



## Maximum and minimum penalty increase for environmental violations

By Sarah Lobe, Alison Torbitt and Al Floro

The U.S. Environmental Protection Agency (EPA) recently increased by approximately 2.5% both maximum and minimum monetary penalty limits for civil violations. According to the [final rule](#), published in the Federal Register on February 6, 2019 (84 Fed. Reg. 2056), this is the third of such fine increases for noncompliance with EPA-administered statutes, including those governing the protection of clean water and air, disposal of hazardous and toxic substances and environmental cleanup. The new penalty amounts became effective on the day of publication in the [Federal Register](#).

Each year, the EPA is mandated to adjust fines according to a [formula](#) in the Federal Civil Penalties Inflation Adjustment Act of 2015. Congress' theory is that, without regular adjustment of statutorily set fines, monetary penalties will fail to create the desired effects of deterrence and compliance. Accordingly, the increases in penalties ratchet up the potential cost of noncompliance. For example, for a violation that occurred after November 2, 2015, the maximum fine assessed rose approximately 2% last year and nearly another 2.5% this year. Steady climbs in civil penalties could significantly add up, particularly when considering recent headline cases with civil penalties in the hundreds of millions for Clean Air Act violations.

However, despite this formulaic increase on paper, the current regulated community may not actually see higher fines than in previous years. EPA enforcement personnel have the discretion to choose the penalty assessed in each case. Although a fine cannot be below an established minimum, EPA enforcement personnel consider many factors—such as the violator's good faith efforts to comply, ability to pay and benefits gained as well as the violation's severity—to determine the actual fine. Moreover, under the current administration, civil penalties for environmental harms have dropped to the lowest average level since 1994. These figures are consistent with the [EPA's announcement](#) last summer that it plans to refocus on compliance programs rather than stricter enforcement actions.

Despite the administration's general stance, individual alleged violators and targeted industries are still likely to feel the impact of these annually rising fine limits, especially in conversations regarding enforcement risk and transfers of ownership. This year's newest increase should factor into this risk assessment and expectation management. For help with that evaluation and what to

anticipate when violations are discovered or enforcement is initiated, or for more information on the content of this alert, please reach out to your Nixon Peabody attorney or:

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