

**1999 SENATE NATURAL RESOURCES**

**SB 2178**

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2178

Senate Natural Resources Committee

Conference Committee

Hearing Date January 15, 1999

Tape Number	Side A	Side B	Meter #
1	x		0-3875
1		x	590-650
Committee Clerk Signature <i>Lyla A. Ziegen</i>			

Minutes:

SENATOR TRAYNOR opened the hearing on SB 2178: A BILL FOR AN ACT TO AMEND AND REENACT SECTIONS 23-25-10 AND 61-28-08 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO AIR AND WATER POLLUTION PENALTIES; AND TO PROVIDE A PENALTY.

FRANCIS SCHWINDT of the ND Department of Health testified in support of the bill. (See attached testimony)

SENATOR TRAYNOR asked if there is a violation, will someone be penalized under the new subsection 1 and subsection 2.

LYLE WITHAM, Assistant Attorney General responded that both civil and criminal penalties are unusual. The Attorney General's Office cannot bring both civil and criminal actions at once.

SENATOR TRAYNOR asked if the state is more stringent or less stringent.

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Senate Natural Resources Committee

Bill/Resolution Number Sb 2178

Hearing Date January 15, 1999

LYLE WITHAM replied the state is less stringent.

SENATOR TRAYNOR asked if federal law doesn't require jail time, then why include this in the bill.

LYLE WITHAM replied it has been included to halt further violations.

SENATOR TRAYNOR asked if subsection 2 of section 1 regarding criminal negligence is all new.

LYLE WITHUM stated it is and that the federal law is more stringent.

SENATOR TRAYNOR closed the hearing and asked if the committee desired to take any action.

Senator Freborg moved for a DO PASS. Senator Heitkamp seconded the motion.

ROLL CALL - 6 AYES, 0 NAYES, 0 ABSENT

FLOOR ASSIGNMENT: SENATOR TRAYNOR

FISCAL NOTE

(Return original and 10 copies)

Bill/Resolution No.: SB 2178 Amendment to: \_\_\_\_\_

Requested by Legislative Council Date of Request: 1-4-99

- 1. Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, cities, and school districts.

Narrative:

This bill decreases the penalties for criminal violations of the air and water pollution control laws. It also standardizes the language that each penalty is per day of violation as required by EPA for delegation of the federal programs to the state. All of our penalties to date have been collected under the civil penalty authority.

Fiscal impact is less than \$5,000.

- 2. State fiscal effect in dollar amounts:

Table with 7 columns: 1997-99 Biennium (General Fund, Special Funds), 1999-2001 Biennium (General Fund, Special Funds), 2001-03 Biennium (General Fund, Special Funds). Rows: Revenues, Expenditures.

- 3. What, if any, is the effect of this measure on the appropriation for your agency or department:

- a. For rest of 1997-99 biennium: None
b. For the 1999-2001 biennium: < \$5,000
c. For the 2001-03 biennium: < \$5,000

- 4. County, City, and School District fiscal effect in dollar amounts:

Table with 9 columns: 1997-99 Biennium (Counties, Cities, School Districts), 1999-2001 Biennium (Counties, Cities, School Districts), 2001-03 Biennium (Counties, Cities, School Districts).

If additional space is needed, attach a supplemental sheet.

Signed [Signature]

Typed Name Robert A. Barnett

Department ND Department of Health

Phone Number 328-2392

Date Prepared: 1-7-99

Date 1-15-99

Roll call vote # 1

Please type or use black pen to complete

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2178

Senate Natural Resources Committee

Subcommittee on \_\_\_\_\_ (Identify or

Conference Committee \_\_\_\_\_ (check where appropriate)

Legislative Council Amendment Number \_\_\_\_\_

Action Taken DO PASS

Motion Made By Freborg

Seconded By Heitkamp

Senators	Yes	No	Senators	Yes	No
SENATOR TRAYNOR, CHR	✓				
SENATOR FISCHER, VCHR	✓				
SENATOR CHRISTMANN	✓				
SENATOR FREBORG	✓				
SENATOR HEITKAMP	✓				
SENATOR REDLIN	✓				
_____					
_____					
_____					
_____					

Total 6 0  
(Yes) (No)

Absent 0

Floor Assignment Senator Traynor

If the vote is on an amendment, briefly indicate intent:

DO NOT USE HIGHLIGHTER ON ANY FORMS

**REPORT OF STANDING COMMITTEE (410)**  
January 15, 1999 1:20 p.m.

**Module No: SR-09-0705**  
**Carrier: Traynor**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2178: Natural Resources Committee (Sen. Traynor, Chairman)** recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2178 was placed on the Eleventh order on the calendar.

