
Program Evaluation Update
Office of the Legislative Auditor

**POLLUTION CONTROL AGENCY'S USE OF
ADMINISTRATIVE PENALTY ORDERS**

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**Administrative
penalty orders have
been an effective tool
for enforcing
environmental
regulations.**

In January 1991, the Office of the Legislative Auditor issued an evaluation report on the Pollution Control Agency (PCA). The report found, among other things, that with the exception of hazardous waste violations, PCA lacked the enforcement tools to encourage prompt compliance with environmental regulations. The report recommended that, "the Legislature should strengthen PCA's enforcement capabilities by granting the PCA commissioner administrative penalty authority for air, water, and solid waste violations."¹

The 1987 Legislature had previously authorized PCA's commissioner to issue administrative penalty orders of up to \$10,000 for violations of hazardous waste regulations.² In accordance with the Legislative Auditor's recommendations, the 1991

Legislature extended this authority to air, water, and solid waste regulations.³ Previously, PCA had to rely on voluntary compliance or costly and time-consuming negotiations with violators and the threat of civil court action to enforce pollution regulations in these areas. The administrative penalty law requires PCA to forgive penalties if the violation is corrected, but penalties for serious and repeat violations may be nonforgivable.⁴

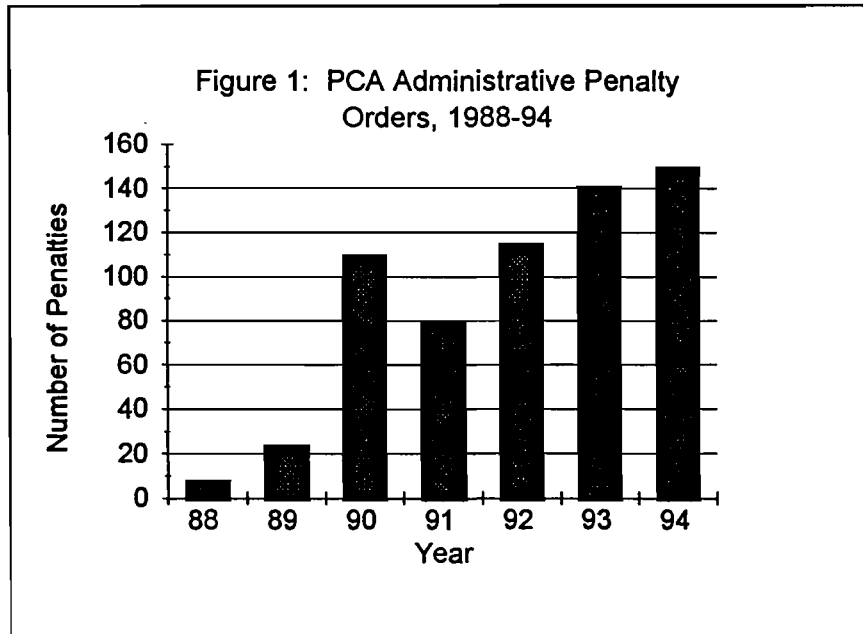
This update looks at PCA's use of its additional enforcement tools and whether administrative penalty orders have helped PCA enforce pollution laws. We asked:

¹ Office of the Legislative Auditor, *Pollution Control Agency* (St. Paul, 1991), 170.

² *Minn Laws* (1987), Chap. 174.

³ *Minn. Laws* (1991), Chap. 347, Art. 1, Secs. 9-13. The Legislature has also authorized other agencies to issue administrative penalties for violating environmental and public health regulations including the Department of Transportation for transporting hazardous waste without a license or for otherwise violating hazardous waste transportation rules (*Minn Stat.* §221.036), the Department of Agriculture for violating agency rules and orders relating to chemical fertilizers and pesticides (*Minn Stat.* §18D.315), and the Department of Health for violating public health laws and rules (*Minn. Stat.* §144.99, Subd. 4). The 1995 Legislature extended this authority to county boards for violations of solid and hazardous waste ordinances, effective August 1, 1996. (*Minn Laws* (1995) Chap. 247, Art. 1, Sec. 39.)

⁴ *Minn. Stat.* §116.072, Subd. 5.



- How many administrative penalty orders has PCA issued? What types of violations are subject to administrative penalties?
- Has PCA's ability to enforce pollution control regulations improved as a result of its expanded administrative penalty order authority? What percentage of violations are corrected and how long does it take?
- Is PCA issuing administrative penalty orders fairly and impartially? How does PCA determine when to issue an administrative penalty order and the penalty amount?

