

**Full Performance Review**

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**Department of  
Environmental Protection**  
*Division of Air Quality*

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**The Division of Air Quality's Settlement Agreements  
Run the Risk of Limiting the Deterrent Effect  
of Enforcement Actions**



**January 2003  
PE02-40-272**

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John Sylvia  
Director

January 6, 2003

The Honorable Edwin J. Bowman  
State Senate  
129 West Circle Drive  
Weirton, West Virginia 26062

The Honorable Vicki V. Douglas  
House of Delegates  
Building 1, Room E-213  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting a Full Performance Review of the Department of Environmental Protection, Division of Air Quality, which will be presented to the Joint Committee on Government Operations on Monday, January 6, 2003. The issue covered herein is "The Division of Air Quality's Settlement Agreements Run the Risk of Limiting the Deterrent Effect of Enforcement Actions."

We transmitted a draft copy of the report to the Division of Air Quality on December 17, 2002. The Division opted not to have an Exit Conference. We received the agency response on December 31, 2002.

Sincerely,

Handwritten signature of John Sylvia in cursive script.  
John Sylvia

JS/wsc

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*Joint Committee on Government and Finance*

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# Executive Summary

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## Issue 1: The Division of Air Quality's Settlement Agreements Run the Risk of Limiting the Deterrent Effect of Enforcement Actions.

According to the Environmental Protection Agency's (EPA) Clean Air Act Stationary Source Civil Penalty Policy, assessment for violations of Clean Air Act policies should include a gravity component and an economic benefit component. The EPA's policy states,

*Enforcement actions prevent violators from gaining any competitive advantages by skirting pollution control requirements. No one should gain from violating environmental laws, and putting people's health and the environment at risk. Furthermore, responsible citizens and companies who make the necessary expenditures to comply with our laws should not be placed at a competitive disadvantage to those who do not. EPA is committed to ensuring that actions are taken to level the economic playing field for law-abiding companies.*

When asked how the Division of Air Quality (DAQ) assesses civil penalties, the DAQ provided the Legislative Auditor's Office with a penalty matrix which provides for the assessment of both gravity and economic benefit. However, penalty amounts assessed against violators are a single amount. **There is no documentation or breakdown that shows how much of the payment represents the gravity component or the economic benefit component.** Therefore, it is not clear if the DAQ is considering these important components in its assessments. The EPA's Office of the Inspector General (OIG) cited Louisiana for not breaking out the total amount among the factors it considered in determining penalty amounts. Without a break out of how the penalty amount considers the gravity and economic benefit components, there is the risk that penalties are assessed inconsistently, the economic playing field is not level and deterrence is hindered.

Furthermore, settlement agreements do not contain specific language required by the EPA indicating that penalty payments are not tax deductible for federal taxes. The EPA's concern may be that without such language, violators could reduce their penalties by claiming a tax deduction. Additionally, if a company claims the penalty as a deduction on the federal level, it could also be used as a deduction at the state level.

Alternative methods of penalty assessment are available. Several other states have adopted policies allowing the regulatory agency the ability to assess

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administrative, not just civil penalties. However, there is no guarantee that the DAQ would have a better result with administrative penalties than with civil penalties only.

### **Recommendations:**

1. *The Legislative Auditor's Office recommends that the DAQ document all penalty assessments to indicate what was assessed for gravity and economic benefit.*
2. *The DAQ should insert language into penalty assessments notifying violators that penalty assessments are not tax deductible for Federal or State taxes.*
3. *The Legislature may wish to consider amending the Code to give the DAQ the ability to assess administrative penalties and demand payment from violators.*
4. *The DAQ should consider setting up a separate account for penalty collections that is not capable of also receiving gifts, donations and contributions.*



# Review Method, Scope & Methodology

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This preliminary performance review of the West Virginia Department of Environmental Protection is required and authorized by the West Virginia Sunset Law, Chapter 4, Article 10 of the West Virginia *Code*, as amended. The mission of the DEP is to use all available resources to protect and restore West Virginia's environment in concert with the needs of present and future generations.

The **Objective** of this review was to determine if the Division of Air Quality was issuing penalties for air quality violations in a consistent and efficient manner. The **Scope** of this evaluation covers the period from 1994 to Present. The **Methodology** included but was not limited to interviews, conversations and correspondence with the Department of Environmental Protection and the Division of Air Quality and review of DEP annual reports from FY 1994 to FY 2001. Every aspect of this review complied with Generally Accepted Government Auditing Standards (GAGAS)<sup>1</sup>.

