.C. § 6928(g) (for civil penalties: "Each day of such violation shall, for purposes of this subsection, constitute a separate violation").

90. EPA, INTERIM CLEAN WATER ACT SETTLEMENT POLICY, attach. 1 (1995) (citing Atlantic States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1139–40 (11th Cir. 1990)).

penalty is 1/365 of the total gravity-based penalty amount.[91]

The initial penalty (based on the economic benefit and gravity-based components) is then adjusted by a number of factors that either increase or decrease the penalty amount. For example, the ability to pay is a prime consideration. The CWA enforcement policy, for example, states: "EPA should not seek a penalty that would seriously jeopardize the violator's ability to continue operations and achieve compliance, unless the violator's behavior has been exceptionally culpable, recalcitrant, threatening to human health or the environment, or the violator refuses to comply."[92] The EPCRA policy adjusts the penalty based not only on ability to pay, but also voluntary disclosure, history of violations, and attitude.[93]

The EPA has made a valiant attempt in these penalty policies to guide regional offices in their assessment of appropriate penalties. The policies evince much careful consideration of the relative gravity of various types of transgressions, which give much more structure to the list of statutory factors. Those agencies that have not fleshed out their authority by delineating their penalty approach, such as the California Coastal Commission, would benefit from emulating the EPA's models.

Nevertheless, the EPA's penalty policies leave significant decisions to the discretion of agency officials, which can result in wide variations. Our data analysis discussed below reveals that, in fact, the policies are not sufficient to achieve the EPA's uniformity goals. In addition, we discuss the wiggle room in the policies that might be tightened to better confine agency discretion.

At the state level, the amount of discretion is even greater. Some state agencies have adopted policies or regulations to guide the imposition of penalties.[94] Other states use the federal enforcement policy as guidance,[95] but of course these policies do not bind their determinations under state law.[96] Other states do not use any kind of penalty guidance, which heightens the dangers of non-

91. EPA, ENFORCEMENT RESPONSE POLICY FOR SECTION 313 OF THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, at 1 (2001).

92. EPA, INTERIM CWA SETTLEMENT PENALTY POLICY, at 21 (1995).

93. EPA, EPCRA ENFORCEMENT POLICY FOR SECTION 313 OF THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, at 14–18 (1995).

94. *See, e.g.*, NJ ADMIN. CODE § 7:14–8.5 (matrix for CWA violations).

95. *See, e.g.*, Barrett Refining Corp. v. Miss. Comm'n on Env't. Qual., 751 So.2d 1104, 1123 (Miss. Ct. App. 1999) (state agency used EPA policy to assess CAA violations).

96. State v. Elementis Chem., Inc., 155 N.H. 299, 306 (N.H. 2007).

uniformity.[97]

Another component of the overall penalty can be an "environmentally beneficial expenditure," also known as a "supplemental environmental project" (SEP).[98] These payments, directed to projects that help remediate the harm caused by the violations, can be a major component of penalty settlements. While penalty amounts must go the government, SEPs can reduce the penalty amount and redirect some of those funds toward the environment. For example, instead of paying the government $100,000 for the failure to file the required reports under the Emergency Planning and Community Right-to-Know Act, the EPA might allow the violator to buy new fire suppression equipment for the local fire department in exchange for a reduction in the penalty.[99] The regulated community often appreciates the SEP component because it allows the violator to repair in some way the damage to its reputation and community relationship caused by the violation and any publicity surrounding it.[100]

The EPA issued a comprehensive penalty policy in 1998 which set forth the basic requirements for SEPs and placed limits on the amount the monetary penalty could be reduced.[101] During the Trump Administration, SEPs fell out of favor and were declared impermissible by the United States Department of Justice (DOJ) in 2020.[102] However, Attorney General Garland has rescinded the Trump ban, noting: "When used appropriately, settlement

97. Glicksman & Simpson, *supra* note 85, at 10 (noting lack of penalty policy in Maryland).

98. For a helpful summary of the evolution of these payments, *see* Seema Kakade, *Remedial Payments in Agency Enforcement*, 44 HARV. ENV'T L. REV. 117, 128–31 (2020).

99. The project funded must have an adequate nexus to the violation (for example, the fire suppression equipment helps the community prepare to deal with the chemicals the company was supposed to report). *See* EPA, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY, at 8 (2015 update).

100. *See, e.g.*, Consent Decree, U.S. v. Dow Chemical Co., Civ. No. 2:21-cv-114, (E. D. La. Jan. 19, 2021) (in Clean Air Act settlement, defendants agree to fund over $400,000 in projects such as environmental education and purchase of air monitoring equipment in addition to $3 million civil penalty), https://www.epa.gov/sites/default/files/2021-01/documents/thedowchemicalcompany.pdf [https://perma.cc/TT63-4SPS].

101. In general, the penalty cannot be reduced below the economic benefit of noncompliance component plus 10% of the gravity component, or 25% of the gravity component, whichever is higher. EPA, THE SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY, at 12 (1998).

102. *See* Memorandum of Jeffery Clark (March 12, 2020), https://www.justice.gov/enrd/file/1257901/download [https://perma.cc/J8TB-XTZ2].

agreements that provide for payments to nongovernmental third parties are critical tools for addressing violations of federal law and remedying the harms those violations cause."[103]

C. *Judicial Determination of Penalties*

Courts are bound only by the relatively vague set of factors set forth in the applicable statute. The Supreme Court, in an early case on Clean Water Act penalties,[104] noted that civil penalty statutes seek to impose not only restitution, but also punishment:

> The legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties. A court can require retribution for wrongful conduct based on the seriousness of the violations, the number of prior violations, and the lack of good-faith efforts to comply with the relevant requirements. It may also seek to deter future violations by basing the penalty on its economic impact.[105]

Professors Mintz, Rechtschaffen, and Kuehn identify two basic methods courts use in determining the appropriate penalty: the "top-down" method and the "bottom-up" method.[106] A court using the "top-down" method would first determine the statutory maximum for the violation, and then reduce it based on the statutory factors. For example, in *United States v. Roll Coater*,[107] the court arrived at a penalty of just over $2 million for improperly discharging treated sewage into the city's wastewater system.

The court first calculated the statutory maximum penalty to be almost $53 million.[108] The court arrived at this by considering the maximum daily penalty of $10,000 and treating violations of monthly averages as violations for each day of that month (e.g., eight violations of the monthly average equals 248 days of violation,

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103. Memorandum of Merrick Garland on the "Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties," 2 (May 5, 2022), https://www.justice.gov/ag/page/file/1499241/download [https://perma.cc/9BLP-P7N9].

104. Tull v. United States, 481 U.S. 412, 422 (1987).

105. *Id.* at 422–43 (remarks of Sen. Muskie) (citing 123 CONG. REC. 39191 (1977)).

106. MINTZ ET AL., *supra* note 61, at 139–144.

107. United States v. Roll Coater, Inc., 21 Env't L. Rep. (Env't L. Inst.) 21,073 (S.D. Ind. March 22, 1991).

108. *Id.* at 21,075.

or $2.48 million).[109] It also considered a violation of each of three pollution parameters (chromium, zinc, and cyanide) as separate violations.[110] The court then reduced the penalty to $16.75 million by excusing violations before the date the company could reasonably have known that its actions, which the state of Indiana deemed to be compliant, were not sufficient under EPA standards.[111]

The court reduced the penalty another 50% based on the "seriousness" factor, given the lack of evidence proving the violations actually harmed the environment.[112] The court selected the 50% level because it balanced the need to preserve the deterrent effect despite the lack of harm in this case. Finally, the court reduced the penalty another 75% based on the company's good faith in halting construction in order to return to compliance.[113] The court determined that the final penalty of just over $2 million was sufficient to negate the economic benefit the company received from the violation ($631,173–778,907) and to provide effective deterrence.[114]

The *Roll Coater* case illustrates the lack of real limitations provided by the statutory factors. In this case, the court began with the maximum possible penalty (which has no relation to the actual violation committed) and then proceeded to whittle away at it almost at random. This approach seems to be like starting with a life sentence for a speeding violation and then reducing the sentence by large, arbitrary percentages to arrive at the final penalty. The court's approach also differs from the EPA's, which begins with an economic benefit calculation to ensure, subject to the critique above, that the violator does not profit from the violation.