To answer these questions, we reviewed PCA quarterly enforcement reports between 1992 and

1994, reviewed each division's enforcement guidelines and other relevant documents, interviewed agency enforcement staff, and observed several staff meetings where penalties were discussed. We also reviewed case files of 98 administrative penalty orders issued in 1993 and 1994.

Number and Types of Penalties Issued

Figure 1 shows the number of administrative penalty orders issued since 1988 when PCA implemented its authority to issue administrative penalty orders for violations of hazardous waste regulations. Table 1 presents a breakdown by the agency's four enforcement divisions. It shows that the number of penalties issued by PCA's Hazardous Waste Division increased considerably in 1990, declined in 1991, and has remained stable since then. Use of administrative penalty orders by the other PCA divisions began in 1992 and has increased gradually since then. From 1988 through 1994, PCA issued a total of 628 administrative penalty orders. Three-fourths of the penalties were issued by the Hazardous Waste Division. Hazardous waste violations accounted for 56 percent of the administrative penalty orders issued in 1993 and 1994.

Table 1: Administrative Penalty Orders Issued by Division, 1988-94

Year	Air Quality	Ground Water & Solid Waste	Hazardous Waste	Water Quality	Agency Total
1988	--	--	8	--	8
1989	--	--	24	--	24
1990	--	--	110	--	110
1991	--	--	80	--	80
1992	4	14	84	13	115
1993	25	12	84	20	141
1994	32	22	78	18	150
Total 1988-94	61	48	468	51	628

Source: Pollution Control Agency Quarterly Enforcement Reports.

As noted above, administrative penalties for serious or repeat violations are nonforgivable. Otherwise, administrative penalties are forgivable if the violator takes appropriate action within 30 days to correct the violation. Some administrative penalty orders involve multiple violations and may contain both forgivable and nonforgivable portions. Fifty-five percent of the administrative penalty orders issued in 1993 and 1994 were fully forgivable, 21 percent were partially forgivable, and 24 percent were fully nonforgivable. Penalties ranged from \$200 to \$10,000. The average penalty was \$2,487, of which an average of \$1,172 was nonforgivable.⁵

We reviewed agency files for a sample of 98 administrative penalty orders to determine the typical violations that result in a penalty, how violations are discovered, and the length of time it takes to issue a penalty. Table 2 shows that for three of PCA's divisions, between 58 and 76 percent of the violations were uncovered through routine inspections of permitted air emissions and solid waste facilities and licensed hazardous waste generators. PCA's Water Quality Division, on the other hand, uncovered 70 percent of its violations through reviews of discharge monitoring reports that all municipal and industrial wastewater treatment plants are required to submit. About 5 percent of the hazardous waste and water quality violations, primarily spills and excessive dis-

charges or emissions, were self-reported.

Table 2 shows that between 41 and 75 percent of the facilities were assessed penalties for failing to submit required monitoring reports on time, or submitting incomplete or inaccurate reports. For the Hazardous Waste Division, these violations usually related to hazardous waste manifests, a method of cradle-to-grave tracking of all hazardous wastes generated in the state. The other divisions re-

quire various forms of water quality monitoring, air emissions testing, periodic reports of wastes received or processed, or monitoring and testing of pollution control equipment. In addition, facilities are required to immediately notify PCA of incidents, spills, mechanical breakdowns, and changes in operating conditions that could affect the environment. Because PCA relies heavily on facilities' self-reporting of emissions, discharges, and environmental conditions, the agency views the failure to

Table 2: Characteristics of Violations Resulting in Administrative Penalties

	Air Quality (N=25)	Ground Water & Solid Waste (N=17)	Hazardous Waste (N=36)	Water Quality (N=20)
HOW WAS VIOLATION DISCOVERED?				
Inspection	76%	59%	58%	25%
File Review	24	41	36	70
Self-Reported	0	0	6	5
	100%	100%	100%	100%
MONTHS FROM VIOLATION UNTIL ISSUANCE OF PENALTY				
Mean	5.4	2.9	5.0	4.4
Median	5.1	1.6	3.6	3.4
NATURE OF VIOLATION^a				
Reports deficient, submitted late, or not submitted	44%	41%	75%	60%
Failure to notify PCA ^b	48	18	17	20
Operating Violations ^c	60	47	61	5
Illegal Disposal of Wastes	8	24	8	10
Pollution level exceeds permit	12	12	0	15

Source: Sample of 98 administrative penalty orders issued in 1993 and 1994.