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<sup>1</sup>The Legislative Auditor formally recused himself from this evaluation for personal reasons.



## The Division of Air Quality's Settlement Agreements Run the Risk of Limiting the Deterrent Effect of Enforcement Actions.

According to the Environmental Protection Agency's (EPA) Clean Air Act Stationary Source Civil Penalty Policy, assessment for violations of Clean Air Act policies should include a gravity component and an economic benefit component. The EPA's policy states,

*Enforcement actions prevent violators from gaining any competitive advantages by skirting pollution control requirements. No one should gain from violating environmental laws, and putting people's health and the environment at risk. Furthermore, responsible citizens and companies who make the necessary expenditures to comply with our laws should not be placed at a competitive disadvantage to those who do not. EPA is committed to ensuring that actions are taken to level the economic playing field for law-abiding companies.*

When asked how the Division of Air Quality (DAQ) assesses civil penalties, the DAQ provided the Legislative Auditor's Office with a penalty matrix which provides for the assessment of both gravity and economic benefit. However, penalty amounts assessed against violators are a single amount. **There is no documentation or breakdown that shows how much of the payment represents the gravity component or the economic benefit component.** Therefore, it is not clear if the DAQ is considering these important components in its assessments. The EPA's Office of the Inspector General (OIG) cited Louisiana for not breaking out the total amount among the factors it considered in determining penalty amounts. Without a break out of how the penalty amount considers the gravity and economic benefit components, there is the risk that penalties are assessed inconsistently, the economic playing field is not level and deterrence is hindered.

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*Without a break out of how the penalty amount considers the gravity and economic benefit components, there is the risk that penalties are assessed inconsistently, the economic playing field is not level and deterrence is hindered.*

---

Furthermore, settlement agreements do not contain specific language required by the EPA indicating that penalty payments are not tax deductible for federal taxes. The EPA's concern may be that without such language, violators could reduce their penalties by claiming a tax deduction. Additionally, if a company claims the penalty as a deduction on the federal level, it could also be used as a deduction at the state level.

Alternative methods of penalty assessment are available. Several other states have adopted policies allowing the regulatory agency the ability to assess

administrative, not just civil penalties. However, there is no guarantee that the DAQ would have a better result with administrative penalties than with civil penalties only.

## Air Quality Regulation

According to WV Code §22-5-1,

*It is hereby declared to be the public policy of this state and the purpose of this article to achieve and maintain such levels of air quality as will protect human health and safety, and to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of this state and facilitate the enjoyment of the natural attractions of this state.*

The DAQ within the Department of Environmental Protection (DEP) is the primary division charged with the administration of the West Virginia Air Pollution Control Act. According to the EPA's database, the DAQ currently regulates over 900 facilities across the state. Table 1 shows the number of regulated facilities by county.

<b>County</b>	<b>#</b>	<b>County</b>	<b>#</b>	<b>County</b>	<b>#</b>	<b>County</b>	<b>#</b>	<b>County</b>	<b>#</b>
Barbour	6	Grant	9	Logan	30	Nicholas	22	Summers	3
Berkeley	31	Greenbrier	18	Marion	23	Ohio	19	Taylor	3
Boone	19	Hampshire	6	Marshall	18	Pendleton	3	Tucker	8
Braxton	11	Hancock	15	Mason	9	Pleasants	6	Tyler	7
Brooke	28	Hardy	10	McDowell	13	Pocahontas	6	Upshur	16
Cabell	34	Harrison	43	Mercer	23	Preston	20	Wayne	35
Calhoun	4	Jackson	12	Mineral	16	Putnam	17	Webster	7
Clay	3	Jefferson	13	Mingo	26	Raleigh	33	Wetzel	12
Doddridge	9	Kanawha	96	Monongalia	38	Randolph	20	Wirt	1
Fayette	19	Lewis	11	Monroe	6	Ritchie	6	Wood	36
Gilmer	4	Lincoln	3	Morgan	3	Roane	3	Wyoming	27

## Violations Represent a Small Percentage of Inspections

The DAQ has averaged over 900 facility inspections each year. The DAQ also investigates a large number of citizen complaints. Since FY 1994, the

DAQ has investigated over 700 citizen complaints each year. Out of nearly 1,500 total inspections a year, the DAQ issues an average of 88 Notice of Violations and 51 Cease and Desist Orders a year. From FY 1994 to FY 2001, the DAQ performed a total of 13,763 inspections and has issued 1,126 enforcement orders. This means that 8% of all inspections lead to an enforcement order. Table 2 shows the total number of inspections, violations and cease and desist orders issued by fiscal year.