**1999 HOUSE NATURAL RESOURCES**

**SB 2178**

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2178

House Natural Resources Committee

Conference Committee

Hearing Date 2/26/99

Tape Number	Side A	Side B	Meter #
1	x		8.0-30.2
Committee Clerk Signature <i>Robin D. Small</i>			

Minutes:

FRANCIS SCHWINDT, CHIEF OF THE ENVIRONMENTAL HEALTH SECTION/ ND DEPT. OF HEALTH. SEE HANDOUT. SCHWINDT states that LYLE WITHUM, with the ATTN. GEN. OFFICE is present to answer any questions.

REP. PORTER asks about section 1, # 2, criminal negligence. Is that a definition or a penalty.

SCHWINDT replies that it is criminal activity that is accessed through the court. REP. PORTER asks if it is criminal then that person could be assessed a \$ 10,000.00 penalty. SCHWINDT replies that he would let WITHUM reply. WITHUM replies that there could be a civil and a criminal case. WITHUM knows of two cases that have been to court.

REP. NOTTESTAD asks about the state having practice. WITHUM replies that in all cases that the state have had practice that they are satisfied how they are being handled. SCHWINDT responds into it further.

REP. NELSON asks about exceeding the minimum federal penalties, and about stiffer regulations. SCHWINDT replies that there are lists of minimums of responsibilities of the program. Enforcement's, types, how many, severity, willful violations and then to determine how the court is imposing the penalties. REP. NELSON asks if our maximums are higher.

SCHWINDT replies that we are higher on the repeat violators.

REP. LUNDGREN asks why are we lowering the existing state law for our maximum.

SCHWINDT replies that the department made the decision. REP. LUNDGREN asks if we are making our maximum their minimum. SCHWINDT replies not necessarily. REP. LUNDGREN asks about the state law stating not more than. SCHWINDT replies that yes it does. WITHUM addresses the committee to look at the first page, a maximum of \$10, 000.

REP. SOLBERG asks who is the body that determines the violation. SCHWINDT replies that it is the Dept. of Health that determines it.

Being there was no opposition to the bill REP. GROSZ asked the committee their wishes.

REP. DEKREY motions for a DO PASS, seconded by REP. DROVDAL. The roll call was taken with 13 YES, 0 NO, 2 ABSENT. The bill passes. The CARRIER of the bill on the floor will be REP. LUNDGREN.

Date: 2.26.99  
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO.

House House Natural Resources Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken 2178 Do Pass

Motion Made By DeKrey Seconded By Drovdal

Representatives	Yes	No	Representatives	Yes	No
Chairman Mick Grosz	✓				
Vice-Chairman Dale Henegar					
Representative David Drovdal	✓				
Representative Pat Galvin	✓				
Representative Duane DeKrey	✓				
Rep. Darrell D. Nottestad	✓				
Representative Jon O. Nelson	✓				
Representative Byron Clark	✓				
Representative Todd Porter	✓				
Representative Jon Martinson	✓				
Representative Lyle Hanson	✓				
Representative Scot Kelsh					
Representative Deb Lundgren	✓				
Representative Sally M. Sandvig	✓				
Representative Dorvan Solberg	✓				

Total (Yes) 13 No 0

Absent 2

Floor Assignment Lundgren

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
**February 26, 1999 11:59 a.m.**

**Module No: HR-35-3656**  
**Carrier: Lundgren**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2178: Natural Resources Committee (Rep. Grosz, Chairman) recommends DO PASS**  
**(13 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2178 was placed on the**  
**Fourteenth order on the calendar.**