Professors Mintz, et al., use *United States v. Municipal Authority of Union Township*[115] to illustrate a commonly used alternative: the "bottom-up" method of determining a penalty. In that case, a dairy plant run by Fairmont Products committed 2,360 CWA violations between 1989 and 1995. Fairmont knew of the violations but did

109. *Id.* (citing *Tyson Foods*, 897 F.2d at 1139–40).
110. *Id.* at 21,075 n.3.
111. *Id.* at 21,077.
112. *Id.*
113. *Id.*
114. *Id.*
115. U.S. v. Mun. Auth. of Union Twp., 929 F. Supp. 800 (M.D. Pa. 1996)).

not lower the plant's production level, which would have brought it into compliance. The court rejected the "top-down" approach, instead starting with the economic benefit and adding to that amount based on the remaining factors, such as the seriousness of the violation and ability to pay. The court found this "bottom-up" approach to be the majority view.[116]

The court determined that Fairmont benefited economically, gaining around $2,015,000 from the violations.[117] Significantly, the parties had stipulated that Fairmont would receive no economic benefit from its failure to comply, derived from the delay in making the capital improvements necessary to achieve compliance. The court, however, instead focused on the fact that the company could have achieved compliance by decreasing production volume. The court estimated that the company gained over $400,000 annually by failing to comply.[118] Even though this theory of economic benefit did not comply with the EPA's penalty policy, the court noted that it was not bound by the EPA's view of this factor.[119]

The court next considered the number, frequency, and degree of the violations, along with the harm to the environment, to determine the seriousness of the violations. The company committed around 2,360 violations, which "contributed to tangible degradation of Kishacoquillas Creek."[120] The court noted, however, that the pollutants were "conventional" rather than toxic pollutants, which would have been more egregious. The court found that Fairmont did not show good faith in its attempt to become compliant.[121] The company knowingly violated its permit for nearly five years before taking any compliance measures. In assessing ability to pay, the court pierced the corporate veil to consider the very substantial assets of Dean Foods, the parent company of Fairmont.[122] Considering these factors, the court imposed a penalty of $4,031,000, exactly twice the economic

116. *Id.* at 806 (finding the economic benefit is the "starting point" and the other § 1319(d) factors are used to increase that amount). *See also* Student Pub. Int. Rsch. Grp. of N.J., Inc. v. Monsanto Co., 1988 WL 156691, at *16 (D.N.J. March 24, 1988) (specifically rejecting the "top-down" method).

117. U.S. v. Mun. Auth. Of Union Twp., 929 F. Supp. at 805.

118. *Id.*

119. *Id.* at 807.

120. *Id.* at 807.

121. *Id.*

122. *Id.* at 808.

benefit calculation.[123] In arriving at this number, the court had no yardstick other than reaching an amount that would promote punishment and deterrence, so as to "inspire fidelity to the law."[124]

Because the "bottom-up" method starts with an economic benefit component, the penalty it yields seems more closely tied to the severity of the violation than the penalty yielded by the "top-down" approach. However, the *Union Township* case illustrates several issues with this type of penalty calculation. First, the failure of the statute to define what constitutes an economic benefit leads to vastly disparate approaches to calculation. As described above, the EPA's policy focuses on the costs of compliance—e.g., constructing compliant pollution control facilities—and the economic benefit of delaying those costs. However, the EPA does also consider increased revenue when appropriate. Without more guidance on when increased revenue should be considered, both the EPA and the courts will continue to reach widely disparate results.

Second, the court's determination based on the relevant factors seems arbitrary, as the court simply doubles the economic benefit figure. By contrast, the EPA's gravity-based penalty framework considers how the violation stacks up against other violations under the relevant statute. For instance, improperly storing fifty drums of highly toxic waste will result in a higher penalty than mislabeling one drum of a less toxic chemical. Despite the shortcomings outlined above, judicial penalties would be more uniform and have a greater relationship to the relevant gravity of the violation if courts consistently followed the EPA's penalty framework.

D. *State Penalty Authority*

As noted above, many federal environmental statutes allow the EPA to delegate implementation and enforcement to the states. The division of enforcement authority between the EPA and state authorities for delegated programs is complex. While the delegation of a particular program means that the state agency has primary enforcement authority, the EPA retains the right to take action in certain circumstances, such as imminent endangerment, or when the state has not commenced timely and appropriate

123. *Id.* at 809.

124. *Id.*

enforcement action.[125] The details regarding this arrangement are typically spelled out in a Memorandum of Agreement (MOA) between the state and the EPA.[126] Even though the state agency is not bound by the EPA's penalty policy, the MOA may indicate that the state agency will "employ the spirit of" that policy.[127]

The statutory maximum penalty for violations may be significantly less at the state level. For example, Section 309 of the Clean Water Act specifies that the EPA may impose an administrative penalty of $10,000 per day of violation up to a maximum of $125,000.[128] With the application of the Civil Monetary Penalty Inflation Adjustment rule, those amounts increased to $22,584 per day in 2022, up to a maximum of $282,293.[129] A federal court may impose civil penalties of $25,000 per day ($56,540 with the inflation adjustment) for each violation, with no maximum amount.[130] By contrast, many state penalty limits are much lower. For example, the Iowa environmental agency authority is limited to $5,000 per day for Clean Water Act violations, with a maximum administrative penalty of $10,000.[131] In Iowa, as in most states, there is no equivalent inflation adjustment rule to keep these amounts consistent over time. As of today, the maximum administrative penalty in Iowa is capped at 3.5% of the equivalent federal authority ($10,000 as opposed to $282,293).

The EPA has not required state penalty authority to mirror federal authority in order to delegate programs and has not made inflation adjustments a requirement of continued delegation. Section 402(b) of the CWA requires only that states have the authority "to abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement."[132] EPA regulations governing the delegation process require only that states have the authority to impose civil

125. *See, e.g.*, 33 U.S.C. §1319a–c.

126. *See, e.g.*, National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Arizona and the United States Environmental Protection Agency Region 9 (Dec. 5, 2002), https://www.epa.gov/sites/default/files/2013-08/documents/az-moa-npdes.pdf [https://perma.cc/R6NV-UVW3].

127. *Id.* at 13.

128. Clean Water Act of 1972 § 309(g)(2)(B).

129. Civil Monetary Penalty Inflation Adjustment, 85 Fed. Reg. 83818, 83820 (Dec. 23, 2020).

130. Clean Water Act of 1972 § 309(g)(2)(B).

131. IOWA CODE § 455B.191–2 (2021); IOWA CODE § 455B.109–1 (2016).

132. Clean Water Act of 1972 § 402(b)(7), 33 U.S.C. §1342(b)(7).

penalties of $5,000 per day.[133] The minimum penalty amount required for a delegated program has not been updated since the penalty's original promulgation in 1980 and is not subject to the periodic penalty inflation adjustment.[134]

In proposing the original version of the delegation regulation in 1978, the EPA originally anticipated that states should have the same maximum and minimum penalty authority as the federal provisions.[135] However, in response to backlash from the states, the EPA retreated from this requirement in the final regulation, and instead had to defend why it included *any* minimum penalty requirement.[136] The EPA noted that unless it set such minimum levels, it would have to step in more often to take enforcement action due to the inadequacy of the state-level response. Notably, the EPA offered no rationale for allowing states to have weaker enforcement authority, noting only that it had reduced them below the federal authority level "based on the large volumes of comments from states requesting such relief."[137]

Most state delegations of CWA permit administration occurred in the 1970s, so the EPA's assessment of whether the state has adequate enforcement authority is seriously out of date.[138] Nevertheless, the EPA has reiterated its weak position on state enforcement authority as recently as 2020 in its proposed rule clarifying that states and tribes are not required to include the same criminal intent standard as the federal statute in order to have delegated CWA authority.[139]

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133. 40 C.F.R. §123.27 (1993). This consolidated regulation also governs delegation of the Clean Water Act Section 404 program, the RCRA hazardous waste program, and the underground injection program.

134. *See* 45 Fed. Reg. 33,290, 33,462 (May 19, 1980) (providing for minimum National Pollutant Discharge Elimination System (NPDES) civil penalty authority of $5,000 per day).

135. National Pollutant Discharge Elimination System Revision of Existing Regulations, 43 Fed. Reg. 37,078, 37,108 (Aug. 21, 1978).

136. Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,382 (May 19, 1980).

137. *Id.*

138. The EPA maintains a table of state delegations on its website. *NPDES State Program Authority*, EPA, https://www.epa.gov/npdes/npdes-state-program-authority [https://perma.cc/ERP5-KKYN]. In addition, it maintains a repository of all the Memoranda of Agreement regarding delegated authority. *Memorandum of Agreements Between EPA and States Authorized to Implement the National Pollutant Discharge Elimination System (NPDES) Program*, EPA, https://www.epa.gov/compliance/memorandum-agreements-between-epa-and-states-authorized-implement-national-pollutant [https://perma.cc/EA7E-YAKF].

