



## Environmental Notes - August 2016

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**ENVIRONMENTAL NOTES**  
August 2016

**TIME TO PAY MORE: EPA INCREASES MAXIMUM CIVIL PENALTIES**  
BY: CHANNING J. MARTIN

Remember the days when the maximum civil penalty EPA could assess for a violation of environmental law was \$25,000 per day? Those days disappeared 26 years ago due to the Federal Civil Penalties Inflation Adjustment Act of 1990. The 1990 Act applied to all federal agencies with civil penalty authority, not just EPA, and it required agencies to review their penalties and, as appropriate, adjust them upward for inflation every four years. Thus, over the course of 26 years, EPA raised the maximum per day penalty under most environmental laws from \$25,000 to \$37,500.

Enter Congress in 2015. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 requires federal agencies such as EPA to adjust for inflation annually. But wait, there's more. It also includes a catch-up provision requiring agencies to increase their penalties up to 100% of their maximum amount on November 2, 2015, i.e., up to 100% of \$37,500 for EPA, to account for inflation not fully taken into account since the penalty was first enacted. The 2015 Act requires that the increase be calculated based on a comparison of the 1990 Consumer Price Index - Urban (CPI-U) to the October 2015 CPI-U.

Who knew inflation was so out of control? In an interim final rule that was effective on August 1, 2016, EPA increased dramatically the amounts that may be assessed for violations that occurred after November 2, 2015. The increases affect 85 different EPA penalties, and their amounts vary by the specific statute under which they are assessed. For example, the maximum per day per violation penalty under most provisions of the Clean Air Act increased from \$37,500 to \$44,539 for penalties that can be assessed by EPA, and to a whopping \$60,750 for penalties that can be assessed by a court. Similarly, the maximum per day per violation penalty under most provisions of the Clean Water Act increased from \$37,500 to either \$44,539 or \$51,570.

The rule was proposed as an "interim final rule" which went into effect a little more than one month after it was promulgated. There was no opportunity for public comment. EPA issued guidance to its regional offices on July 27, 2016 concerning how the increases in penalties are to be implemented. Regulated parties should review revised Table 2 in 40 C.F.R. § 19.4 and the guidance carefully to better understand how the new increases will be implemented.

Civil Monetary Penalty Inflation Adjustment Rule, 81 Fed. Reg. 42,083 (July 1, 2016) (amending 40 C.F.R. Part 19), Amendments to EPA's Civil Penalty Policies (EPA/OECA July 27, 2016).

**COURT TO CONSIDER EPA RULE ELIMINATING EXEMPTION FOR EXCESS EMISSIONS DURING O&M**  
BY: RYAN W. TRAIL

A 2015 EPA rulemaking required 36 states to revise their State Implementation Plans ("SIPs") to eliminate provisions exempting air emission exceedances during periods of startup, shutdown, or malfunction (the "SSM SIP Call rule"). The SSM SIP Call rule gives states a deadline of November 22, 2016 to submit revised SIPs to EPA. Exemptions in existing Title V permits will

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