

COMPLIANCE ASSURANCE RESPONSE POLICY

September 27, 2000

Guidance used to address violations

Economic Benefit

The first step in any enforcement case is to assess the economic benefit that may have accrued to the Respondent. "Assess" in this context means to take a common-sense view of the case to see if it is likely that the economic benefit was "significant". The "significance" of the economic benefit must be determined with respect to the circumstances of the case; it cannot be defined as an absolute number. Economic benefit usually will be found to be "significant" if the amount of the benefit was more than inconsequential to the Respondent, including whether the benefit conferred a competitive advantage. If the economic benefit that accrued was significant, then DES will seek to recoup it through a penalty action.

If, based on the initial assessment it appears that the economic benefit may be significant, then it will be more precisely calculated. The benefit realized from delaying costs of compliance (e.g., not installing control equipment when required or not preparing and submitting a permit application) and from avoiding costs of compliance (e.g., not paying operation and maintenance costs) usually are calculated using a computer model called BEN (developed by EPA). EPA's penalty policies for the Clean Water Act and the Safe Drinking Water Act include adjustments that are made when calculating the economic benefit in certain cases under those statutes (such as where the original capital outlay would have been very large and should have been made quite along time ago), which DES would also apply in analogous situations. If the amount calculated using BEN does not appear to accurately reflect the economic benefit in other cases, DES will look at the inputs and assumptions underlying the calculation to see whether adjustments can be made.

In cases where the economic benefit isn't attributable (in whole or in part) to delayed or avoided costs, DES will take a logical approach. If money was received for accepting wastes in violation of applicable requirements, DES will consider the amount that was received; if wastes were illegally disposed of and can't be retrieved for proper disposal (e.g., were discharged to surface or ground water), DES will consider the amount that should have been paid to properly dispose of the wastes. Cases in other jurisdictions are increasingly looking at illegal competitive advantage ("ICA") as a component of economic benefit. EPA's policy regarding calculation of economic benefit, including ICA, is at Appendix VI-3. As appropriate and where it can be reasonably determined, DES may consider ICA when determining economic benefit.

Although doing a calculation to determine the economic benefit suggests that a precise figure will result, economic benefit often cannot be absolutely determined. For example, if hazardous wastes were illegally discharged to a surface water, a primary component of the economic benefit is the avoided costs of proper disposal. However, it is unlikely that the exact amount of wastes discharged can be determined; often, a reasonable estimate

must be made. Thus, the calculated economic benefit should not be seen as an unadjustable amount.

If the economic benefit that accrued is not significant, then economic benefit will not be the deciding factor in whether to seek a penalty or, if a penalty is otherwise appropriate, whether to seek an administrative fine or a civil penalty. Instead, other criteria will be used to make those decisions.

If violations resulted in a significant economic benefit and the other factors in the case would not automatically lead to a referral to the AGO, DES will calculate the total administrative fine that could be sought for the violations, as discussed in B.2, below. If the total fine is greater than the economic benefit and is large enough to provide an appropriate deterrent/punitive impact, then DES probably will seek an administrative fine while pursuing whatever other action may be necessary to compel remediation and/or compliance.

If the total fine is not greater than the economic benefit or is not large enough to provide an appropriate deterrent/punitive impact, DES will review the calculations to see whether they can/should be adjusted or whether a civil penalty should be sought.