



Hawaii Volcanoes National Park Teaching Note

Synopsis

This case study features the first RCRA administrative enforcement action that the U.S. Environmental Protection Agency (“EPA”) Region 9 brought against the Department of the Interior (“Interior”) under the 1992 Federal Facilities Compliance Act. The case study begins with a surprise RCRA site inspection at the Hawaii Volcanoes National Park on the Big Island of Hawaii. After EPA inspectors identify serious hazardous waste violations, EPA Assistant Regional Counsel Vicky Lang files an administrative enforcement complaint against Interior, seeking a \$243,800 penalty. Barbara Goodyear, Field Solicitor for Interior, offers to conduct a Supplemental Environmental Project (“SEP”) to settle the matter, in lieu of any cash penalty.

Putting themselves in Lang’s shoes, the students must decide whether EPA should accept Interior’s settlement offer or propose a counter demand. The students must determine whether Interior should pay a monetary penalty under EPA’s Interim Revised SEP Policy (and if so, what amount). Students must also review Interior’s proposed SEP and suggest any changes needed to make the SEP consistent with EPA’s Policy. Finally, students must determine what percentage of the \$235,000 estimated SEP cost should be used to mitigate the monetary penalty.

Mary J. Decker prepared this note, under the editorial guidance of Barton H. (“Buzz”) Thompson, Jr., Robert E. Paradise Professor of Natural Resources Law, Stanford Law School, for the sole purpose of aiding classroom instructors in the use of SLS Case No. SLS 97-016. It provides analysis and questions intended to present alternative approaches to meeting the learning objectives of the case and stimulating class discussion. Copyright © 1998 by the Board of Trustees of the Leland Stanford Jr. University.

Positioning

This case study was developed for use in Law 603, Environmental Law, Policy and Process, at Stanford Law School. Law 603, an introductory environmental course, covers environmental regulatory approaches, waste management, toxics regulation, administrative issues, the Federal Clean Air Act, and enforcement. The students discuss this case study near the end of the course, after the teacher has lectured on substantive RCRA requirements. This case study discussion falls within the enforcement section of the class syllabus.

Learning Objectives

This case study seeks to generate an understanding and appreciation for the legal, policy, and ethical issues an EPA attorney must consider in settling a RCRA administrative enforcement action against a fellow Federal agency. The case study requires that students develop a settlement strategy synthesizing information on the alleged RCRA violations, EPA's penalty calculations, EPA's Interim Revised SEP Policy, and Interior's countervailing settlement arguments.

On a substantive level, the case study reinforces the students' previous exposure in the course to RCRA regulatory requirements, including large and small quantity generator status, the 90-day and 270-day storage exemptions, and the hazardous waste inspection process.

Case Study Exhibits

List of Case Study Exhibits

- A Interior's organizational chart
 - B Waste Inventory
 - C EPA's inspection report (excerpts)
 - D Interior's vehicle wash rack SEP
 - E EPA's Interim Revised SEP Policy
 - F EPA's penalty calculation worksheet
 - G Correspondence between counsel
 - H Interior's model RCRA program SEP
- A Interior's organizational chart (1 page)

This one page chart from Interior's web site shows the seven major offices that the Secretary of the Interior controls, including the National Park Service, the U.S. Fish and Wildlife Service, the Geological Survey, the Bureau of Indian Affairs, and Bureau of Reclamation. The case study notes that these offices also operate facilities that generate hazardous waste. Students may use the information on Interior's organizational structure to support their settlement arguments. Students may also visit Interior's web site, <http://www.doi.gov>, to learn more about the Agency's statutory mandates and environmental management responsibilities.

B The Park's waste inventory (4 pages)

This inventory, prepared by Park employees, shows the kind and quantity of hazardous wastes stored at the dog kennel at the time EPA conducted its inspection. Students may note that the inventory includes listings for "solvents," "unknown liquid," "unknown powder," and "mercury-contaminated items." The inventory also lists batteries, lead-based paint, and motor oil. Students may use this factual information to support their arguments about the Park's generator status, the seriousness of the violations found, and the appropriate penalty amount.