**Table 2  
Inspections, Complaints, Violations, and Cease and Desist Orders by Fiscal Year**

<b>Fiscal Year</b>	<b>Inspections</b>	<b>Complaints Investigated</b>	<b>Violations Issued</b>	<b>Cease and Desist Orders</b>
1994	761	900	110	14
1995	706	700	135	13
1996	839	708	147	66
1997	1084	633	104	78
1998	1400	757	101	81
1999	1478	700	69	61
2000	896	836	37	55
2001	532	833	7	48

### **Economic Benefit and Gravity**

Economic benefit is the benefit achieved by delaying or avoiding compliance. According to the EPA,

*The February 16, 1984, Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment. More specifically, it says that any penalty should, at a minimum, remove any significant economic benefit resulting from noncompliance. In addition, it should include an amount beyond recovery of the economic benefit to reflect the seriousness of the violation. That portion of the penalty which recovers the economic benefit of noncompliance is referred to as the economic benefit*

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*component; that part of the penalty which reflects the seriousness of the violation is referred to as the gravity component.*

For example, a facility which fails to install a scrubber will eventually have to spend the money needed to install the scrubber in order to achieve compliance. But, by deferring these capital costs until EPA or a State takes an enforcement action, that facility has achieved an economic benefit. Among the types of violations which may result in savings from deferred cost are the following:

1. Failure to install equipment needed to meet emission control standards.
2. Failure to effect process changes needed to reduce pollution.
3. Failure to test where the test still must be performed.
4. Failure to install required monitoring equipment.

### **DAQ Uses Penalty Matrix as a Guide for Penalty Assessments**

When asked how the DAQ assesses civil penalties, the DAQ provided the Legislative Auditor's Office with a penalty matrix which provides for the assessment of both gravity and economic benefit. According to the Director of the DAQ,

*The DAQ, as previously stated in the July 29, 2002 letter, utilizes a penalty policy (currently in draft form) which seeks to ensure equitable settlement for all violators. The two components of this policy include penalties related to the environmental damage that occurred as a result of the violation [gravity] and the economic benefit of non-compliance for the violator.*

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*However, the DAQ does not have statutory authority to demand payment from any violator.*

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However, the DAQ does not have statutory authority to demand payment from any violator. Instead, the DAQ must depend on either civil court for penalty assessment, or it must negotiate penalty assessments. Since 1994, the DAQ has pursued civil penalties in Circuit Court for 7 violations, and has entered into 305 settlement agreements. **The DAQ was unable to provide the Legislative Auditor's Office with any documentation as to how the factors in the penalty matrix were applied or what portion of a penalty represented economic benefit and gravity for any given penalty assessment.**

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Without consistently applying the penalty matrix, there is no way to ensure a level playing field as is the intent of the EPA's guidance documents on penalty assessment. For example, from calendar year 2000 to calendar year 2002, there were 24 penalties assessed for construction or modification of a facility without a permit. The penalties for these violations ranged from \$5,000 to \$200,000.

This same condition was cited specifically as a problem by the EPA's Office of the Inspector General (OIG) when they completed a review of Louisiana's regulatory program in 1997. According to the OIG,

*To compute fines, Louisiana completed a Penalty Assessment Form with nine factors to consider when determining a recommended penalty amount. One of these factors was to consider the economic benefit realized through noncompliance. **However, Louisiana officials did not break out among the nine factors how the total penalty was computed.***[emphasis added]

Furthermore, according to the OIG, when economic benefit is not recovered, deterrent to violation no longer exists.