139. Criminal Negligence Standard for Clean Water Act Section 402 and 404

Courts have upheld the EPA's interpretation that the Clean Water Act allows for weaker state enforcement in a delegated program. In *Natural Resources Defense Council v. United States Environmental Protection Agency*,[140] the D.C. Circuit held that the delegation statute did not require a state to have the same level of penalties as the CWA provides to the federal government.[141] The court found that the challengers "presume[d] an unexpressed congressional intent that state requirements must mirror the federal ones," which is "inconsistent with the elements of the statutory scheme limiting operation of the provisions to enforcement efforts at the national level and explicitly empowering the Administrator to set the prerequisites for state plans."[142] In fact, the court noted that the Water Quality Act of 1987 contained a provision explicitly rejecting a requirement that state monetary civil penalty authority match the federal penalty maximums.[143] The court found that the delegation regulations "reflect the balancing of uniformity and state autonomy contemplated by the Act."[144]

Similarly, in *Akiak Native Community v. United States Environmental Protection Agency*,[145] the Ninth Circuit approved the delegation of National Pollutant Discharge Elimination System (NPDES) authority to Alaska to regulate water pollution, despite the lack of administrative penalty authority at the state level. Under Alaska law, only a court could impose penalties for permit violations. The court noted that the delegation statute did not require the authority to impose administrative penalties and the EPA could find that the ability to seek civil penalties in court was sufficient.[146] Given the resources necessary to take a case to court compared to the administrative penalty system, this difference in authority will undoubtedly result in less robust enforcement in Alaska compared to other states, exacerbating the lack of uniformity.

The justification for allowing states to have lower penalty maximums should be re-examined. The *Natural Resources Defense*

Programs, 85 FR 80713–01, 80715–16 (Dec. 14, 2020).

140. 859 F.2d 156 (1988).

141. *Id.* at 179–80.

142. *Id.* at 180.

143. *Id.* (citing Water Quality Act of 1987 § 313(b)(2), 33 USC § 1319).

144. *Id.* at 180–81.

145. 625 F.3d 1162 (9th Cir. 2010).

146. *Id.* at 1171–72.

Council court concluded that the discretion to have a lower penalty authority supports the balance between uniformity and state autonomy. But the ability of a state to select dramatically lower penalties destroys uniformity. Uniformity in penalties is supposed to prevent regulated entities from "pollution shopping" for jurisdictions with lower environmental standards. If that consistency is important with regard to the standards that must be met, it surely is just as important with regard to the enforcement of those standards. The value of state autonomy, on the other side of this balance, requires further delineation. While a state may have an interest in enforcing its own laws against its own citizens, surely its interest in autonomy does not extend to treating a violation differently just because it happened in a different jurisdiction. If state autonomy means significantly differential treatment, then the goal of uniformity has been completely undercut.

In fact, the EPA originally proposed that state penalty maximums needed to be "comparable" to the federal maximums.[147] In the preamble to the proposed rule, the EPA emphasized the importance of uniformity in penalty determination, noting that requiring all states to follow the EPA's penalty assessment approach "will help to assure fairness and national uniformity in enforcing the Act, i.e., no area of the country will be able to offer lenient enforcement as an advantage to its industries or as a lure to industries located in other areas."[148]

In its regulatory preamble, the EPA cited no justification for backing away from this uniformity commitment. In the passage quoted above, the agency indicates it simply bowed to the pressure of "large volumes of comments from states requesting such relief."[149] Now that it was going to allow state levels to be different from the federal authority, the EPA had to determine what the minimum penalty authority would be. It did so without any analysis whatsoever regarding the level of penalties that would be sufficient to achieve the goals of deterrence and punishment. Instead, it simply set the levels to be the same as "past policy," such that no state that had been previously delegated NPDES authority would be in violation.[150] With that decision, the EPA threw uniformity out the window, taking the path of least resistance and caving to the

147. 43 Fed. Reg. 37,078, 37,108 (Aug. 21, 1978).

148. *Id.* at 37,083.

149. State Program Requirements, 45 Fed. Reg. 33,377, 33,382 (May 19, 1980).

150. *Id.*

desire of states to maintain penalty amounts far below those provided in the federal Act.

Remarkably, the weakness inherent in this "differential" approach has significantly worsened in the intervening decades. As described above, federal penalty authority has continued to increase under the inflation adjustment statute, while state penalties have remained largely stagnant. To the extent there ever was a "balance" between uniformity and state autonomy, as the D.C. Circuit believed in its 1988 opinion, that balance clearly no longer exists. At this point, it is hard to believe that a $5,000 maximum penalty fulfills the goals of deterrence set out above.

The EPA does have the authority to step in and undertake an enforcement action when state enforcement is deemed inadequate. For reasons of comity and resources, that option must necessarily be reserved for rare cases. In fact, the EPA brought only 7% of CWA penalty cases over the past decade.[151] Thus, the availability of federal enforcement cannot be seen as a rationale for allowing weaker systemic enforcement at the state level.

In addition to the disparity in penalty authority between the states and the federal government, there is also a great deal of variation in authority between states. State penalty authority ranges from a low of $10,000 per violation to a high of about $55,000 per day. At the weaker end of the scale, no administrative penalties are authorized by Idaho state law, and the statute limits judicial civil penalties to $10,000 per violation or $5,000 per day for continuing violations.[152] Wyoming limits penalties to $10,000 per day.[153] Florida revised its pollution penalty statute in 2000 to provide for civil penalties of $15,000 per offense.[154]

Other state authorities are more robust: Michigan, for example, provides for a maximum civil judicial penalty of $25,000 per day of violation, although that amount is not adjusted for inflation.[155] New York's penalty statute authorizes $37,500 per violation per day.[156] Colorado provides a model example of what state authority should be. Its penalty provision was recently

151. Table 1 below indicates that over the last ten fiscal years, the EPA concluded 1296 CWA cases with penalties compared to 17,282 concluded at the state level.

152. IDAHO CODE § 39-108(5)(a)(ii) (2022).

153. WYO. STAT. ANN. § 35-11-901(a) (2022).

154. FLA. STAT. ANN. § 403.141(1) (LexisNexis 2022).

155. MICH. COMP. LAWS § 324.3115(1)(a) (2022).

156. N.Y. ENV'T CONSERV. L. § 71-1929 (McKinney 2019).

amended to increase penalties to a maximum of $54,833 per day per violation and includes an annual inflation adjustment similar to federal law.[157]

In addition to differences in the amount of their authority, state agencies also differ widely in the method of penalty calculation. The EPA originally wanted states to follow the EPA's civil penalty policy in assessing their own penalties, making the adoption of a similar policy part of the delegation decision. However, the EPA backed down from that approach and the regulations no longer require any specific method of determining penalties, saying only that the resulting penalty must be "appropriate to the violation."[158] So, again, the EPA sacrificed its goal of uniformity to its amorphous goal of state autonomy.

To determine whether these differences resulted in actual disparities in penalty assessment, we examined the reported CWA penalties for each state and EPA region. The next section discusses that data and our conclusion that the issues identified above have resulted in significant differences in penalties imposed.

IV. DATA ANALYSIS REVEALS SIGNIFICANT DISPARITIES IN AMOUNTS OF PENALTIES IMPOSED

We were able to access data on environmental penalties through the EPA's Enforcement and Compliance History Online (ECHO) website.[159] For this article, we decided to focus on the penalties assessed under CWA Sections 301 and 402 for discharging pollutants without a permit or in violation of a permit.[160] Using the ECHO website instructions, we downloaded the national CWA penalty dataset.[161] For a comparison of state

157. COLO. REV. STAT. § 25-8-608(1) (2022).

158. Permit Regulations: Revisions in Accordance with Settlement, 48 Fed. Reg. 39,611, 39,615 (Sept. 1, 1983).

159. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ENFORCEMENT AND COMPLIANCE HISTORY ONLINE, http://echo.epa.gov [https://perma.cc/U4RP-5L83] (last visited Nov. 1, 2022).

160. 33 U.S.C. § 1311 (Westlaw 1995); 33 U.S.C. § 1324 (Westlaw 2019). Our statistical analysis found no significant difference between the median penalties for violations under Section 301 versus Section 402; the median 301 penalty was $16,000, while the median 402 penalty was $20,550, Wilcoxon Rank Sum test p-value = 0.628. Therefore, we used both sets of data in our subsequent tests.

161. For the database download instructions, see https://echo.epa.gov/tools/data-downloads#downloads [https://perma.cc/92VF-CF97]. The data was downloaded on

penalties with federal penalties, we used the EPA ECHO Dashboard website entitled "Analyze Trends: EPA/State Wastewater Dashboard"[162] and downloaded the data under the "Penalties" section.[163] EPA officials in confidential conversations with the authors suggested that there may be gaps in the data provided to the agency by the EPA regional offices and the states. Nevertheless, the EPA must believe the data is reliable enough to use for its public-facing dashboard, and we believe the data is robust enough to suggest grounds for concern regarding the disparities.

A. *State vs. Federal Enforcement Disparity*

The differences in penalty authority between states and the federal government is reflected by a wide gulf in the level of actual penalties imposed. Over the last ten fiscal years (2013–22), state penalties for Clean Water Act violations averaged $35,403. In comparison, at the federal level, the EPA imposed an average CWA penalty of $186,042 during the same period. Thus, the average federal CWA penalty is over *five times higher* than the average state penalty.