**1999 TESTIMONY**

**SB 2178**

**TESTIMONY IN SUPPORT OF SENATE BILL NO. 2178  
BY  
FRANCIS SCHWINDT  
CHIEF OF THE ENVIRONMENTAL HEALTH SECTION  
NORTH DAKOTA DEPARTMENT OF HEALTH  
701.328.5150**

The North Dakota Department of Health requested Senate Bill No. 2178 to update penalty provisions under North Dakota's air pollution (N.D.C.C. ch. 23-25) and water pollution (N.D.C.C. ch. 61-28) laws. These updates are necessary to satisfy federal requirements for state assumption and retention of delegated federal programs under the Federal Clean Air Act and Water Pollution Control Act. The proposed amendments relate only to the penalty sections of North Dakota's air and water pollution laws. I will give you a very brief history of these laws, and then give you a brief summary of the reasons for the proposed changes and why they are necessary.

The Federal Clean Air Act is the principal source of statutory authority for controlling air pollution. North Dakota's air pollution statutes, rules, and standards follow the federal statutes and regulations. Originally enacted in 1963, the Clean Air Act was amended in 1970, 1977 and 1990. The 1970 amendments established the basic program for controlling air pollution that remains in effect today.

North Dakota's Air Pollution Control Act (N.D.C.C. ch. 23-25) was originally enacted in 1969, with major changes being made to that law in 1975 to allow the state to take primacy of federal programs delegated to the states under the 1970 amendments to the Clean Air Act. Primacy simply means that the state takes authority and responsibility for programs under the Clean Air Act, and is given federal funding to run those programs, provided the state adopts, through statutes and rules, the requirements for implementing and enforcing the program. Attached to my testimony is a list of the air programs that the Department of Health has primacy for under the Clean Air Act.

The penalty provisions of North Dakota's air pollution law, N.D.C.C. § 23-25-10, were last amended in 1975. The Environmental Protection Agency (EPA) has asked the Department to make changes to this law in order for the Department to take primacy for the Title V operating permit program, the program that came into existence under the 1990 Amendments to the Clean Air Act. These changes will also allow the Department to retain primacy under its other air pollution programs as those programs periodically come up for review under the Clean Air Act. Section 23-25-10 is patterned

after the penalty provisions in the Clean Air Act at 42 USCA § 7413, a copy of which is attached to this testimony.

The Federal Water Pollution Control Act was first enacted in 1956 and in 1965 was strengthened to require states to adopt water quality standards for interstate waters. In 1972 additional major changes to this Act were enacted by Congress, which is now generally called the Clean Water Act. North Dakota first adopted its Water Pollution Control Act in 1967 as chapter 61-28 of the North Dakota Century Code. The last changes to the penalty provisions of North Dakota's Water Pollution Control Act, N.D.C.C. § 61-28-08 were made in 1973. There have been many significant changes to the Clean Water Act since then. The EPA has requested the Department to make several changes to the penalty provision of North Dakota's water pollution law, N.D.C.C. § 61-28-08, in order for the Department to take primacy under § 307 of the Clean Water Act for the National Pretreatment Program. These changes will also allow the Department to retain primacy of the other programs the Department has under the Clean Water Act as they periodically come up for review. N.D.C.C. § 61-28-08 is patterned after the penalty provisions of the Clean Water Act at 33 USCA § 1319, a copy of which is attached to this testimony.

Let me briefly go over the specific proposed changes with you. Section 1 of the bill addresses the revisions to the air pollution law and section 2 of the bill addresses the revisions to the water pollution law.

In section 1 of the bill, the following revisions were made:

Existing subsection 1 has been deleted as it is outdated. The administrative hearing process is spelled out in N.D.C.C. ch. 28-32 and the Department handles any legal action through an assistant attorney general assigned to the Department. The present language also makes it difficult to use the injunctive relief remedy.