C EPA's inspection report (excerpts) (4 pages)

This four-page excerpt from EPA's inspection report provides additional factual background regarding the inspection. It includes details such as RCRA waste codes, a description of violations found in satellite accumulation areas, and a summary of the record review that EPA inspectors conducted at the Park. Students can use these facts to support their settlement analyses.

D Interior's vehicle wash rack SEP (3 pages)

This document describes a vehicle wash rack SEP proposed by Interior early in the settlement negotiations with EPA. Lang rejected this SEP as inconsistent with EPA's SEP Policy. The project calls for construction of a \$90,000 vehicle wash rack to capture and recycle oily wash water, preventing release of the wash water into a catch basin (the current practice at the Park). Students should examine Interior's assertion that the wash rack SEP has an appropriate nexus with the Park's hazardous waste violations. Interior argued a nexus existed because the vehicle wash rack would be constructed at the Park (same geographic location) and because the project deals with vehicle maintenance (and vehicle maintenance activities generate hazardous waste at the Park).

E EPA's Interim Revised SEP Policy (13 pages)

One of the key documents supporting the students' analysis, EPA's SEP Policy lays out five legal guidelines that all SEPs must adhere to and lists seven categories of acceptable SEPs (and several categories of unacceptable SEPs). The SEP Policy also describes how to calculate the final penalty amount in settlements involving SEPs.

F EPA's penalty calculation worksheet (1 page)

Students can use this worksheet to calculate an appropriate final cash penalty amount based on EPA's SEP Policy. The worksheet calculations will also show the percentage of the SEP cost used to mitigate the penalty amount EPA included in its complaint. As a general rule under EPA's SEP Policy, EPA should use no more than 80% of the SEP cost to mitigate the penalty.

G Correspondence between counsel (16 pages)

This correspondence consists of two settlement letters: one from Interior's counsel and a responding letter from EPA's counsel. The lawyers describe their settlement positions and their legal arguments regarding large v. small quantity generator status. Lang's letter on behalf of EPA contains a counter-demand to settle the matter for \$205,500.

Teachers with longer class meeting times may use these letters to stimulate discussion on whether the Park is properly classified as a large or small generator under RCRA, and whether the penalty amount EPA included in its administrative complaint was appropriate under EPA's 1990 RCRA Civil Penalty Policy. (Note: EPA's 27 page 1990 RCRA Civil Penalty Policy is not attached as a case study exhibit, but could be provided to the students if the teacher desires. The case study does include two matrices from the RCRA Penalty Policy for calculating the gravity and multi-day penalty components.) Students could also discuss the basis for EPA's \$205,500 settlement counter-demand, using the RCRA Penalty Policy matrices included in the case study to justify a settlement counter-demand in this amount.

H Interior's model RCRA program SEP (18 pages)

Another critical document in the students' analysis, this document describes Interior's proposed model RCRA program SEP. Under this SEP, Interior will develop and implement at six parks, a model RCRA hazardous waste and hazardous materials management plan. Students will need to read this document carefully to determine whether the project Interior proposes to implement meets EPA SEP Policy requirements.

Teaching Plan

This proposed 65 minute teaching plan assumes that Vicky Lang will participate as a class guest. If no class guest attends, or the class period is substantially longer than the 65 minutes allotted here, the students may raise and discuss additional issues (e.g., stipulated penalties for failure to carry out SEP tasks; personal liability of Park employees for RCRA violations).

Teaching Plan

(1)	Opening	1 minute
(2)	Discussion Area #1: EPA's evaluation of the model RCRA program SEP	20 minutes
(3)	Discussion Area #2: EPA's consideration of cash penalty and penalty mitigation	20 minutes
(4)	Class Guest	20 minutes
(5)	Closing	4 minutes
Total Class Time		65 minutes

Analysis

(1) Opening — 1 minute

Here is one possible introduction to the case study: The Department of the Interior has offered to conduct a fairly elaborate Supplemental Environmental Project to settle an administrative enforcement action brought by U.S. EPA Region 9 for hazardous waste violations at the Hawaii Volcanoes National Park. Interior thinks it should not have to pay any cash penalty to settle the enforcement action, if it agrees to conduct the SEP.