With regard to median penalties, we found a significant difference between the state and federal penalties, with a state median of $4,000 and federal median of $28,938.[164] An alpha level of 0.05 was used to determine significance for all tests. Table 1 below shows the mean and median penalty amounts imposed at the state and federal level over the last ten fiscal years.

April 12, 2022. We downloaded the "ICIS FE&C Dataset" and filtered the data down to the CWA sections.

162. https://echo.epa.gov/trends/comparative-maps-dashboards/state-water-dashboard [https://perma.cc/6GT9-6WLF].

163. This dataset was downloaded on August 15, 2022.

164. The Wilcoxon rank sum test indicates significance with W = 17358300 and p-value = 0.0000.

Table 1: State v. Federal Penalty Comparison

Year	State Mean (n)	Federal Mean (n)	State Median	Federal Median
2013	$26,744 (1,520)	$76,561 (103)	$3,300	$20,000
2014	$23,218 (1,439)	$186,891 (169)	$3,500	$47,700
2015	$31,106 (1,729)	$201,682 (166)	$2,810	$45,000
2016	$28,546 (1,855)	$49,261 (127)	$3,750	$30,000
2017	$15,218 (1,656)	$155,312 (201)	$3,531	$51,050
2018	$18,688 (1,913)	$77,449 (98)	$5,000	$15,360
2019	$89,784 (2,102)	$50,929 (93)	$7,830	$16,200
2020	$13,872 (1,852)	$64,869 (102)	$3,000	$27,500
2021	$73,553 (1,752)	$651,597 (157)	$4,687	$64,500
2022	$18,278 (1,464)	$118,037 (80)	$3,308	$10,900
Overall	$35,403 (17,282)	$186,042 (1,296)	$4,000	$28,938

Certainly, federal penalties often may be higher for legitimate reasons. Under the system of shared enforcement authority, the EPA might tend to step in only on the worst cases, where more enforcement muscle is needed, while the state authority handles more routine enforcement matters. To get a true comparison of apples to apples, it would be necessary to isolate state and federal cases with similar types of violations and compare the results, which this dataset does not allow us to do. Nevertheless, the problem of disparate penalty authority we have identified above could account for at least part of this remarkable state/federal penalty gap. Moreover, the drastic difference gives a roulette-wheel quality to enforcement, with the consequences becoming massive only if you are unlucky enough to be one of the cases the EPA decides to bring.

As noted above, there are also great differences among states in

terms of their penalty authority. Our data confirmed that there is also a significant difference from state to state in terms of actual penalties assessed.[165] Using the median values for the last ten years of state penalties, there were 417 out of 1,176 significant pairwise differences between states. Of note is that the highest mean state penalty value in this ten-year time frame is from American Samoa at $2,600,000 and the smallest mean is from Idaho at $1,089, although both have small sample sizes. The largest median state penalty also belongs to American Samoa at $2,600,000, while the smallest median is from Montana at a mere $300, with almost 200 penalties administered.[166]

Table 2: Highest and Lowest State Medians

Highest 5		Lowest 5	
American Samoa	$2,600,000	Montana	$300
District of Columbia	$1,605,429	North Carolina	$617
Nebraska	$413,750	Michigan	$780
Nevada	$126,250	Hawaii	$1,000
Wyoming	$85,320	Idaho	$1,089

This data indicates a striking degree of penalty disparity from state to state. Although some individual case differences may be justified by the circumstances involved, the statistically significant disparity here over a ten-year period indicates that these provisions are not being uniformly enforced.

B. *Penalty Differences Between EPA Regions*

EPA enforcement comes from ten regional offices throughout the United States. The geographic jurisdiction of each regional office is shown in Table 3 below. Although certainly a penalty assessed by an administrative law judge at the regional level can be appealed to the national Environmental Appeals Board (and from there to a federal district court), the vast majority of penalty cases are settled by the parties or not appealed beyond the regional office.

165. The Kruskal-Wallis test indicates significance with $H(48) = 6716$, $p = 0.0000$.

166. There are no recorded values from Arizona, New Mexico, and Vermont; New Hampshire and Puerto Rico also have only federal and no state values.

Table 3: EPA Regions

EPA Region 1	EPA Region 2	EPA Region 3	EPA Region 4	EPA Region 5	EPA Region 6	EPA Region 7	EPA Region 8	EPA Region 9	EPA Region 10
Connecticut	New York	Delaware	Georgia	Illinois	Louisiana	Iowa	Colorado	Nevada	Alaska
Maine	New Jersey	Maryland	Kentucky	Indiana	Arkansas	Kansas	Montana	California	Idaho
Massachusetts	Puerto Rico	Pennsylvania	North Carolina	Michigan	Oklahoma	Missouri	North Dakota	Arizona	Oregon
New Hampshire	U.S. Virgin Islands	Virginia	South Carolina	Minnesota	New Mexico	Nebraska	South Dakota	Hawaii	Washington
Rhode Island	7 Tribal Nations	West Virginia	Alabama	Ohio	Texas	9 Tribal Nations	Utah	Samoa	271 Tribal Nations
Vermont		Washington, D.C.	Mississippi	Wisconsin	65 Tribal Nations		Wyoming	Guam	
10 Tribal Nations			Florida	35 Tribal Nations				147 Tribal Nations	

There is a remarkable disparity in the size of monetary penalties assessed by the various regions. Table 4 shows the mean and median penalty assessed by each Region under the Clean Water Act. We focus on the median penalty rather than the mean to avoid the results being skewed by the disproportionate impact of one particularly large penalty. In order to also smooth out any aberrational penalties, a ten-year window of penalties for each region was examined.

The following hypotheses are investigated:

$H1_a$: There is a difference in the median size of penalties by Region.

$H2_a$: There is a difference in the median size of penalties by Year.

$H3_a$: There is a difference in the percentage of penalties that include SEPs.

After investigating the first hypothesis, we found that the median penalty does differ by region[167] and that there are significant differences between a large number of pairs of regions.[168] In Table 4, the median of every region is compared to that of every other region. The numbers in the center and right of the table are the p-values for every pair of regions being compared. Any comparison of two regions that are significantly different from each other are marked with an asterisk (*).

167. The Kruskal-Wallis test indicates significance with $H(9) = 139.0$, $p = 1.35e\text{-}25$.

168. These significances were determined from Dunn's pairwise post hoc test p-values with a Bonferroni correction.

Table 4: Penalties by Region

Region	Mean	Median	n	Region								
				1	2	3	4	5	6	7	8	9
1	$65,624.6	$15,360.5	94									
2	$35,338.2	$10,000.0	184	0.1030								
3	$471,603.8	$40,000.0	135	0.0001*	0.0000*							
4	$151,230.7	$21,500.0	162	1	0.0001*	0.0008*						
5	$180,778.5	$54,734.5	28	0.1129	0.0000*	1	0.5510					
6	$326,830.1	$10,000.0	131	0.5090	1	0.0000*	0.0027*	0.0001*				
7	$90,629.7	$25,500.0	183	1	0.0000*	0.0948	1	1	0.0000*			
8	$345,300.7	$15,500.0	70	1	0.3410	0.0006*	1	0.1560	1	1		
9	$318,801.7	$68,388.0	49	0.0095*	0.0000*	1	0.0592	1	0.0000*	0.9060	0.0161*	
10	$56,331.9	$20,000.0	205	1	0.0104*	0.0000*	1	0.0519	0.1450	0.1830	1	0.0013*

* Pairwise p-values significant at alpha = 0.05

Thus, a typical violator in Region 9, with a median penalty of $68,388, faces a much more severe penalty threat than the typical violator in Region 2 or Region 6, with a $10,000 median.

The disparity between regions is difficult to explain. In part, it could be the result of which types of violations are primarily handled by the EPA in each region. If the state authorities in that region handle all but the most egregious cases, the federal regional penalty is likely to be higher. More precise analysis, comparing penalties imposed by various regions for cases with very similar violations, would be more revealing, but is not possible with the EPA's existing database.

To address the second hypothesis, the significance test found that the median penalty also differs by year,[169] but that when the median penalty of every year is compared to that of every other year, there were significant differences between only 2014 (Mdn = $28,000) and 2021 (Mdn = $10,500), as well as 2015 (Mdn = $23,850) and 2021 (Mdn = $10,500).[170] The full results are given in Table 5. It is difficult, based on this data, to discern any trend in penalty amounts over time, or to draw any conclusions regarding the impact of different presidential administrations.

169. The Kruskal-Wallis test indicates significance with $H(9) = 19.9$, $p = 0.0183$.

170. These significances were determined from Dunn's pairwise post hoc test p-values (0.0103 and 0.0106) with a Bonferroni correction.

