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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment

FROM: Courtney M. Price
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TO: Regional Administrators
Associate Enforcement Counsels
OECM Office Directors

I. PURPOSE

This guidance amplifies the material in the Appendix of GM-22, "Framework for Statute-Specific Approaches to Penalty Assessment." The Appendix presents a description of how to calculate the economic benefit of noncompliance as part of developing a civil penalty. A new computer model, BEN, is a refinement of the methodology for calculating the economic benefit of noncompliance.

By refining the methods by which we calculate the economic benefit of noncompliance, we will:

1. Respond to the problems that enforcement and program officers identified concerning methods for calculating the economic benefit component of a civil penalty;

2. Ensure among the media programs appropriate consistency in calculating the economic benefit component of a civil penalty;

3. Ensure that the economic benefit of noncompliance continues to be a fairly valued, reasonable component of a civil penalty; and

4. Ensure that the assumptions and data used in BEN to calculate the economic benefit component can be defended at either an administrative hearing or a judicial proceeding.

II. SCOPE

This guidance describes BEN, the new computer model, in terms of how this model resolves the identified problems related to the use of CIVPEN. EPA personnel can use BEN to calculate the economic benefit a violator gains from delaying capital expenditures for pollution control equipment or from avoiding the costs of operating and maintaining pollution control equipment. Exhibit I summarizes BEN.

EPA personnel cannot use BEN to calculate the economic benefit component of a civil penalty if a violator's action does not involve a delayed or avoided expenditure. Under these circumstances, program offices may elect to develop statute-specific formulas as provided in GM-22 for calculating the economic benefit component of a civil penalty. These formulas would be used to develop civil penalties in response to actions such as certain TSCA marking/disposal violations or RCRA reporting violations. The rule of thumb in the general penalty policy would not be appropriate for these types of violations.

OPPE is considering the feasibility of developing a second computer model or rule of thumb formula that could be applied uniformly to violations that do not involve delayed or avoided expenditures.

III. NEW CIVIL PENALTY POLICY APPROACH

Regional personnel may use the rule of thumb described in GM-22 to develop a preliminary estimate of the economic benefit component of a civil penalty. The rule of thumb is for the convenience of EPA and is not intended to give a violator a lower economic benefit component in a civil penalty. Regional personnel should consider whether an estimate of economic benefit derived with the rule of thumb would be lower than an estimate calculated with BEN. For example, the longer the period of noncompliance, the more the rule of thumb underestimates the economic benefit of noncompliance.

If EPA proposes and a violator accepts the rule of thumb calculation, Regional personnel can develop the civil penalty without further analysis of economic benefits. If a violator disputes the economic benefit figure calculated under the rule of thumb, a more sophisticated method to develop the economic benefit component of the penalty is required.

In general, if the estimate under the rule of thumb is less than $10,000, the economic benefit component is not needed to develop a civil penalty;[1] the other factors in GM-22 still apply. If the rule of thumb estimate is more than $10,000, Regional personnel should use BEN to develop an estimate of the economic benefit component.

IV. USING BEN TO CALCULATE ECONOMIC BENEFIT OF NONCOMPLIANCE

EPA personnel should use the revised computer model BEN whenever:

1. the rule of thumb indicates that the economic benefit of noncompliance is greater than $10,000; or

2. the violator rejects the rule of thumb calculation.

BEN uses 13 data variables. At the option of the user, BEN substitutes standard values for 8 of the 13 entries, and the user only provides data for 5 variables. (See Exhibit I.)

BEN also has the capability for EPA personnel to enter for those 8 variables the actual financial data of a violator. In appropriate cases, EPA should notify a violator of the opportunity to submit actual financial data to use in BEN instead of the 8 standard values. If a violator agrees to supply financial data, the violator must supply data for all the standard values.

V. ADVANTAGES OF BEN OVER OTHER CALCULATION METHODS

The computer model BEN has advantages over previously used methods for calculating the economic benefit component or a civil penalty. BEN does not require financial research by EPA personnel. The five required variables are information about capital costs, annual operation and maintenance costs, and the dates for the period of noncompliance. Further, BEN has the flexibility to allow a violator who cooperates with EPA to provide actual financial data that may affect the penalty calculation.

1/ Although the general penalty policy cut off point is $10,000, each program office may establish a cut off point for the program's medium-specific policy.

An economic benefit component calculated with BEN can be defended in an administrative or judicial proceeding on the grounds that the standard values used in BEN are derived from standard financial procedures and the violator had an opportunity to provide financial data to help develop the civil penalty.

The use of BEN or statute-specific formulas when appropriate gives the Regional Offices flexibility in determining the economic benefit of noncompliance. Regional personnel have a consistent method for developing a civil penalty under several statutes for multiple violations that involve delayed capital costs and avoided operation and maintenance costs.

BEN is easy for a layman to use. The documentation is built into the program so that a Regional user always has updated documentation and can use the program with minimal training. States are more likely to follow EPA's lead in pursuing the economic benefit of noncompliance through civil penalty assessments because the method available from EPA to serve as a model does not require extensive financial research.

cc: Regional Enforcement Contacts
Program Compliance Office Directors

Exhibit I

BEN

A. Accessed via terminal to EPA's IBM computer in Durham, N.C.

B. Can be run in either of two modes:

1. Standard mode:

a) Requires 5 inputs:

i. Initial Capital Investment

ii. Annual Operating and Maintenance Expense

iii. First Month of Noncompliance

iv. Compliance Date

v. Penalty Payment Date

b) Relies on realistic standard values for remaining variables:

i. A set of standard values for private companies

ii. A set of standard values for municipally-owned or not-for-profit companies

c) Would be used for final calculation of economic benefit unless the violating firm objected and supplied all its own financial data

2. Specific mode:

a) Requires 13 inputs

b) Would be used if violating firm supplied data or if EPA staff researched data

C. Is easy to use

1. Optional on-line documentation will guide inexperienced users through each step of the model

2. Written documentation will be available by December 1984

D. Is based on modern financial principles