From the perspective of U.S. EPA Region 9 attorney Vicky Lang, you must determine whether Interior's proposed SEP is consistent with EPA's Interim Revised SEP Policy. You must also determine what, if any, monetary penalty EPA should recover. This is EPA Region 9's first administrative enforcement action against the National Park Service under the 1992 amendments to RCRA known as the Federal Facilities Compliance Act. EPA believes the hazardous waste violations at the Park are serious and has assessed a \$243,800 penalty in its complaint.

(2) Discussion Area #1: EPA's evaluation of the model RCRA program SEP — 20 minutes

Potential Discussion Questions

- Is Interior's proposed SEP consistent with EPA's Interim Final SEP Policy? Is there an appropriate nexus between Interior's proposed SEP and the hazardous waste violations EPA identified at the Park? Does the proposed SEP require that Interior carry out activities not otherwise required? Does the proposed model RCRA program SEP help achieve EPA's pollution prevention goals?
- How does the proposed model RCRA program SEP compare with the vehicle wash rack SEP that Interior suggested earlier? (consider the nexus requirement, the estimated SEP cost, the requirement that SEP tasks be in addition to what is already required by law)
- What revisions to Interior's proposed model RCRA program SEP do you suggest?

- What will happen to Interior’s model RCRA programs after the SEP tasks are completed in two and half to three years?
- Who will most likely pay the SEP implementation costs? (Interior) Who will most likely pay any cash penalty that EPA imposes? (the Park)
- Does Lang have an ethical obligation to communicate Goodyear’s model RCRA program SEP settlement offer to her client? What about Goodyear’s settlement offer involving the vehicle wash rack SEP? Does it make any difference if the settlement offer is written or oral? Who is Lang’s client?

As the potential discussion questions listed above indicate, this discussion area should focus on identifying what Interior’s SEP proposal requires and then comparing those tasks with the requirements in EPA’s Interim Revised SEP Policy. The two chief analytical areas based on EPA’s Interim Final SEP Policy are: (1) the requirement for a nexus between the SEP and the alleged violations; and (2) the requirement that the SEP tasks represent activities not otherwise required by law.

Pages four-five of EPA’s SEP Policy describe the nexus requirement:

All projects must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if the project remediates or reduces the probable overall environmental or public health impacts or risks to which the violation at issue contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future. SEPs are likely to have an adequate nexus if the primary impact of the project is at the site where the alleged violation occurred or at a different site in the same ecosystem or within the immediate geographic area. Such SEPs may have sufficient nexus even if the SEP addresses a different pollutant in a different medium. In limited cases, nexus may exist even though a project will involve activities outside of the United States.

The students should explore the relationship between the model RCRA program SEP and the alleged hazardous waste storage and handling violations at the Park, as well as any revisions to the SEP that could enhance the nexus. Students may also discuss how well the model RCRA SEP meets the nexus requirement, in comparison with Interior’s earlier proposed vehicle wash rack SEP.

Page four of EPA’s SEP Policy defines SEPs as “environmentally beneficial projects which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is *not otherwise legally required to perform*.” Under the EPA Policy, the phrase “not otherwise legally required to perform” means “. . . the SEP is not required by any federal, state or local law or regulation.”

The teacher may question whether the proposed model RCRA program SEP truly goes above and beyond what is already required by law. The students may bring up the distinction between meeting existing RCRA requirements and developing, disseminating, and evaluating a systematic hazardous waste management plan. The teacher or class guest can explain that in order to meet this SEP Policy requirement, in the final settlement Interior agreed that the Park would meet the more stringent RCRA regulatory requirements applicable to large quantity generators, rather than continuing to dispute the Park's generator status.