^aExceeds 100% due to more than one violation per administrative penalty order.

^bIncludes notification of incidents and spills, asbestos removal, or change in equipment or operations.

^cIncludes improper maintenance and operation of pollution control equipment, improper management, storage, handling, and labeling of wastes, improper asbestos removal procedures, inadequate training of personnel, and inadequate preparation for emergencies.

5 This was calculated by dividing the total dollar amount of forgivable and nonforgivable penalties by the number of administrative penalty orders during the time period.

submit reports on time as a significant violation that impedes its ability to enforce environmental regulations or respond quickly to pollution incidents.

Except for the Water Quality Division, between 47 and 61 percent of the facilities receiving administrative penalty orders violated agency rules or permit conditions relating to the proper handling of waste or the operation of pollution control equipment. For the Air Quality Division, many of these violations related to asbestos removal, such as the failure to moisten and seal asbestos material to prevent particles from becoming airborne. For the Hazardous Waste Division, these violations usually related to improper storage and labeling of hazardous wastes, such as the failure to keep hazardous waste drums sealed and on an impermeable surface. Finally, except for the Hazardous Waste Division, between 12 and 15 percent of the penalties were for unintended leaks and spills or for exceeding allowable level of emissions or discharge.

Table 2 also shows that it takes about 3 to 4 months for PCA to investigate a violation and issue an administrative penalty order. As discussed below, PCA usually takes enforcement action after corresponding with the violator and only after internal discussions among agency staff. Although we noted a few cases where the time to investigate seemed quite lengthy, in general

we think the agency has completed its investigations and taken action in a reasonable amount of time.

Procedures for Issuing Administrative Penalty Orders

After receiving legislative authorization to issue administrative penalty orders in 1987, PCA's Hazardous Waste Division developed a procedure for evaluating violations and determining what, if any, enforcement actions to take. Over the years, this procedure has been modified and adopted by PCA's other divisions. Upon learning of a violation of a permit requirement or agency rule, PCA staff meet to consider the agency's response. This meeting, called a "forum," involves an internal discussion of the case among supervisory and line staff. Forums typically last about 30 minutes and involve about four to six staff. The forum members refer to written enforcement guidelines and a penalty calculation worksheet to determine whether to issue an administrative penalty order, the amount of the penalty, and whether or not the penalty should be forgivable. These guidelines include an evaluation of the seriousness of the violation (potential and actual environmental damage), the willfulness of the violator,

whether it is a repeat violation, how much money the violator saved by not complying with regulations, the violator's ability to pay and willingness to correct the violation, and other factors unique to the situation. If the forum participants agree that the violation is serious enough to warrant a nonforgivable administrative penalty order, PCA sends a letter describing the violations and giving the violator ten days to respond.⁶ A second forum will then convene to discuss the appropriate penalty in light of the violator's response.

PCA's policy requires unanimous agreement among all forum participants before an enforcement action is taken. In addition, the division manager must agree to and sign all forgivable penalty orders and the agency's assistant commissioner must agree to and sign all non-forgivable penalty orders.

We did not assess the fairness of each individual administrative penalty order. However, based on our review of case files and each division's enforcement guidelines, we conclude that:

- **PCA has instituted a process that provides for thoughtful and consistent use of its administrative penalty authority.**

Most violators who responded in writing to the ten-day letter or to the penalty itself admitted the violation and blamed it on over-

⁶ The Air Quality Division usually sends this "10-day letter" to potential recipients of both forgivable and nonforgivable administrative penalty orders.

sight, lack of knowledge of the regulations in question, or unusual circumstances such as mechanical breakdowns or weather conditions. A few felt that their penalty was too harsh or that a nonforgivable penalty should have been forgivable.⁷

Only 5 percent of the administrative penalty orders (30 of 628) and 12 percent of the partially or totally nonforgivable penalty orders (28 of 233) have been appealed.⁸ Ten of those appeals were settled before the hearing, sometimes with a reduction in the penalty, and five appeals were pending as of June 1995. Of the 15 appeals decided, the agency was upheld in 10 cases, the penalty was reduced in four cases, and the agency was reversed in only one case. It is possible, however, that more people do not appeal because possible legal costs would exceed the relatively small penalties involved.

