

Note on the U.S. Environmental Protection Agency's Penalty Policy for Violations Arising Under the Vehicle and Engine Emissions Certification Requirements under the Clean Air Act

The author of this note is George Lawrence, who worked for almost thirty years as an attorney at the U. S. Environmental Protection Agency (EPA) in the Mobile Source Enforcement office. During his career at EPA, Mr. Lawrence represented or supervised attorneys who represented the Agency in hundreds of enforcement cases involving violations of the motor vehicle and motor vehicle fuels requirements under the Clean Air Act (CAA), including violations of the vehicle and engine emissions certification requirements, the tampering prohibition and the gasoline and diesel fuel regulations. From 1998 through 2007 Mr. Lawrence was the Chief of the Mobile Source Enforcement Branch, the office responsible for nationwide enforcement of all violations of EPA's motor vehicle and fuels requirements, and for developing the enforcement provisions of new vehicle/engine and motor vehicle fuels regulations. Mr. Lawrence retired from EPA in August 2008.

During 2007 and 2008, Mr. Lawrence developed and authored the Penalty Policy for violations of the CAA Vehicle and Engine Certification Requirements (Penalty Policy). EPA began using this Policy in late 2007 as an internal tool for calculating penalty amounts for vehicle/engine cases. On January 16, 2009, this Penalty Policy was formally issued by EPA (<http://cfpub.epa.gov/compliance/resources/policies/civil/penalty>).

The Vehicle/Engine Penalty Policy was developed in response to a significant increase in the number and types of vehicle/engine enforcement actions being prosecuted by EPA. This increase in enforcement cases occurred largely because many categories of

nonroad vehicles and engines, which previously had not been regulated by EPA, became subject to emission standards during the period 1998 through 2006, including recreational vehicles, non-road gasoline and diesel engines, marine engines, and locomotives. In addition, there was a significant increase in importations from China of regulated scooters, motorcycles and small gasoline and diesel-powered equipment such as pumps and generators. An unusually large portion of this Chinese equipment was found to violate the certification requirements, which resulted in a large number of enforcement actions against companies that imported this equipment. These companies in general are smaller and less sophisticated regarding the certification requirements as compared to traditional vehicle/engine manufacturers.

At the same time, EPA continued to prosecute cases involving violations committed by large vehicle/engine manufacturers where a large number of vehicles or engines were in violation.

As a result, EPA developed the new Penalty Policy for calculating penalty amounts in a quick, easy and objective manner using information normally contained in inspection reports that document violations, which avoids the time and expense of gathering additional information prior to beginning an enforcement action. In addition, EPA developed this Policy to calculate penalty amounts that reflect the comparative egregiousness of violations across the entire vehicle/engine practice area, so that enforcement consistency could be achieved without having to compare the facts of each particular case with prior enforcement actions.¹

¹ Under Section 205(a) of the CAA, the maximum penalty for violations of the vehicle and engine requirements is \$25,000 (later increased to \$32,500) per vehicle or engine, with two exceptions. The maximum penalty for violations of the tampering prohibition when committed by any person other than a

Sections 205(b) and (c)(2) of the CAA provide the factors that should be taken into account in setting penalties for violations of the vehicle and engine certification requirements. These factors are the following:

- The gravity of the violation;
- The economic benefit or savings resulting from the violation;
- The size of the violator's business;
- The violator's history of compliance;
- Action taken to remedy the violation;
- The effect of the penalty on the violator's ability to continue in business;
- and
- Other matters as justice may require.

Therefore, the Penalty Policy uses these statutory factors as the basis for calculating the penalty for each case. The economic benefit penalty component and the gravity penalty component are calculated and combined to yield the preliminary penalty amount. This preliminary penalty then is adjusted to address the remainder of the statutory factors to calculate the final penalty amount.

The economic benefit penalty component is intended to recover any significant economic benefit of noncompliance to the violator. The actual amount of the violator's economic benefit of noncompliance in any given case normally is not known, because the quantification of benefit would require a fact-specific economic analysis that is time-consuming and expensive. However, the Penalty Policy uses a "rule of thumb" method

manufacturer is \$2,500 (later increased to \$2,750) per vehicle, and the maximum penalty for violations of the defeat device prohibition is \$2,500 (later increased to \$2,750) per device.

of calculating economic benefit, based on the number of vehicles or engines in violation and their horsepower. This approach is appropriate because the violator's economic benefit in most mobile source cases involves the failure to meet some or all of the certification requirements. Moreover, the cost of emissions control is roughly proportional to engine horsepower. The horsepower and number of the vehicles/engines in violation normally is known, so the economic benefit penalty can be calculated without having to conduct a case-specific economic analysis.

Nevertheless, actual economic benefit can be substituted in any particular case if the violator has evidence the rule of thumb economic benefit estimate is too high, or if the government has evidence this estimate is too low.