Students may also note that the proposed SEP appears to meet the Agency's pollution prevention goal (page 2) and arguably falls within the following three categories of acceptable SEPs: pollution prevention (pages 5-6), pollution reduction (page 6), and environmental compliance promotion (page 8). When discussing these issues in the past, students have also raised the following points regarding the proposed model RCRA program SEP:

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| <ul style="list-style-type: none"> ➤ The SEP should be rejected entirely because it's more effective enforcement policy to put Interior on notice now that surprise inspections <i>will</i> result in steep penalties at all its facilities, no special deals will be struck. ➤ The suggested posting of the model RCRA program on the Internet is too informal; Interior must formally sanction and promote the model RCRA plans to all national parks. ➤ The SEP contains unclear descriptions of the required tasks. ➤ The SEP lacks an enforcement provision. | <ul style="list-style-type: none"> ➤ The SEP lays out an unclear division of labor (too many players involved in the project with no one ultimately responsible for specific tasks). ➤ The SEP lacks a requirement for outside review of completed project tasks, especially regarding evaluation of the model RCRA program at six national parks. |
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(3) Discussion Area #2: EPA’s consideration of a cash penalty and penalty mitigation — 20 minutes

Potential Discussion Questions

- Should EPA treat Interior differently than a private company when it comes to recovering a monetary penalty?
- Why *should* Interior pay a cash penalty for these violations? What interests or motivations drive EPA’s settlement decision making? Who will approve the final settlement?
- Did the Park enjoy any economic benefit by not complying with RCRA?
- Assuming Interior’s final model RCRA program SEP cost \$235,000 to implement, what percentage of the SEP cost do you recommend be used as mitigation?
- What final cash penalty do you recommend that Interior pay? Does EPA’s SEP Policy require that a \$51,375 monetary penalty be paid? (Students can use EPA’s penalty calculation worksheet attached as Exhibit F to the case study to determine the percentage of the SEP cost used as mitigation and the final penalty amount.)

EPA’s SEP Policy states that the Agency will seek “substantial” monetary penalties to deter noncompliance, even where a violator agrees to conduct a SEP (see pages 2 and 9 of Exhibit E to the case study). EPA believes that recovering substantial cash penalties deters not only the violator, but other would-be violators. According to EPA’s Policy, recovering substantial penalties also helps ensure a “national level playing field” where violators do not gain a competitive or economic advantage by failing to invest in pollution control equipment, etc. Finally, EPA’s Policy states that monetary penalties encourage pollution prevention and recycling.

Section E of EPA’s Penalty Policy addresses calculation of the final monetary penalty. The penalty amount EPA includes in its administrative complaint serves as the starting point for penalty negotiations. The Policy states that, as a general rule, EPA *should* recover at least 25% of the penalty’s gravity component, or the economic benefit component plus 10% of the gravity component, whichever is greater. Only under *extraordinary circumstances* should EPA depart from this penalty recovery guideline.

After running the BEN computer model to calculate the profit the Park gained from its noncompliance, EPA concluded that the Park gained no economic benefit from its violations. Using the 1990 RCRA Civil Penalty Policy, EPA computed a \$243,800 gravity penalty for the violations. The case study includes two Civil Penalty Policy matrices showing how EPA calculated this penalty. Under the SEP Policy’s general rule of thumb, absent extraordinary

circumstances, Interior should pay at least a \$51,375 penalty (25% of the \$205,500 settlement counter-demand).

Section E also describes penalty mitigation — what percentage of the SEP cost (calculated using an EPA computer model called PROJECT) will mitigate the penalty amount EPA included in the complaint. Here the Policy provides another general guideline — the mitigation percentage should not exceed 80%. For governmental agencies, however, the percentage may be set as high as 100% of the SEP cost, if EPA gives the SEP a high score based on the following five criteria:

1. benefits to the public or environment
2. innovation
3. environmental justice
4. multimedia impacts
5. pollution prevention