Table 5: Penalties by Year

				Year								
Year	Mean	Median	n	2012	2013	2014	2015	2016	2017	2018	2019	2020
2012	$307,044.2	$18,000.0	169									
2013	$403,566.9	$17,750.0	162	1								
2014	$100,410.1	$28,000.0	137	1	1							
2015	$268,057.9	$23,850.0	147	1	1	1						
2016	$79,881.3	$19,786.5	148	1	1	1	1					
2017	$93,608.8	$20,000.0	121	1	1	1	1	1				
2018	$70,233.4	$22,000.0	101	1	1	1	1	1	1			
2019	$103,717.8	$22,500.0	89	1	1	1	1	1	1	1		
2020	$41,444.9	$18,700.0	78	1	1	1	1	1	1	1	1	
2021	$39,367.3	$10,500.0	89	0.434	1	0.0103*	0.0106*	0.9310	0.3610	0.2000	0.349	1

* Pairwise p-values significant at alpha = 0.05

Another area of disparity involves the use of Supplemental Environmental Projects (SEPs) in Clean Water Act settlements. Table 6 illustrates the reduced frequency of SEPs during the Trump Administration as a result of the DOJ memo noted above. Beyond that, however, it also reveals differences between regional offices in the use of this tool.[171] A violator in Region 10 or Region 4 would have very little chance of having an environmentally beneficial project accepted as a penalty component, while Region 1 included this component in almost one-fifth of penalty cases. Because SEPs can often be seen as a way for the violator to do something positive for the community, which often can help repair its image, the significant regional variation in the use of this option constitutes another form of disparity in treatment of violators.

171. Table 6 reports the percentage of cases *in which penalties were imposed* that included SEPs. It does not include cases in which no penalty was imposed.

Table 6: SEP Frequency by Year and Region

SEP Frequency by Region											
Year	Region 1	Region 2	Region 3	Region 4	Region 5	Region 6	Region 7	Region 8	Region 9	Region 10	**Annual Total**
2012	9	4	1	0	0	1	0	0	0	0	**15**
2013	2	4	0	2	0	0	2	0	1	0	**11**
2014	1	0	1	1	1	2	3	1	1	0	**11**
2015	1	0	1	0	0	1	5	0	1	0	**9**
2016	2	4	1	0	1	0	9	0	0	1	**18**
2017	1	1	0	0	0	1	6	0	1	0	**10**
2018	1	1	1	0	0	1	0	1	1	0	**6**
2019	0	0	1	0	2	0	3	0	0	1	**7**
2020	0	0	0	0	0	0	0	0	1	0	**1**
2021	0	0	0	0	0	0	0	0	0	0	**0**
10 yr Total	**17**	**14**	**6**	**3**	**4**	**6**	**28**	**2**	**6**	**2**	**88**
Total penalty cases	94	184	135	162	28	131	183	70	49	205	1241
SEP percentage	**18.1**	**7.6**	**4.4**	**1.9**	**14.3**	**4.6**	**15.3**	**2.9**	**12.2**	**1**	**7.1**

The data in Table 6 shows that, as expected, the overall use of SEPs dwindled towards zero as the Trump DOJ policy came into effect. Before that, however, the data shows a number of differences in the use of the SEP option in the various regions. For hypothesis three, a significant difference in the proportion of penalties that included SEP by region was found; a look at every possible pair is shown below in Table 7.[172] It is noted that there are multiple differences that occur with Region 1, which has the highest SEP occurrence at 18.09%, and with Region 10, which has the lowest amount at 0.98%, when compared to the other regions. As discussed above, a violator in Region 10, where the ability to propose an SEP is basically not available, is treated very differently from a violator in Region 1, where SEPs seem to be a very common part of the penalty equation.

172. The overall Fisher's Exact test had a p-value = 0.0000. The table provides the Fisher's Exact post hoc tests with Bonferroni pairwise correction p-values from all possible pairs.

Table 7: SEP Penalties by Region

		Region								
Region	*% that are SEP*	1	2	3	4	5	6	7	8	9
1	18.09%									
2	7.61%	0.6480								
3	4.44%	0.0572	1							
4	1.85%	0.0003*	0.9990	1						
5	14.29%	1	1	1	0.4420					
6	4.58%	0.0635	1	1	1	1				
7	15.30%	1	0.9990	0.0756	0.0003*	1	0.1260			
8	2.86%	0.1120	1	1	1	1	1	0.1970		
9	12.24%	1	1	1	0.2560	1	1	1	1	
10	0.98%	0.0000*	0.0580	1	1	0.0968	1	0.0000*	1	0.0364*

* Pairwise p-values significant at alpha = 0.05

The disparities of enforcement levels among EPA regions may (in part) reflect the fact that Regional Administrators (RAs)—who have a major say in the quality and quantity of regional enforcement—must be approved by officials from each of the states in their regions.[173] Since state governments tend to vary politically from region to region, some regions will have more conservative RAs and some will have more liberal RAs. However, this is only a partial explanation and does not account for the fact that some supposedly liberal regions are less enforcement-minded than one might expect. A more positive spin on these differences might be that one region is more "compliance-minded" than another. In other words, one region may favor working with the regulated community to achieve compliance rather than imposing large penalties for a deterrent effect. Regardless of the reason, from the violator's point of view, the disparity in treatment is unfair.

Regional differences in the types of violations encountered also may account for part of these disparities. For example, higher concentrations of large industries might result in higher average penalties compared to regions where most violators consist of municipalities, small businesses, or farmers. Some regions might have violations associated with extraction operations, while coastal states might have violations associated with shipping. Thus, further research isolating similar types of violations and violators would be fruitful. In addition, research on the enforcement data on other environmental statutes, such as the Clean Air Act or EPCRA, could help to determine whether regional disparities exist across the enforcement spectrum.

V. EPA PENALTY POLICY DISCRETION

The significant regional variation in the penalties imposed suggests that the EPA's penalty policies are not meeting the agency's objective of providing a uniform approach. A closer analysis of the policies reveals that numerous points of discretion result in a readily malleable instrument that provides less consistency than desired. The biggest opportunities for discretion include: 1) determination of whether to charge; 2) number of

173. Thank you to Joel Mintz for this insight.

counts of violation; 3) whether to impose per-day penalties; and 4) application of the reduction factors.

First, the agency has a great deal of authority regarding when to actually penalize a violator, akin to prosecutorial discretion. Many violations are handled by using a "Notice of Violation (NOV)" or "Notice of Noncompliance" rather than any sort of more stringent enforcement. Certainly, there are instances when penalties are not warranted: for example, if the violation occurred due to an unforeseeable weather event or equipment malfunction. Nevertheless, the total lack of control over the use of NOVs seems problematic.[174] Enforcement discretion here could be curtailed or made more uniform by a policy indicating the circumstances warranting the use of a NOV.[175] The policy could also limit the number of NOVs that could be issued per violator and require that the decision not to penalize be explained to ensure that it falls within the policy.

Second, agency officials have discretion over how to charge the violations. For example, under EPCRA § 304, a facility is required to report certain releases of hazardous chemicals to local and state emergency planning coordinators for all jurisdictions that might be affected by the release.[176] So, a release from a railroad tank car involving two extremely hazardous chemicals occurring in Omaha, Nebraska might require at least three entities to be notified (local, state of Iowa, state of Nebraska). The failure to notify each of these three entities about each chemical could be a separate violation, resulting in six counts of Section 304 violations. On the other hand, another region might view this as one violation: the failure to report a release to proper authorities. The difference in total penalties, therefore, can be significant even before the penalty

174. For example, in *Northeast Iowa Citizens for Clean Water v. Agriprocessors, Inc.*, plaintiffs alleged numerous violations of defendant's National Pollution Discharge Elimination System (NPDES) permit over a period of five years, without any penalty being assessed. The Iowa Department of Natural Resources issued a Notice of Violation each time. After a citizen group filed suit and the EPA intervened, the court eventually entered a consent decree imposing a $600,000 penalty for these violations. 489 F.Supp.2d 881 (N.D. Iowa 2007).

175. *See, e.g.*, OFF. OF COMPLIANCE MONITORING OF THE OFF. OF PREVENTION, PESTICIDES & TOXIC SUBSTANCES, U.S. E.P.A., ENFORCEMENT RESPONSE POLICY FOR SECTION 313 OF THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (1986) 3-4 (1992), https://www.epa.gov/sites/default/files/2017-03/documents/epcra313erpamendments2017.pdf [https://perma.cc/NJ8Y-DKXE] (detailing "Circumstances Generally Warranting an NON").

176. 42 U.S.C. § 11004 (Westlaw 2018); 40 C.F.R. § 355.42 (2022).

policy is applied.

Daily penalties seem to present another significant opportunity for non-uniformity, because they can accrue to huge numbers without a clear relationship to the impact of the violation. For example, in *Lent v. California Coastal Commission,* the Commission calculated a maximum potential penalty of $8,370,000 because the statute allowed a penalty of $11,250 per day, and the Commission determined that the Lents were in violation for 744 days, measured from the date they were advised that their violations could result in an administrative penalty.[177] This large penalty, however, was not carefully calibrated to reflect the seriousness of the violation.