Effectiveness of Administrative Penalty Orders

PCA's enforcement actions have several purposes. First, they are intended to stop or control ongoing

pollution and, to the extent possible, require the responsible party to clean up the environmental damage that has already occurred. Second, they are intended to encourage violators to take appropriate actions to prevent repeat violations. Finally, by sending a message that violations may result in monetary penalties, enforcement actions are intended to deter other companies and individuals from illegally polluting the environment.

Table 3 shows the percent of violators in our sample who took the corrective actions required by PCA after receiving an administrative penalty order. We found that:

- About 90 percent of violations were corrected and about half were corrected within one month.

In addition, over 90 percent of the nonforgivable penalties we reviewed were paid.⁹ We also observed that very few facilities or companies received more than one administrative penalty order and none of those were for the same type of violation. Finally, a review of Minnesota's Hazardous Waste Management Program for fiscal year 1994 by the U.S. Environmental Protection Agency concluded that, "with respect to timely and appropriate enforcement practices, MPCA's approach in the types

Table 3: Results of Administrative Penalty Orders

	Air Quality (N=25)	Ground Water & Solid Waste (N=17)	Hazardous Waste (N=36)	Water Quality (N=20)
Percent of Violations Corrected ^a	88%	88%	94%	95%
MONTHS FROM PENALTY ISSUANCE UNTIL VIOLATION IS CORRECTED				
Mean	2.8	1.8	2.2	2.5
Median	0.9	1.2	1.0	1.2

Source: Sample of 98 administrative penalty orders issued in 1993 and 1994.

^aCorrective actions taken and nonforgivable penalty paid. Excludes two penalties currently being appealed.

7 *Minn. Stat.* §116.072, Subd. 5 (b) allows PCA to issue a nonforgivable penalty order for a "repeated or serious" violation, but it does not define serious. Although PCA staff have tried to be consistent across cases in determining whether a penalty should be nonforgivable, some subjectivity is involved.

8 Appeals can be made to the district court or an expedited hearing may be requested before an administrative law judge. For expedited hearings, final decisions are made by PCA's Commissioner. PCA procedures establish a separate appeals team to advise the commissioner on an appeal. The appeals team is designated whenever the staff is considering issuing an administrative penalty order and does not partake in the decision to issue the penalty. Decisions of the commissioner or the District Court may be appealed to the Court of Appeals. Twenty-three of the 30 appeals (77 percent) were before an administrative law judge.

9 PCA refers cases of violators who refuse to pay to the Attorney General's Office for legal action to force payment.

of enforcement actions issued continues to be appropriate."¹¹

We also found that:

- **PCA enforcement staff believe that administrative penalty orders have improved their ability to effectively enforce environmental regulations.**

On the one hand, administrative penalty orders provide an actual monetary penalty as opposed to a notice of violation or letter of warning, which violators have often ignored.¹² On the other hand, compared with stipulation agreements which may take years to negotiate and ultimately require the violator's consent, administrative penalty orders are relatively easy to issue.

Based on our interviews with PCA staff and our review of case files, we conclude that

- **Administrative penalty orders have been an effective tool for enforcing environmental regulations.**

However, because of their short history, it is too soon to know

whether administrative penalty orders have caused chronic violators to permanently change their approach to environmental protection. Nor were we able to measure the deterrent effect of administrative penalty orders on other potential violators.

Lack of Administrative Rules

PCA's use of an "enforcement response plan" and penalty calculation worksheet has been challenged. A company that received an administrative penalty order for removing asbestos without notifying PCA ten days in advance appealed the penalty, first to an administrative law judge who ruled in PCA's favor, and then to the Court of Appeals. The appellant argued that PCA lacked the authority to regulate indoor asbestos removal, that the penalty was excessive, and that PCA's enforcement response plan and penalty calculation worksheet were in fact agency rules not adopted according to the provisions of the state's Administrative Procedures Act.¹³

The agency maintained that the documents were only advisory so rulemaking was not required. In addition, PCA argued that the factors considered in the penalty calculation worksheets are contained in state law as factors to be used to determine penalties.¹⁴ A recent Appeals Court decision affirmed the penalty, concluding, among other things, that the penalty calculation worksheet is merely an internal agency guideline and that actual penalties are determined on a case-by-case basis. Therefore, the enforcement guidelines lack the force and effect of law and do not have to be adopted as formal rules¹⁵

Conclusion

Our review of PCA's use of administrative penalty orders indicates that the agency has developed a procedure that promotes careful consideration of enforcement actions, including issuing administrative penalties. We also found that most violators who receive an administrative penalty order returned to compliance. We think that this enforcement tool, used with appropriate thoughtfulness and re-

¹¹ United States Environmental Protection Agency, "Minnesota's FY'94 Year-End Evaluation, RCRA Subtitle C Hazardous Waste Management Program" (Chicago, 1995).