*Not recovering the economic benefit of violations also limited the deterrent effect of enforcement actions. If the economic benefit is not assessed, it continues to be less expensive for a company to violate the law than to comply with it. As a result, some companies were more likely to ignore emission limits and continue polluting the environment, while waiting to see if EPA or the delegated agencies identified their violations. **This can lead to unnecessary risks to human health and the environment.*** [emphasis added]

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*All consent agreements should state that penalties paid pursuant to this penalty policy are not deductible for federal tax purposes under 28 U.S.C. § 162(f)...*

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## **Settlement Agreements Should Indicate Tax Status of Penalty Payments**

According to EPA's penalty assessment guidance document, *All consent agreements should state that penalties paid pursuant to this penalty policy are not deductible for federal tax purposes under 28 U.S.C. § 162(f).* [emphasis added] There is currently no language in settlement agreements entered into by the Division of Air Quality which indicate this. Additionally, in one settlement agreement, specific language was included to

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describe the penalty payment as a voluntary donation.<sup>1</sup> Money received from settlement agreements is deposited into the West Virginia Air Pollution Education and Environment Fund. This same account is also used to receive gifts, donations, and contributions. This practice of co-mingling penalty assessments with donations further obscures the difference between the two payments. According to the DAQ,

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*...the DAQ does not believe that payment of tax-exempt monies is inconsistent with the federal and State air pollution statutes.*

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*Whether such payment is tax-exempt is an issue that the DAQ has not thoroughly researched. However, the DAQ does not believe that payment of tax-exempt monies is inconsistent with the federal and State air pollution statutes. Regardless of whether the payments of monies is taxable or not, assessment of penalty has economic repercussions for sources and thus, reinforces the agency's efforts to achieve compliance with the air pollution statutes and rules.*

This attitude is clearly in conflict with the EPA's penalty guidance document. Furthermore, if companies have been using penalty payments as tax deductions (as nothing contained in current settlement agreements limits their ability to do so), then the DAQ would be depriving the State of thousands of dollars of business tax revenue. This is because a deduction taken at the federal level is also taken at the state level because the state automatically starts with the adjusted gross income (after deduction income) from the federal return. Table 3 shows the amount deposited into the West Virginia Air Pollution and Environment Fund since FY 1994.



<b>Table 3 Penalties Assessed by Fiscal Year</b>	
<b>Fiscal Year</b>	<b>Deposits</b>
1994	\$171,000
1995	\$297,500
1996	\$290,000
1997	\$1,324,000
1998	\$230,700
1999	\$451,450
2000	\$615,500
2001	\$388,800
2002	\$630,700
2003*	\$69,528
<b>Total</b>	<b>\$4,469,178</b>
*FY 2003 to September 27, 2002	

### **Penalty Assessment in Other States**

To examine alternative methods of penalty assessment, the Legislative Auditor's Office surveyed other states. Twenty eight states responded to the survey. Two different strategies seem prevalent among the states. The first strategy is that which is practiced in West Virginia. Namely, the DAQ does not have authority to demand payment from violators. It must depend upon the circuit court or negotiate settlement agreements to fine violators. The second strategy practiced in 20 of the 28 states surveyed is where the regulatory entities have the authority to demand payment, that is, they have the ability to issued administrative, not just civil penalties. Table 4 shows the states which have administrative penalties and those with civil penalties only.

<b>Table 4 Assessment Methods in Other States</b>			
<b>State</b>	<b>Administrative or Civil Penalties</b>	<b>State</b>	<b>Administrative or Civil Penalties</b>
Tennessee	Administrative	Oklahoma	Administrative
Minnesota	Administrative	Massachusetts	Administrative
Washington	Administrative	Texas	Administrative
Delaware	Administrative	North Dakota	Administrative
South Dakota	Administrative	Ohio	Administrative
Rhode Island	Administrative	New Hampshire	Administrative
Iowa	Administrative	Alaska	Civil
Indiana	Administrative	Wisconsin	Civil
Kansas	Administrative	Wyoming	Civil
New Jersey	Administrative	Arkansas	Civil
Louisiana	Administrative	Utah	Civil
Alabama	Administrative	Maine	Civil
Connecticut	Administrative	Colorado	Civil
Pennsylvania	Administrative	Kentucky	Civil

### **Administrative Penalty System**

The ability to demand payment from violators in the form of administrative penalties has many advantages. The first advantage is that it does not make the regulatory entity dependant on the civil court process. According to the US EPA's Office of the Inspector General,

*In some delegated agencies, limited legal support and a lack of administrative authority contributed to inconsistencies in enforcement. ...If delegated agencies can pursue violations administratively, they can avoid lengthy delays, caused by going through outside legal offices.*

The second advantage to issuing administrative penalties rather than

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issuing civil penalties and negotiating payment, is that it is much easier to have consistent enforcement. According to an Enforcement Coordinator in the State of New Jersey,

*The NJ DEP Air Enforcement program has set penalty schedules for each section of each rule that is promulgated. Therefore any violation of that section/paragraph of any regulation/rule has a specific penalty associated with it, that is assessed through an Administrative process, through our Department. We do not go through any courts to assess penalties. However, the facility is given the right to a hearing through our Administrative Laws for any violation.*

As illustrated above, any regulatory process which has the potential to deprive a regulated entity of property or possession is entitled to due process. The initial due process afforded regulated entities is the Air Quality Board. In calendar year 2001, there were 8 appeals to the West Virginia Air Quality Board. All of these appeals resulted in a settlement agreement. The possibility exists that if administrative penalties were appealed to the Air Board, then the DAQ could enter into settlement agreements as it currently does.