Environmental penalty policies need to address several crucial issues with regard to per-day penalties that can exacerbate the problem of untrammeled discretion. First, the EPA should provide specific guidance on the circumstances justifying the imposition of per-day penalties. If agencies have no guidance on this threshold question, the result can be wildly different penalties for the same violation. Second, the policy should address the question of when a per-day penalty should begin. The number of days can accumulate quickly, often with little relationship to the harm caused by the violation. Finally, the policy should address the amount of the per-day penalty. Again, this amount should be based on the goals of our penalty system (deterrence, punishment, achieving compliance). Some current policies give no indication that they have addressed these issues.

For example, the EPCRA Enforcement Response Policy for Sections 311 and 312, which involves annual reporting of hazardous chemical inventories, allows per-day penalties to be imposed for each day that the annual report is late. The policy specifies that the per-day penalty should be 1% of the base penalty, which is calculated based on the amount of chemicals and the degree of the violation.[178] This policy is sound in that the amount is based on some relationship to gravity, and discretion is reduced. However, note that the penalty is not imposed based on the date the violator was informed they needed to comply; rather, it is calculated from the date the report was due. This fails to

177. 62 Cal.App.5th 812, 830 (Cal. App. Ct. 2d 2021).

178. EPA, ENFORCEMENT RESPONSE POLICY FOR SECTIONS 304, 311, AND 312 OF THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, 23 (1999), https://www.epa.gov/sites/default/files/documents/epcra304.pdf [https://perma.cc/PFK9-Y8B2].

appropriately incentivize compliance. Let us assume that Company A is notified on June 1 that it missed the March 1 filing date and responds by immediately filing its report. Should it be treated the same as Company B, who is notified on April 1 of its delinquency, but does not get around to filing until June 1? And what about Company C, who is not even aware of the potential violation until December 15 and now faces 289 days of per-day penalties?

Similarly, a violation of a monthly permit limitation should be treated as one violation rather than 28–31 separate days of violation. The per-day penalty could be used when the violator has been put on notice of the need to remedy a violation and that penalties will accrue thenceforth until the violation ceases. The per-day penalty amount should be communicated to the violator so they are aware that the meter is running on their potential liability for failure to comply. In this manner, per-day penalties would not be retroactive, but would be used only when the violator is aware that they are subject to the penalty. The per-day penalty would also need to be calculated based on the amount of continuing harm to the public caused by the violation and the amount necessary to provide an adequate incentive to comply, rather than set at an arbitrary percentage of the maximum penalty.

For example, the Lents were on notice that a penalty could be imposed, but they were not aware of the amount that might be imposed. The harm component of the amount could be judged by estimating the value of an easement to the public at that location. If an average of 50 people would use the access and were willing to pay $10 for that access, the value would be $500/day. The incentive value has to be based on the value to the Lents of not complying. For example, let us say the cost of removing the obstruction is $100,000. That amount needs to be included as the economic benefit of noncompliance. However, there is also a daily benefit to the Lents of not having to put up with the public coming through their property (privacy interest). The amount they are willing to pay to avoid that intrusion varies with their economic circumstances. Given the value of the property in this case, we could estimate that the Lents might be willing to pay $500/day to avoid this intrusion. In other words, the per-day penalty amount needs to be justified based on the purpose of that type of penalty, which is to reflect any continuing harm of a violation and to incentivize faster compliance.

Finally, the adjustment factors involve many opportunities for

discretion. The EPCRA penalty policy, for example, allows for nine separate adjustment factors, ranging from "ability to pay" to "attitude." Some of these factors allow the agency official to adjust the penalty up or down by 25–50%.[179] A few 25% adjustments up or down can result in huge variations in penalty based on subjective considerations. The application of these adjustment factors could be subject to great regional variations.

Admittedly, tightening the discretion inherent in these policies while still affording officials the necessary discretion might not be easy. Nevertheless, the above discussion highlights a few significant areas where additional guidance might help. In addition, heightening the oversight of regional penalty assessment to instill a more uniform application of the policy might be useful.

VI. CONSTITUTIONAL LIMITATIONS ON PENALTY DISCRETION

Absent congressional or agency action to reduce disparities, environmental watchdogs and the regulated community have few legal options to address the lack of uniformity. By contrast, individual violators who receive disproportionately large penalties may be able to prove constitutional violations. The most likely constitutional limitations on penalty assessments include the Due Process[180] and the Excessive Fines Clauses.[181]

A. *Due Process*

As noted in the discussion of *Lent* above, procedural due process requires only that the violator has notice of the potential penalty that might be imposed and an adequate opportunity to be heard. The question of whether the procedures available to the violator are adequate, such as whether a hearing is required and, if so, what type, are typically analyzed under the *Mathews v. Eldridge*[182] framework, which requires more extensive procedures as the

179. EPA, ENFORCEMENT RESPONSE POLICY FOR SECTION 313 OF THE EMERGENCY PLANNING COMMUNITY RIGHT-TO-KNOW ACT (1986) AND SECTION 6607 OF THE POLLUTION PREVENTION ACT, 17–18 (1990) [Amended], https://www.epa.gov/sites/default/files/2017-03/documents/epcra313erpamendments2017.pdf [https://perma.cc/Y384-HL3S].

180. U.S. CONST. amend. V and XIV, § 1.

181. U.S. CONST. amend. VIII.

182. 424 U.S. 319 (1976).

potential consequences and the possibility of error increase. Arguably, a violator does not have adequate notice of the potential consequences of a violation when the discretion of agency officials over penalty calculation is not cabined. Moreover, the question of adequate procedure is different from the question of whether the amount of the penalty itself, the breadth of agency discretion, or the resulting variation in penalties poses a constitutional issue.

The United States Supreme Court has found that unfettered discretion and excessive amounts can violate the Due Process Clause in the context of punitive damages. In an early case involving insurance fraud, *Pacific Mutual Life Insurance Company v. Haslip*,[183] the Court recognized that giving a jury unlimited discretion to impose punitive damages might lead to "extreme results that jar one's constitutional sensibilities."[184] In that case, the jury had awarded $1 million in damages, including punitive damages that were four times the amount of the compensatory damages.[185] The Court noted that the jury instructions highlighted the nature and purpose of punitive damages: deterrence and retribution. Although the jury was given significant discretion, "as long as the discretion is exercised within reasonable constraints, due process is satisfied."[186] Additionally, the Alabama Supreme Court had performed a check on the jury's discretion by developing a reviewing standard that "makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition."[187] Noting that the punitive damages were imposed using objective criteria, the Court held that the award did not violate the Constitution.[188] *Haslip* does suggest, however, that constitutional difficulties could arise in cases in which penalties are imposed without the application of objective criteria tied to permissible regulatory goals.

The Court did find that a punitive damage award violated the Due Process Clause in *BMW of North America, Inc. v. Gore*.[189] Gore brought suit against BMW after he discovered his ostensibly new

183. 499 U.S. 1 (1991).
184. *Id.* at 18.
185. *Id.* at 23.
186. *Id.* at 20.
187. *Id.* at 21.
188. *Id.* at 23–24.
189. 517 U.S. 559 (1996).

car had previously suffered damage that was covered up by repainting. The jury awarded Gore $4,000 in compensatory damages and $4 million in punitive damages, based in part on evidence of similar cases involving the defendant in other states.[190] The Alabama Supreme Court reduced the punitive damages to $2 million, finding that the jury's consideration of cases in other states was improper.[191]

The United States Supreme Court held that the punitive damages award of $2 million exceeded the constitutional limit under the Due Process Clause.[192] The Court noted that the state has a legitimate interest in punishing wrongful conduct and deterring similar future conduct, but when an award is "grossly excessive" in relation to those interests, it becomes an arbitrary exercise of power that violates the Fourteenth Amendment.[193]

In applying the "grossly excessive" test, the Court in *Gore* examined three factors: "(1) degree of reprehensibility . . . (2) the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[194] The Court found BMW's actions were not reprehensible, noting that the repainting practice was legal in many states and did not impact safety.[195] In addition, BMW made no deliberate false statements and did not engage in affirmative misconduct.[196] With regard to the second factor, the Court found that a damages-to-harm ratio of 500-to-1 was excessive when the act itself was not egregious.[197] Although the Court declined to draw a bright-line standard, the majority was "fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit."[198]

The Court further delineated the *Gore* standard in *State Farm Mutual Automobile Insurance Co. v. Campbell*.[199] The Court held that a punitive damage award of $145 million was excessive for a claim of

190. *Id.* at 565–65.
191. *Id.* at 567.
192. *Id.* at 585–86.
193. *Id.* at 568.
194. *Id.* at 575.
195. *Id.* at 576–78.
196. *Id.* at 579.
197. *Id.* at 582–83.
198. *Id.* at 585–86.
199. 538 U.S. 408 (2003).

bad faith refusal to settle an insurance claim where compensatory damages were $1 million.[200] In applying the *Gore* factors, the Court noted that the degree of reprehensibility involved consideration of whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[201]

The Court held that the application of the *Gore* factors in this case would justify a punitive damages award only "at or near the amount of compensatory damages."[202]

In *Exxon Shipping Co. v. Baker*, the Court limited the imposition of punitive damages in maritime cases to the amount of compensatory damages.[203] While this was an exercise of the Court's common law authority for federal maritime cases, rather than a due process case, the Court's analysis of punitive damage cases is instructive. The Court focused on the "stark unpredictability" of punitive damages awards, finding that the data suggested the wide variation between the high and low awards was unacceptable.[204] Importantly, then, due process analysis should include an examination of not only the relationship between a penalty and the seriousness of the conduct, but also a comparison with other penalties imposed for similar transgressions. The Court explicitly recognized the value of uniformity as an element of essential fairness.

