

## Environmental Enforcement Actions: How Are Civil Penalties Calculated?

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(Originally published at: <http://illinoisenvironmentallaw.com/cleanup/enforcement-actions-how-are-civil-penalties-calculated/>)

I am often asked by owners and executives of manufacturers and other companies to calculate the amount of penalty that their organization will face as a result of an environmental violation. Often, there is a maximum penalty provided by statute, and then statutes, regulations, case law, and/or policy guidance help determine how the penalty actually will be calculated.

A good example of this is the Illinois Pollution Control Board's recent decision in *People v. Ward, Case No. PCB 10-72*. This case involved improper disposal of electrical transformers and spills of polychlorinated biphenyl (PCB)-laden oil. The Board previously granted the State's motion for summary judgment ([click here](#) for my analysis of that prior opinion). In this new opinion, the Board found, under Section 42(a) and (b) of the Illinois Environmental Protection Act (the "Act"), that the total maximum penalty that could be assessed against each of the defendants was \$3.9 million.

In determining the actual amount of the penalty, the Board looked at various factors under Section 33(c) of the Act, including: "(i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people; (ii) the social and economic value of the pollution source; (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges, or deposits resulting from such pollution source; and (v) any subsequent compliance."

The Board also analyzed factors under Section 42(h) of the Act, including: (i) the duration and gravity of the violation; (ii) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act; (iii) any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance; (iv) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act; (v) the number, proximity in time, and gravity of previously adjudicated violations of the Act by the respondent; (vi) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and (vii) whether the respondent has agreed to undertake a 'supplemental environmental project,' which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform."

After analyzing the relevant factors, the Board found that penalties of \$5,000 and \$7,000 were appropriate:

"The record contains no evidence of what if any economic benefit accrued, but does provide evidence that Byrom Ward hired proper professionals to assist in remediation. However, the record demonstrates that Timothy James did not participate in the remediation of the site. The record also establishes that hazardous contaminants were released, but no evidence of the impact of that release has been provided. Based on this record, the Board is convinced that a civil penalty is appropriate; however the penalty sought by the People as to Byrom Ward does not sufficiently account for his remediation activities. The Board finds that a civil penalty of \$3,500 is appropriate for Byrom Ward as such a penalty will recoup any economic benefit accrued and will deter future violations. However, the Board also finds that a civil penalty of \$7,000, twice the penalty assessed against Byrom Ward, is appropriate for Timothy James in light of his failure to assist in any subsequent compliance. A civil penalty of \$7,000 will recoup any economic benefit accrued by Timothy James and will deter future violations. Therefore the Board finds that Byrom Ward must pay a civil penalty of \$3,500 and Timothy James must pay a civil penalty of \$7,000. To reiterate, Byrom Ward's penalty is less due to the mitigating factor of obtaining subsequent compliance."

At the end of the day, civil penalties are calculated based on an analysis of factors found in statutes, regulations, case law, and/or policy guidance. During this analysis, very large maximum penalties can become much smaller, depending on the facts of the case.

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