The students may argue that Interior's SEP meets four of these five criteria, providing support for a mitigation percentage higher than 80%. After the students discuss their own calculations, the teacher or class guest can reveal the actual final settlement details. EPA treated the Park's Federal facility status as an extraordinary circumstance warranting a final penalty amount less than 25% of the gravity component. EPA imposed a \$41,100 monetary penalty in its final settlement. EPA calculated a \$234,857 SEP cost for the final version of the SEP, using the PROJECT computer model. Attached to this Note are two versions of EPA's penalty calculation worksheet showing the total penalty amount and the mitigation percentage. One worksheet is based on the Complaint penalty amount, \$243,800. The second worksheet is based on EPA's settlement counter-demand, \$205,500.

It has been Stanford's experience with this case study that many students resist imposing a penalty on Interior, even when asked to play the role of EPA's counsel. For example, students have raised the following points:

- Interior is qualitatively different than a private entity; EPA should grant deference to a fellow Federal agency; the SEP Policy allows EPA to distinguish between private companies and governmental agencies;
- requiring a cash penalty just shifts Federal dollars from one pot to another; and
- taking money away from Interior or the Park won't help solve the environmental problems.

The teacher should be prepared to probe such skepticism by encouraging further discussion of pertinent EPA SEP Policy language and the underlying reasons for imposing substantial penalties, described above.

(4) Class Guest — 20 minutes

The class guest should use most of their allotted time to respond to analytical points raised by the students. The guest should be instructed ahead of time to take notes during the student discussion and be prepared to respond to, expand, or critique the points raised by the students. The class guest should reserve at least five minutes to engage in a question and answer session with the students. An update on SEP implementation and EPA oversight of the SEP would be instructive.

(5) Closing — 4 minutes

After participation by the class guest, the teacher may close with some of the following points explaining EPA's final settlement.

The teacher may also devote a second discussion period to the students' analysis of EPA's final settlement. Was the final settlement fair and reasonable? Did EPA adhere to its own SEP Policy? Does the model RCRA SEP pose an unreasonable oversight and monitoring burden on EPA? Do *extraordinary circumstances* exist warranting EPA's departure from the general rule that 25% of the gravity penalty component should be recovered? Is 70% an appropriate penalty mitigation amount under these circumstances?

Closing Points:

A. The Final SEP Provisions

The final settlement and model RCRA SEP were revised to:

- identify the specific parks at which the model plan would be tested;
- specify the order of required tasks so that the model RCRA plan could be developed, implemented at six parks, evaluated, and then revised as needed;
- require dissemination to all parks through conventional means, in addition to the internet (only a few national parks actually had internet access);
- require compliance at the Park with large quantity generator RCRA regulations that are more stringent than the requirements for small quantity generators; and
- require that the National Park Service quantify the pollution prevention results achieved at each of the six national parks implementing the model RCRA plans.

B. The Final Cash Penalty and Mitigation

EPA recovered a \$41,100 final cash penalty from the Park, an amount less than 25% of the penalty gravity component, \$51,375. EPA found extraordinary circumstances that warranted the lower penalty in the Park's status as a Federal facility.

EPA estimated that the final model RCRA SEP would cost Interior \$234,857 to implement. EPA allowed 70% of this estimated SEP cost as mitigation of the \$205,500 settlement counter-demand. A worksheet showing the final penalty calculation and penalty mitigation percentage is attached to this teaching note.

C. RCRA Closure

Though wastes were improperly stored there for only two weeks, EPA also required that Interior conduct a RCRA closure of the dog kennel area. Interior paid consultants about \$10,000 to conduct an investigation and remove and dispose of a small amount of soil contaminated with metals.

D. EPA's Final SEP Policy

EPA issued a final SEP Policy, effective May 1, 1998. The Final SEP Policy supercedes the Interim Revised SEP Policy used in this case study, without making major changes.

If these points have already been addressed, the teacher could close by clarifying or summarizing key points raised during the discussion. To help reinforce key points, the teacher could also spend three minutes at the beginning of the *next* class period summarizing, clarifying, or expanding on key points gleaned from the case study discussion.