B. *Eighth Amendment*

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[205] The Supreme Court has explained that

200. *Id.* at 426.
201. *Id.* at 419.
202. *Id.* at 429.
203. 554 U.S. 471, 476 (2008).
204. *Id.* at 499–500.
205. U.S. CONST. amend. VIII.

the history of this clause, though originally only applicable in criminal actions, indicates a broad interpretation of the word "fine" as the "payment to a sovereign as punishment for some offense."[206]

> The Framers of our Bill of Rights were aware and took account of the abuses that led to the 1689 Bill of Rights. This history, when coupled with the fact that the accepted English definition of "fine" in 1689 appears to be identical to that in use in colonial America at the time of our Bill of Rights, seems to us clear support for reading our Excessive Fines Clause as limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends.[207]

In *Austin v. United States*, the Court concluded that the Excessive Fines Clause applied beyond the criminal context to prohibit excessive civil fines when the purpose of the civil fine was, at least in part, to impose punishment.[208] The Court focused its analysis on the purpose of the Excessive Fines Clause to prevent the government from abusing its power to punish through the imposition of monetary sanctions.[209] The Court recently held that the Fourteenth Amendment incorporates the Eighth Amendment's prohibition on excessive fines, making it applicable to state penalties as well.[210]

In *United States v. Bajakajian*, the Court established that the Excessive Fines Clause is violated by a monetary sanction that is "grossly disproportional to the gravity of a defendant's offense."[211] The Court summarized that the "touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[212]

In *Colorado Department of Labor and Employment v. Dami Hospitality, LLC*, the Colorado Supreme Court used the "grossly

206. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989).

207. *Id.* at 267.

208. 509 U.S. 602, 610 (1993).

209. *Id.* at 610–11.

210. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

211. 524 U.S. 321, 334 (1998).

212. *Id.*

disproportional" test to evaluate an $841,200 state penalty for failure to maintain workers' compensation insurance.[213] The relevant statute allowed the Division of Workers' Compensation to impose a fine of $250 to $500 per day for the insurance default.[214] The total penalty resulted from the imposition of 1,698 days of penalties.[215] The court held that the penalty was subject to the Eighth Amendment "gross proportionality" test and remanded the case to the Division of Workers' Compensation to determine whether the penalty comported with the test.[216] Notably, the court emphasized that the test did not solely entail an examination of the fine in relation to the offense.[217] Instead, courts should also consider "whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions" as well as the ability of the regulated entity to pay the penalty.[218] Importantly, then, the principle of uniformity is embedded in the test for proportionality.

Regrettably, the *Dami* court blunted the force of this test by holding that it should be applied to each individual daily penalty, rather than the aggregate total.[219] So, the violator would need to show that the $400 penalty imposed for Day 40 was disproportionate—and so on for the other 1,697 days. The court reasoned that the statute put the violator on notice regarding the imposition of daily penalties.[220] This reasoning totally misses the point of this test. Whether the statute authorizes the penalty imposed is not the question; the legislature is not constitutionally entitled to prescribe a penalty that is grossly disproportionate to the offense, and the aggregate total of this per-day penalty is precisely the constitutional infirmity at issue.

C. *Application to Environmental Penalties*

Unlike punitive damages, environmental penalties are

213. 442 P.3d 94, 101 (2019).

214. *Id.* at 97.

215. *Id.*

216. *Id.* at 101, 103 (finding a regulatory penalty is constitutionally excessive when it is "grossly disproportional to the gravity of the underlying offense.").

217. *Id.* at 101.

218. *Id.* at 103. *See also* Saulsbury Enter., 58 Agric. Dec. 19 (U.S.D.A. 1999) (remanding for a determination of whether a $205,000 penalty for violations of a Raisin Order was grossly excessive under the Eighth Amendment).

219. *See id.* at 103.

220. *Id.* at 102.

imposed pursuant to a statutory scheme, which gives the regulated community notice of the potential range of penalties. This narrowing of the scope of agency discretion makes the inquiry different from the virtually unfettered discretion of a jury imposing punitive damages.[221] In other statutory contexts, authorities have found this narrowing of discretion sufficient to meet the Due Process test regardless of the amount of penalty imposed.

For example, in a Federal Reserve System Board of Governors case, a bank holding company challenged the imposition of a $37 million civil penalty under the Bank Holding Company Act of 1956 and the Federal Deposit Insurance Act as contrary to the Excessive Fines and Due Process Clauses.[222] While the Board found the Supreme Court's jurisprudence on excessive fines applicable, it held that the penalty was not excessive in relation to the nature of the conduct at issue.[223] With respect to the Due Process claim, the holding company argued that the penalty violated the *BMW* test because it was "grossly out of proportion to the severity of the offense."[224] The Federal Reserve System Board distinguished punitive damages from statutory penalties, noting that the statutory provisions "embody a considered congressional calibration of penalty to violation."[225] Therefore, the Board found the *BMW* framework inapt and found no due process violation.[226] Other authorities seem to be sharply divided on whether the *BMW* test is applicable to a statutory penalty framework.[227] Similarly, at least two federal circuits have held that the Eighth Amendment prohibition on excessive fines can never be violated if the fines fall

221. *See* Romano v. U-Haul Int'l, Inc., 233 F.3d 655, 673 (1st Cir. 2000) ("A congressionally-mandated, statutory scheme identifying the prohibited conduct as well as the potential range of financial penalties goes far in assuring that [the defendant's] due process rights have not been violated."); Madeja v. MPB Corp., 821 A.2d 1034, 1049 (N.H. 2003) (citing *Romano*, 233 F.3d at 673).

222. Ghaith R. Pharaon, 83 Fed. Res. Bull. 347, 353–54 (Fed. Reserve Sys. Bd. of Governors April 1997) (final enforcement decision for administrative proceeding).

223. *Id.* at 354.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Compare* Richard Cecere & Buyer Defender Inc., Order No. E15-49, 2015 WL 2452717 at *4 (NJ Dept. of Bank. & Ins. May 11, 2015) (finding the *BMW* test inapplicable to penalties for violations of the Insurance Producer Act because "the insurance industry is strongly affected with the public interest"), *with* Certain Neodymium-Iron-Boron Magnets, USITC Inv. No. 337-TA-372, 1997, WL 35430645 at *16 (U.S. Int'l Trade Comm'n Jan. 1, 1997) (applying the *BMW* test but finding a $1.55 million penalty commensurate with violations and therefore not excessive).

within statutory limitations.[228]

While a statutory framework might avoid completely untethered penalties and therefore reduce due process and excessive fines concerns, it does not render these tests completely inapt. Although the environmental penalty statutes specify maximum values for administrative penalties (imposed by the agency), the amount that can be imposed may still end up being grossly disproportionate to the severity of the offense.[229] Civil penalties (imposed by courts) have even fewer safeguards. For example, the Clean Water Act limits civil penalties to $59,973 per day per violation but has no limit on the amount of the total penalty.[230] As the discussion above on judicial penalties revealed, these penalties may become quite large and completely arbitrary.[231] Constitutional considerations should not be dismissed solely because Congress has set some statutory limits. As we have seen, statutory schemes often give agencies tremendous discretion, which may be exercised with the same kind of capriciousness as punitive damages. The whole point of these constitutional protections, after all, is to provide some kind of judicial check on legislative and executive actions.

The applicability of the Excessive Fines Clause may also depend on whether administrative or civil penalties are deemed sufficiently punitive to fall under that limitation. Some penalties, for example, have been deemed "remedial" in nature rather than "punitive," and therefore not subject to the Eighth Amendment analysis.[232] Civil environmental penalties do not require any kind of

228. *See* Newell Recycling Co. v. EPA, 231 F.3d 204, 210 (5th Cir. 2000) ("[I]f the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment."); Martex Farms, S.E., v. EPA, 559 F.3d 29, 34 (1st Cir. 2009) (citing *Id.*); San Pedro Forklift, No. CWA-09-2009-0006, 2010 EPA ALJ LEXIS 17, at *22 (Aug. 11, 2010) ("It is a well-established proposition that a civil penalty that falls within the statutory maximum does not offend the Constitution.").