The gravity penalty component, calculated under the Penalty Policy to reflect the egregiousness of the violation, results in larger penalties where there is a greater potential for excess emissions or greater program harm. The following factors result in greater potential for excess emissions: larger engine horsepower; larger number of vehicles or engines; whether the particular violation is likely to result in actual excess emissions (e.g., a missing catalytic converter is more egregious than missing label information); and whether the violator has remediated the violation.

The Penalty Policy has proven to be an effective tool for standardizing and streamlining the enforcement practice for most types of violations involving all categories of vehicles and engines, including cars and heavy duty highway trucks as well as all non-road engine categories. The Policy standardizes the mobile source enforcement practice by providing an objective method of measuring the potential and actual environmental harm for most vehicle/engine violations. The Policy streamlines the

enforcement practice by basing the economic benefit and gravity penalty calculation on readily available information, such as engine horsepower and number of vehicles/engines in violation. This allows most routine enforcement cases to proceed without the need for emissions testing or other in-depth technical evaluation of the vehicles/engines in violation.

Violations Involving Failure to Properly Obtain a Carry-Over Certificate

In certain situations EPA has treated violations that resulted from a failure to properly obtain a carry-over certificate as an exception to the penalty calculation approach described above. This exception applied only in the following limited situation: the company had properly obtained a certificate for the prior year; there was no change in emission standards from the prior year to the year at issue, so that obtaining a carry-over certificate would have been pro-forma; the company continued to manufacture vehicles/engines identical to those manufactured during the prior year, so these vehicles/engines would have been fully compliant had the company properly obtained a carry-over certificate; the company subsequently obtained a proper carry-over certificate; the company obtained no other regulatory advantage, such as through average-banking-trading (ABT); and the company had no prior violations of this nature. This exception was not included in the Penalty Policy, but was used by EPA enforcement staff in cases where these conditions were present.²

In this limited situation, EPA charged a penalty of \$10,000 per engine family for which a proper carry-over certificate was not obtained, instead of a penalty based on the

² This discussion of the carry-over certificate exception is based on the experience of the author of this note before he retired from EPA in August 2008. In his experience, this carry-over certificate exception was applied consistently in about five cases that met the conditions discussed above.

number of vehicles/engines in the engine family and their engine size. Thus, for example, if a company failed to properly obtain certificates for five engine families and each engine family met the conditions described above, EPA would seek a penalty of \$50,000. EPA would not adjust a penalty calculated under this exception, up or down, based on normal adjustment factors, such as business size or cooperation. In addition, EPA would not engage in negotiations with the company to reduce such a penalty.

The rationale for this carry-over certificate exception is that penalties calculated in the normal manner in these cases often would be very large, particularly if the engine family at issue has a large number of vehicles/engines or large horsepower engines. For example, the penalty for 5,000 uncertified cars where no excess emissions occur would be almost \$1 million. In addition, in the situation where the carry-over certificate exception applies the company has obtained no economic benefit. Rather, the company has invested to obtain a proper certificate (in the prior year) and to produce vehicles/engines that comply with that certificate. Carry-over certificate violations typically are caused by administrative mistake or oversight. The harm in such a case is to program integrity rather than from excess emissions, and this harm is essentially the same regardless of the number of vehicles/engines implicated or their horsepower.

The carry-over certificate exception also is appropriate because, by virtue of the lower penalty amount, it allows these cases to be processed quickly through the informal administrative settlement agreement approach, discussed below. The penalty in such a case, if calculated using the normal Penalty Policy approach, probably would be much larger, which would make resolution of the case more difficult, time-consuming and expensive. Moreover, if a penalty is larger than \$275,000 EPA is required to refer the

case to the Department of Justice for district court filing,³ with even greater resource implications for the government.

Forum of Mobile Source Enforcement Practice

EPA's mobile source enforcement office enforces most violations by negotiating settlement terms with the violator that are memorialized in informal administrative settlement agreements (ASA), in lieu of commencing a formal administrative action to assess civil penalties or filing a complaint in federal district court. In these informal agreements the violator typically agrees to pay a penalty and to undertake remedial actions. If the violator complies with the terms of the ASA, EPA agrees to treat the matter as resolved and to forego initiation of a formal enforcement action. If the violator does not comply with the terms of the ASA, EPA reserves the right to seek administrative or judicial enforcement based on the violation or to enforce the terms of the ASA.

Authority for EPA to enter into informal settlement agreements is based on language contained in Section 205(c)(1) of the CAA. This section, which provides authority for EPA to assess civil penalties, also states that "[t]he Administrator may compromise, or remit, with or without conditions, any administrative penalty which may be imposed under this section." This language has been interpreted as authority for EPA to negotiate informal settlements that include both civil penalties and actions.

³ Under Section 205(c)(1) of the CAA, EPA is required to refer a case to the Department of Justice for prosecution in district court if the penalty amount is over \$200,000, unless EPA and DOJ agree to waive this penalty cap in a particular case. The amount of this penalty cap has been increased to \$270,000.