Existing subsection 2 has been rewritten to make it clear the penalty for willful violations applies to rules, orders or other applicable requirements as well as the chapter, any permit condition or limitation and that the fine is per day per violation. The phrase, "in the county jail" has been eliminated as the place of imprisonment to give more flexibility to the courts. The penalty amount for the initial violation has been reduced from \$25,000 to \$10,000, the minimum required by federal law. Existing subsection 2 is now subsection 1.

A new subsection 2 has been added to provide a penalty for violations with criminal negligence as requested by EPA.

Existing subsection 3 has been revised to add "any permit condition, rule, order,

limitation, or other applicable requirement implementing this chapter” to be complete. The words “per day per violation” were added to satisfy EPA requirements. “In the county jail” was also deleted in this subsection.

Existing subsection 4 was revised to allow the Department to fine persons for each violation that occurs on separate days, and to add “rule, order, . . . or other applicable requirement” as required by EPA.

A new subsection 5 was added to provide clear provisions for injunctive relief for actual or threatened violations of any permit condition, rule, order, limitation or other applicable requirement implementing this chapter. The EPA has asked the Department to make clear in its laws that the Department can enjoin threatened violations of the law and to clarify our injunctive authority.

The revisions to the penalty section of the state water pollution law, N.D.C.C. § 61-28-08, are the same as for the state air pollution law, except the water pollution law did not contain the outdated subsection 1 that is in the air pollution law, and subsection 5 was amended to provide clear provisions for injunctive relief as requested by EPA.

Finally, because of the “per day per violation” clarification, which will allow the Department to assess the required penalty for each violation that occurs on each day, the Department has dropped the penalty provisions down to the minimum cash penalties allowed for delegation of primacy under the law for first violations. The proposed changes retain North Dakota’s more severe penalties for subsequent criminal violations, although as you will see by comparing those with the federal criminal statutes attached to this testimony, the state criminal penalties are still significantly less than the federal criminal penalties. All of our enforcement activities to date have been civil penalties but we believe the criminal penalties must be strong to deter willful crimes and violations.

In conclusion, the Department requests that Senate Bill No. 2178 be passed to allow the Department to receive final approval and delegation of the Title V Operating Permit Program and the National Pretreatment Program and protect previous delegations.

This concludes the Department’s testimony in support of Senate Bill No. 2178 and I will be happy to answer any questions you may have. Assistant Attorney General Lyle Witham, the Department’s attorney, is here to answer any specific questions you may have concerning these changes.

Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18. Any authorized representative of the Administrator (including an authorized contractor acting as a representative of the Administrator) who knowingly or willfully publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information which is required to be considered confidential under this subsection shall be fined not more than \$1,000 or imprisoned not more than 1 year, or both. Nothing in this subsection shall prohibit the Administrator or an authorized representative of the Administrator (including any authorized contractor acting as a representative of the Administrator) from disclosing records, reports, or information to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

**(c) Application of State law**

Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources located in such State. If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (except with respect to point sources owned or operated by the United States).

**(d) Access by Congress**

Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the Administrator (or any representative of the Administrator) under this chapter shall be made available, upon written request of any duly authorized committee of Congress, to such committee.

(June 30, 1948, c. 758, Title III, § 308, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 858, and amended Dec. 27, 1977, Pub.L. 95-217, § 67(c)(1), 91 Stat. 1606; Feb. 4, 1987, Pub.L. 100-4, Title III, § 310, Title IV, § 406(d)(1), 101 Stat. 41, 73.)

**HISTORICAL AND STATUTORY NOTES**

**Legislative History**

For legislative history and purpose of Pub.L. 92-500, see 1972 U.S.Code Cong. and Adm.News. p. 3668. See, also, Pub.L. 95-217, 1977 U.S.Code Cong. and Adm.News. p. 4326.

For legislative history and purpose of Pub.L. 100-4, see 1987 U.S.Code Cong. and Adm.News. p. 5.

**§ 1319. Enforcement**

[FWPCA § 309]

**(a) State enforcement; compliance orders**

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with

such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur

with such order. Such order shall include a schedule of compliance.