229. *See, e.g.*, 33 U.S.C. § 1319(g)(2)(b) (capping maximum administrative penalties at $125,000); 40 C.F.R. § 19.4 (2022) (adjusting maximum administrative penalties for inflation to $299,857).

230. 33 U.S.C. § 1319(d) (capping civil penalties at $25,000 per day per violation); 40 C.F.R. § 19.4 (2022) (adjusting maximum daily civil penalty for inflation to $59,973).

231. *See, e.g.*, United States *ex rel.* Bunk v. Birkart Globistics GmbH & Co., No. 1:02cv1168, 2012 U.S. Dist. LEXIS 18445,"at *24 (E.D. Va. Feb. 14, 2012) (finding that imposing a statutorily mandated civil penalty of $50 million for violations of the False Claims Act would violate the Eighth Amendment).

232. *See, e.g.*, BPDCS, 15 FCC Rcd. 17590, 17609 (2000) (finding that a fine must be punitive in nature to violate the Excessive Fines Clause (citing Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989))).

culpability or intent on the part of the violator, whereas criminal violations require some kind of intent (e.g., "knowing" violations). Nevertheless, the Supreme Court has stated that "[t]he Eighth Amendment protects against excessive civil fines, including forfeitures."[233] Circuit courts have applied the Eighth Amendment analysis to civil penalties that are grossly disproportional to the gravity of the offense, as long as the penalty is not "purely remedial" but has some deterrent or retributive purpose.[234] Indeed, courts have applied the Eighth Amendment disproportionality test in very similar contexts.[235] Given that deterrence is clearly the stated purpose of environmental penalties, there should be no doubt that the Eighth Amendment applies.[236]

In applying these constitutional protections, courts need to more vigorously examine whether penalties are uniformly imposed. For example, some courts have applied the Eighth Amendment analysis only by comparing the penalty amount to the maximum statutorily authorized penalty.[237] Instead, courts should examine whether the amount bears a reasonable relationship to the legitimate goal of deterrence, as well as whether the penalty is reasonably consistent with other penalties imposed for similar violations. Similarly, due process requires not only notice of the maximum possible penalty, but also concrete guidance on how penalties will be calculated.

VII. SUGGESTIONS FOR REFORM

Although more research would be helpful, our data analysis

233. Hudson v. United States, 522 U.S. 93, 103 (1997) (citing Alexander v. United States, 509 U.S. 544 (1993) and Austin v. United States, 509 U.S. 602 (1993)).

234. United States v. Mackby, 261 F.3d 821, 829–30 (9th Cir. 2001); *see also* Collins v. SEC, 736 F.3d 521, 526 (D.C. Cir. 2013) ("[T]he penalty's relation to disgorgement does not render it arbitrary or capricious.").

235. *See, e.g.*, Balice v. USDA., 203 F.3d 684, 699 (9th Cir. 2000) (upholding $225,500 civil penalty under Agricultural Marketing Agreement Act as consistent with Eighth Amendment); Cole v. USDA., 133 F.3d 803, 807–09 (11th Cir. 1998) (upholding $400,000 civil penalty for statutory violation of tobacco marketing quota).

236. *See, e.g.*, Hindt v. Delaware, 421 A.2d 1325, 1333 (Del. 1980), which applied the Eighth Amendment to a penalty of $52,500 for a violation of Delaware's Water and Air Resources Act. The court did not find the penalty "shocking or unreasonable" and noted that many other state statutes allowed similar penalties.

237. *See, e.g.*, United States v. Production Plated Plastics, Inc., No. 93-2055, 1995 U.S. App. LEXIS 20539, at *13"(6th Cir. Jul. 19, 1995).

reveals reasons to be concerned about whether the EPA's important goal of uniformity is being achieved. By examining the sources of agency discretion, we can discern several possible sources of disparate penalties. In this section, we recommend potential remedial measures that should improve uniformity while not unduly restricting necessary discretion.

A. *Delegated Program Remedies*

As a result of delegation, most environmental enforcement occurs at the state level, although the federal authorities retain the ability to take over enforcement in certain instances (e.g., at the request of the state because of lack of resources, or when the EPA deems the state's response inadequate). However, the penalties available at the state level are typically far below the penalties available to the EPA under federal law.[238] This gap is widening as the federal penalties are adjusted for inflation, while state penalties remain stagnant.

Although Congress has specified that state civil penalties need not be identical to federal penalties under the CWA, it has also emphasized that the EPA has the authority to ensure that state civil penalties are "acceptable."[239] The D.C. Circuit, in a challenge to the EPA's delegation statute, indicated that the agency has the discretion to balance the goals of uniformity and state autonomy in determining the delegation requirements.[240] Therefore, the EPA should be able to amend the delegation regulation in several respects that will result in an immediate reduction in disparities:

1. Increase the minimum required penalty authority acceptable for delegation. As noted, this amount is currently at $5,000.[241] It was low to begin with and has not changed for decades. An amount much closer to the federal authority should be required to ensure an "acceptable" level of enforcement.

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238. *See supra* Section III.D.

239. Water Quality Act of 1987, Pub. L. No. 100–4, § 312, 101 Stat. 7, 45 (1987) (current version at 33 U.S.C. § 1319) ("INCREASED PENALTIES NOT REQUIRED UNDER STATE PROGRAMS.—The Federal Water Pollution Control Act shall not be construed as requiring a State to have a civil penalty for violations described in section 309(d) of such Act which has the same monetary amount as the civil penalty established by such section, as amended by paragraph (1). Nothing in this paragraph shall affect the Administrator's authority to establish or adjust by regulation a minimum acceptable State civil penalty.")

240. *See supra* notes 140-44 and accompanying text.

241. *See supra* note 134 and accompanying text.

2. Require states to implement an inflation adjustment provision that automatically increases the penalty authority in a similar manner to the EPA's. We do not want to be back in this situation thirty years from now.

3. Require states to adopt penalty policies to guide the exercise of discretion and have those policies approved by the EPA.

4. Require states to have a system of administrative imposition of penalties. Absent that authority, the state must demonstrate that its judicial system has the capacity to conduct similarly robust enforcement of environmental laws.

B. *Regional Uniformity*

In the federal context, the EPA should take another look at its penalty policies to attempt to better cabin the discretion of regional authorities. As discussed in Section IV above, policies should identify the proper circumstances for using an NOV rather than a penalty and require a written explanation of the justification for not imposing a penalty. Per-day penalties should be carefully examined to ensure that they are used consistently with the goals of the penalty system. For example, the *Tyson Foods* formula, which treats violations of monthly permit limitation as 28–31 separate days of violation, is a harmful fiction that does not comport with the goals of the system.[242] The adjustment factors should be delineated carefully to ensure that discretion is kept within reasonable limits.

Another possible remedy would be for EPA headquarters to take a more active role in ensuring uniformity in regional enforcement authority. EPA headquarters could do specific audits or studies of comparative penalties in order to provide more guidance to the EPA regions that proved to be outliers. If necessary and feasible, EPA could require headquarter approval of proposed penalties in each case, at least in outlier regions or in particular types of enforcement actions that exhibit greater disparity.

C. *Judicial Remedies*

These proposed EPA regulatory and policy changes will not impact disparity in the judicial imposition of civil or criminal penalties for federal violations. To achieve greater uniformity,

242. *See supra* note 90 and accompanying text (discussing *Tyson Foods*).

courts should recognize the shortcomings of the current "top-down" or "bottom-up" approaches in use and instead adopt a penalty calculation that closely mirrors the EPA's penalty policies. The rationale behind making criminal sentencing more uniform through the adoption of nationwide guidelines also applies in this context. Courts should not impose multimillion-dollar penalties in this area without greater concern for uniformity.

Finally, in reviewing penalties imposed by agencies, courts should be open to constitutional challenges based on the Due Process and Excessive Fines Clauses. Courts should be prepared to rigorously examine the reasonableness of penalties imposed based on the proportionality of the amount to the severity of the violation. Courts should require that penalties be based on agency policies that ensure at least some degree of uniform application. Importantly, courts should also be open to challenges based on unequal treatment and consider how the severity of the penalty compares to penalties for similar violations in other jurisdictions. The fact that Congress or a state legislature has authorized fines cannot supplant a judicial determination of whether they are excessive.

VIII. CONCLUSION

In authorizing penalties under the various environmental statutes, Congress gave agencies broad discretion in determining penalty amounts. Although the EPA and some state agencies have adopted policies to guide penalty calculations, a closer examination reveals several fundamental problems that seriously undermine the goal of uniformity. As our data shows, one violator might be treated much more severely than another, depending on whether the state or federal government is the lead agency, as well as on which state or region the violator is located in. This disparity weakens the deterrence and equal justice objectives of the system and, at the extremes, can present constitutional issues under the Due Process and Excessive Fines Clauses. By auditing the current framework to close unnecessary gaps and re-evaluating state penalty authorities and policies, the EPA should be able to improve uniformity in treatment without unduly restricting state autonomy or necessary discretion.