¹² PCA staff told us that administrative penalties are also effective with large companies, which can easily afford a penalty under \$10,000, but are concerned about their environmental record and corporate image.

¹³ *Minn. Stat.* Chap. 14. The rulemaking issue was also the subject of hearings before the Legislative Commission to Review Administrative Rules, but the commission took no formal action.

¹⁴ *Minn. Stat.* §116.072, Subd. 2. In addition, the law authorizing PCA's expanded use of administrative penalty orders, while neither requiring nor exempting the agency from rulemaking, required PCA to adopt a plan for issuing administrative penalty orders. (*Minn. Laws* (1991), Art. 1, Chap. 347, Sec. 14.) The plan, adopted by PCA's board on September 24, 1991, contains the framework for enforcement guidelines and penalty calculation worksheets adopted by each of PCA's divisions.

¹⁵ *Minnesota Pollution Control Agency v. Paul William Environmental, Inc.*, Minnesota Court of Appeals (Case No. C8-94-2654) Unpublished Opinion, May 16, 1995.

straint, has increased the agency's ability to enforce environmental regulations.

Pollution Control Agency's Response

On June 26, 1995, the Office of the Legislative Auditor received the following response to this report from Charles W. Williams, Commissioner of the Minnesota Pollution Control Agency:

Since initial authorization by the Legislature in 1987, the Minnesota Pollution Control Agency (MPCA) has worked dilligently to develop consistent, thorough, and fair practices related to the issuance of Administrative Penalty Orders (APOs). The MPCA's use of this "tool" since initial implementation has demonstrated that APOs can be an effective and efficient method of obtaining corrective action and a return to compliance with environmental laws and regulations.

For these reasons, the MPCA is pleased that the Legislative Auditor concluded:

- *... the agency has completed its investigations and taken action in a*

reasonable amount of time.

- *MPCA has instituted a process that provides for thoughtful and consistent use of its administrative penalty authority.*
- *About 90 percent of violations were corrected and about half were corrected within one month.*
- *... that administrative penalty orders have been an effective tool for enforcing environmental regulations.*

My staff was impressed with the thoroughness of the evaluation, given the scope and schedule of the review, and appreciate the opportunity to review the draft report. The MPCA will continue to employ the APO tool in a fair and consistent manner in order to obtain compliance with environmental laws and regulations.

The Original Study: SUMMARY OF JANUARY 1991 EVALUATION OF THE POLLUTION CONTROL AGENCY

Our 1991 evaluation examined how effectively and efficiently the Pollution Control Agency (PCA) regulated polluters and cleaned up hazardous waste sites. We examined the agency's staffing, data collection, permitting of polluters, oversight of pollution cleanups, and enforcement of environmental regulations. We also examined the role of the PCA board. In general, we found that:

- **PCA's monitoring and enforcement efforts were not sufficient to ensure ongoing compliance with pollution regulations. The agency did too few inspections, collected too little information on pollution levels, and did not always take effective enforcement action against pollution violators.**

With regard to enforcement, we found that with the exception of the Hazardous Waste Division, PCA lacked the enforcement tools necessary to encourage prompt compliance with pollution control

regulations. The agency's main enforcement tool, the "notice of violation," told violators they had done something wrong but imposed no penalty for the violations nor incentives for quickly correcting them. PCA could seek "stipulated agreements" or pursue civil litigation, but we found that those remedies tended to be expensive and time-consuming and it was often difficult for PCA to justify their use for any but the most serious and persistent violators.

In contrast, we found that the Hazardous Waste Division's use of administrative penalty orders of up to \$10,000 had proven to be an effective enforcement tool. Accordingly, we recommended that:

- **The Legislature should strengthen PCA's enforcement capabilities by granting the PCA commissioner administrative penalty authority for air, water, and solid waste violations.**

In response, the 1991 Legislature enacted legislation which gave PCA expanded administrative penalty authority.

The report presented many other findings and recommendations for improving agency performance as well as descriptions of the regulatory framework, organization, staffing, and activities of PCA's four enforcement divisions.

For additional information or copies of our 1991 evaluation, contact:

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