**(b) Civil actions**

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

**(c) Criminal penalties**

**(1) Negligent violations**

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State; shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

**(2) Knowing violations**

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section

1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

### (3) Knowing endangerment

#### (A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than \$1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

#### (B) Additional provisions

For the purpose of subparagraph (A) of this paragraph—

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defen-

dant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

#### (4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

#### (5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

**(6) Responsible corporate officer as "person"**

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

**(7) Hazardous substance defined**

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of Title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

**(d) Civil penalties; factors considered in determining amount**

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

**(e) State liability for judgments and expenses**

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality

from raising revenues needed to comply with such judgment.

**(f) Wrongful introduction of pollutants into treatment works**

Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.

**(g) Administrative penalties**

**(1) Violations**

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary, the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

**(2) Classes of penalties**

**(A) Class I**

The amount of a class I civil penalty under paragraph (1) may not exceed \$10,000 per viola-

tion, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed \$25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

**(B) Class II**

The amount of a class II civil penalty under paragraph (1) may not exceed \$10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed \$125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

**(3) Determining amount**

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

**(4) Rights of interested persons**

**(A) Public notice**

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

**(B) Presentation of evidence**

Any person who comments on a proposed assessment of a penalty under this subsection shall

be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

**(C) Rights of interested persons to a hearing**

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

**(5) Finality of order**

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

**(6) Effect of order**

**(A) Limitation on actions under other sections**

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

**(B) Applicability of limitation with respect to citizen suits**

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which—

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

**(7) Effect of action on compliance**

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

**(8) Judicial review**

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the

Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

**(9) Collection**

If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be,

the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

**(10) Subpoenas**

The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

**(11) Protection of existing procedures**

Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

(June 30, 1948, c. 758, Title III, § 309, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 859, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 54(b), 55, 56, 67(c)(2), 91 Stat. 1591, 1592, 1606; Feb. 4, 1987, Pub.L. 100-4, Title III, §§ 312, 313(a)(1), (b)(1), (c), 314(a), 101 Stat. 42, 45, 46; Aug. 18, 1990, Pub.L. 101-380, Title IV, § 4301(c), 104 Stat. 537.)

6472; Pub.L. 103-322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

### § 3566. Implementation of a sentence of probation

The implementation of a sentence of probation is governed by the provisions of subchapter A of chapter 229.

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1995.)

#### HISTORICAL AND STATUTORY NOTES

##### Effective Date

Section effective on the first day of first calendar month beginning thirty-six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

##### Legislative History

For legislative history and purpose of Pub.L. 98-473, see 1984 U.S. Code Cong. and Adm. News, p. 3182.

#### SUBCHAPTER C—FINES

##### Sec.

3571. Sentence of fine.  
 3572. Imposition of a sentence of fine and related matters.  
 3573. Petition of the Government for modification or remission.  
 3574. Implementation of a sentence of fine.

### § 3571. Sentence of fine

(a) **In general.**—A defendant who has been found guilty of an offense may be sentenced to pay a fine.

(b) **Fines for individuals.**—Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of—

- (1) the amount specified in the law setting forth the offense;
- (2) the applicable amount under subsection (d) of this section;
- (3) for a felony, not more than \$250,000;
- (4) for a misdemeanor resulting in death, not more than \$250,000;
- (5) for a Class A misdemeanor that does not result in death, not more than \$100,000;
- (6) for a Class B or C misdemeanor that does not result in death, not more than \$5,000; or
- (7) for an infraction, not more than \$5,000.

(c) **Fines for organizations.**—Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of—

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (d) of this section;

(3) for a felony, not more than \$500,000;

(4) for a misdemeanor resulting in death, not more than \$500,000;

(5) for a Class A misdemeanor that does not result in death, not more than \$200,000;

(6) for a Class B or C misdemeanor that does not result in death, not more than \$10,000; and

(7) for an infraction, not more than \$10,000.

(d) **Alternative fine based on gain or loss.**—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

(e) **Special rule for lower fine specified in substantive provision.**—If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense. (Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1995, and amended Pub.L. 100-185, § 6, Dec. 13, 1987, 101 Stat. 1280.)