## **Conclusion**

Without documentation of how the factors of economic benefit and gravity are considered in penalty assessments, there is a risk that the DAQ is not assessing penalties consistently, the economic playing field is not level and deterrence is hindered. The DAQ should take steps to ensure that penalty payments are not confused with tax exempt donations so as to ensure that the State receives all corporate tax revenue due. Furthermore, many other states have realized the benefit which can be gained from a penalty system which allows the State to demand payment from violators and not virtually forcing negotiated payments.

## **Recommendations:**

- 1. The Legislative Auditor's Office recommends that the DAQ document all penalty assessments to indicate what was assessed for gravity and economic benefit.*
- 2. The DAQ should insert language into penalty assessments*

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*notifying violators that penalty assessments are not tax deductible for Federal or State taxes.*

3. *The Legislature may wish to consider amending the Code to give the DAQ the ability to assess administrative penalties and demand payment from violators.*
4. *The DAQ should consider setting up a separate account for penalty collections that is not capable of also receiving gifts, donations, and contributions.*

# Appendix A: Transmittal Letter to Agency

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## WEST VIRGINIA LEGISLATURE *Performance Evaluation and Research Division*

Building 1, Room W-314  
1900 Kanawha Boulevard, East  
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John Sylvia  
Director

December 17, 2002

Ms. Stephanie R. Timmermeyer, Director  
Office of Air Quality  
WV Department of Environmental Protection  
7012 MacCorkle Ave. SE  
Charleston, WV 25304

Dear Ms. Timmermeyer:

This is to transmit a draft copy of the Full Performance Evaluation of the Department of Environmental Protection's Division of Air Quality. This report is scheduled to be presented at the Sunday, January 5, 2003 interim meeting of the Joint Committee on Government Operations. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committee may have.

We need to schedule an exit conference to discuss any concerns you may have with the report. We would like to schedule the meeting with you sometime between December 18, 2002 and December 23, 2002. Please notify us to schedule an exact time. In addition, we need your written response by noon on December 27, 2002 in order for it to be included in the final report. If your agency intends on distributing additional material to committee members at the meeting, please contact the House Government Organization staff at 340-3192 by Thursday, January 2, 2003 to make arrangements.

We request that your personnel treat the draft report as confidential and that it not be disclosed to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

Handwritten signature of John Sylvia in cursive script.  
John Sylvia

Enclosure

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*Joint Committee on Government and Finance*

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# Appendix B: Agency Response



Division of Air Quality  
7012 MacCorkle Avenue, SE  
Charleston, WV 25304-2943  
Telephone Number: (304) 926-3847  
Fax Number: (304) 926-3739

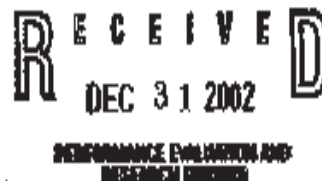
## West Virginia Department of Environmental Protection

Bob Wise  
Governor

Michael O. Callaghan  
Cabinet Secretary

December 30, 2002

Mr. John Sylvia, Director  
West Virginia Legislature  
Performance Evaluation and Research Division  
1900 Kanawha Boulevard, East  
Building 1, Room W-134  
Charleston, WV 25303-0610



Re: Draft copy Full Performance Evaluation of the Department of Environmental Protection's Division of Air Quality.

Dear Mr. Sylvia:

The Division of Air Quality (DAQ) appreciates the opportunity to see and respond to the subject report in its draft form. Within the full report the DAQ noted statements that are inconsistent with the actual procedures and functions of the agency. However, time constraints imposed on the agency during this holiday season have prevented a more complete response. The following is the DAQ's response to the specific recommendations contained in the draft evaluation.

**Recommendation 1.** *The Legislative Auditor's Office recommends that the DAQ document all penalty assessments to indicate what was assessed for gravity and economic benefit.*

**Response:** The DAQ, up until 2001, had no policy for assessing penalties. The agency relied on the considerable experience of its leadership and staff to determine the value of assessed penalties. In 2001, a policy for assessing and calculating penalty amounts was drafted. The policy provides for both gravity and economic portions of the penalty calculation.

Assessing economic benefit is difficult because the agency is not often able to obtain definite information about how much money it will cost a company to come into compliance. Because of this difficulty, assessment of economic benefit has been merely a consideration and has not been separated from the gravity component. However, for all future assessments, the agency will define a separate amount for that component of the calculation. The USEPA offers training for inspectors on that issue and the agency commits to utilizing that resource.



West Virginia Department  
of Environmental Protection

"Promoting a healthy environment."

It is important to note that the draft policy is currently used to determine penalty amounts to be negotiated in many, but not necessarily all settlements. The DAQ has purposely kept the policy in draft form so that it can be refined into a workable tool. The DAQ has no procedural systems in place which require the formal documentation of the penalty determination process. However, such procedural processes are possible and the draft policy could be an integral part of them. Such processes could be made a formal part of the consent agreement drafting process for each inspector. Please bear in mind, however, that these assessments, when calculated during settlement negotiations, are required to remain confidential by law.

*Recommendation 2. The DAQ should insert language into penalty assessments notifying violators that penalty assessments are not tax deductible for Federal or State taxes.*

**Response:** The DAQ will add language to all future consent orders and payments to the Air Pollution Education and Environment Fund are not tax deductible for federal or state taxes.

*Recommendation 3. The Legislature may wish to consider amending the Code to give the DAQ the ability to assess administrative penalties and demand payment from violators.*

**Response:** The DAQ believes that the current methods which are employed to assess penalties serve the agency well. West Virginia's two part process for citing and settling violations (i.e. 1 - providing notice of violation, cease and desist orders and, 2 - negotiating a settlement agreement which includes a compliance plan and penalty assessment) provides the facility the opportunity to appeal only the facts of the violation. Negotiated settlements, once reached, are not appealable. Should the facility default on the compliance plan or the penalty payment, civil court actions may be initiated by the DAQ. The threat of civil court action, whether explicit or implied, is a significant incentive for a facility to negotiate a settlement and avoid the associated costs of litigation.

The system of administrative penalties and demanded payments would result in more violations appealed to the Air Quality Board. Administrative penalties unilaterally assessed by the DAQ would be more likely to foster an appeal than the current settlement process. In fact, the Auditor's report also indicates this would occur. Such appeals implicate increases in personnel time and costs and legal fees for both the facility and the agency. As a result, a system of administrative penalties could have the effect of slowing the overall enforcement process.



Additionally, such a system would require a modification of the West Virginia Code 22-5 and nearly all of DAQ's thirty-six legislative rules. A new rule also may be required to establish penalties and calculation methods. An alternative method for assessing penalties is mentioned in the Report by the example of New Jersey. Again, if West Virginia were to follow that state's method nearly all of the DAQ's rules would require modification.

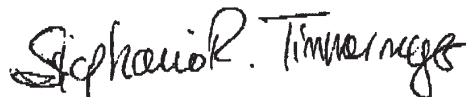
A better solution is to formalize the use of the DAQ's draft penalty policy in conjunction with the current practice of negotiating settlement agreements. The advantage is a relatively low incident of appeal and avoidance of the cost associated with the appeal process. The use of a formal policy which established penalties to be uniformly applied through negotiated settlements would result in fewer appeals. Such a solution is still leveraged by the threat of civil court action. This solution also addresses what seems to be the main concerns of the audit: ie., the DAQ's lack of penalty determination documentation, a consistent and uniform application of penalties, and the inclusion of economic benefit as a deterrent to future violations.

Recommendation 4. *The DAQ should consider setting up a separate account for penalty collections that is not capable of also receiving gifts, donations, and contributions.*

Response: The DAQ agrees that payments resulting from settlement agreements and gifts, donations, and contributions should be differentiated and currently we have the ability to do so. However, in the future, the DAQ agrees to differentiate these up front before deposit of monies into the fund.

Should you have additional questions please contact me at 926-3636 or John Benedict, Jesse Adkins, or Earl Billingsley of my staff at 926-3647.

Sincerely,



Stephanie R. Timmermyer  
Director