#### HISTORICAL AND STATUTORY NOTES

##### Effective Date

Section effective on the first day of first calendar month beginning thirty-six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

##### Legislative History

For legislative history and purpose of Pub.L. 98-473, see 1984 U.S. Code Cong. and Adm. News, p. 3182.

For legislative history and purpose of Pub.L. 100-185, see 1987 U.S. Code Cong. and Adm. News, p. 2187.

### § 3572. Imposition of a sentence of fine and related matters

(a) **Factors to be considered.**—In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)—

- (1) the defendant's income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense;

(6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;

(7) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

(b) **Fine not to impair ability to make restitution.**—If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, other than the United States, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.

(c) **Effect of finality of judgment.**—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

(1) modified or remitted under section 3573;

(2) corrected under rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified under section 3742;

a judgment that includes such a sentence is a final judgment for all other purposes.

(d) **Time, method of payment, and related items.**—(1) A person sentenced to pay a fine or other monetary penalty, including restitution, shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments. If the court provides for payment in installments, the installments shall be in equal monthly payments over the period provided by the court, unless the court establishes another schedule.

(2) If the judgment, or, in the case of a restitution order, the order, permits other than immediate pay-

ment, the length of time over which scheduled payments will be made shall be set by the court, but shall be the shortest time in which full payment can reasonably be made.

(3) A judgment for a fine which permits payments in installments shall include a requirement that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay the fine. Upon receipt of such notice the court may, on its own motion or the motion of any party, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(e) **Alternative sentence precluded.**—At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be carried out if the fine is not paid.

(f) **Responsibility for payment of monetary obligation relating to organization.**—If a sentence includes a fine, special assessment, restitution, or other monetary obligation (including interest) with respect to an organization, each individual authorized to make disbursements for the organization has a duty to pay the obligation from assets of the organization. If such an obligation is imposed on a director, officer, shareholder, employee, or agent of an organization, payments may not be made, directly or indirectly, from assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

(g) **Security for stayed fine.**—If a sentence imposing a fine is stayed, the court shall, absent exceptional circumstances (as determined by the court)—

(1) require the defendant to deposit, in the registry of the district court, any amount of the fine that is due;

(2) require the defendant to provide a bond or other security to ensure payment of the fine; or

(3) restrain the defendant from transferring or dissipating assets.

(h) **Delinquency.**—A fine or payment of restitution is delinquent if a payment is more than 30 days late.

(i) **Default.**—A fine or payment of restitution is in default if a payment is delinquent for more than 90 days. Notwithstanding any installment schedule, when a fine or payment of restitution is in default, the entire amount of the fine or restitution is due within 30 days after notification of the default, subject to the provisions of section 3613A.

[ (j) **Redesignated (i)** ]

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1995, and amended Pub.L. 100-185, § 7, Dec. 11, 1987, 101 Stat. 1280; Pub.L. 101-647, Title XXXV, § 3587, Nov. 29, 1990, 104 Stat. 4930; Pub.L. 103-322, Title II, § 20403(a), Sept. 13, 1994, 108 Stat. 1825; Pub.L. 104-132, Title II, § 207(b), Apr. 24, 1996, 110 Stat. 1236.)

ministrative recommendations, shall be made available to the public for comment not later than 42 months after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990] and shall be submitted to the President and to the Congress not later than 48 months after such date of enactment. In the report, the Commission shall make recommendations with respect to the appropriate use of risk assessment and risk management in Federal regulatory programs to prevent cancer or other chronic health effects which may result from exposure to hazardous substances. The Commission shall cease to exist upon the date determined by the Commission, but not later than 9 months after the submission of such report.

"(g) Authorization.—There are authorized to be appropriated such sums as are necessary to carry out the activities of the Commission established by this section."

§ 7413. Federal enforcement

[CAA § 113]

(a) In general

(1) Order to comply with SIP

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may, without regard to the period of violation (subject to section 2462 of Title 28)—

(A) issue an order requiring such person to comply with the requirements or prohibitions of such plan or permit,

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action in accordance with subsection (b) of this section.

(2) State failure to enforce SIP or permit program

Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator shall so notify the State. In the case of a permit program, the notice shall be made in accordance with subchapter V of this chapter. If the Administrator finds such failure extends beyond the 30th day after such notice (90 days in the case of such permit program), the Administrator shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce

such plan or permit program (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by—

(A) issuing an order requiring such person to comply with such requirement or prohibition,

(B) issuing an administrative penalty order in accordance with subsection (d) of this section, or

(C) bringing a civil action in accordance with subsection (b) of this section.

(3) EPA enforcement of other requirements

Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under those provisions or subchapters, or for the payment of any fee owed to the United States under this chapter (other than subchapter II of this chapter), the Administrator may—

(A) issue an administrative penalty order in accordance with subsection (d) of this section.

(B) issue an order requiring such person to comply with such requirement or prohibition.

(C) bring a civil action in accordance with subsection (b) of this section or section 7605 of this title, or

(D) request the Attorney General to commence a criminal action in accordance with subsection (c) of this section.

(4) Requirements for orders

An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation and specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers. An order issued under this subsection

shall require the person to whom it was issued to comply with the requirement as expeditiously as practicable, but in no event longer than one year after the date the order was issued, and shall be nonrenewable. No order issued under this subsection shall prevent the State or the Administrator from assessing any penalties nor otherwise affect or limit the State's or the United States authority to enforce under other provisions of this chapter, nor affect any person's obligations to comply with any section of this chapter or with a term or condition of any permit or applicable implementation plan promulgated or approved under this chapter.

**(5) Failure to comply with new source requirements**

Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may—

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;<sup>1</sup>

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action under subsection (b) of this section.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

**(b) Civil judicial enforcement**

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than \$25,000 per day for each violation, or both, in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. Such an action shall be commenced (A) during any period of federally assumed enforcement, or (B) more than 30 days following the date of the Administrator's notification under subsection (a)(1) of this section that such person has violated, or is in violation of, such requirement or prohibition.

(2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this chap-

ter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter).

(3) Whenever such person attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant's principal place of business is located, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States under this chapter (other than subchapter II of this chapter) and any noncompliance assessment and non-payment penalty owed under section 7420 of this title, and to award any other appropriate relief. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable.

**(c) Criminal penalties**

(1) Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) of this section by the Administrator that such person is violating such requirement or prohibition), any order under subsection (a) of this section, requirement or prohibition of section 7411(e) of this title (relating to new source performance standards), section 7412 of this title, section 7414 of this title (relating to inspections, etc.), section 7429 of this title (relating to solid waste combustion), section 7475(a) of this title (relating to preconstruction requirements), an order under section 7477 of this title (relating to preconstruction requirements), an order under section 7603 of this title (relating to emergency orders), section 7661a(a) or 7661b(c) of this title (relating to permits), or any requirement or prohibition of subchapter IV-A of this chapter (relating to acid deposition control), or subchapter VI of this chapter (relating to stratospheric ozone control), including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or subchapters, and including any requirement for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter) shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not to exceed 5 years, or both. If a conviction of any person under

this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(2) Any person who knowingly—

(A) makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this chapter to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State);

(B) fails to notify or report as required under this chapter; or

(C) falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this chapter<sup>2</sup>

shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more than 2 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(3) Any person who knowingly fails to pay any fee owed the United States under this subchapter, subchapter III, IV-A, V, or VI of this chapter shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(4) Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(5)(A) Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who knows at the time that he thereby places another person in imminent danger of

death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than \$1,000,000 for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

(B) In determining whether a defendant who is an individual knew that the violation placed another person in imminent danger of death or serious bodily injury—

(i) the defendant is responsible only for actual awareness or actual belief possessed; and

(ii) knowledge possessed by a person other than the defendant, but not by the defendant, may not be attributed to the defendant;

except that in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information.

(C) It is an affirmative defense to a prosecution that the conduct charged was freely consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(i) an occupation, a business, or a profession; or

(ii) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subparagraph by a preponderance of the evidence.

(D) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subparagraph (A) of this paragraph and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(E) The term "organization" means a legal entity, other than a government, established or organized for

## PRETREATMENT PENALTIES

Sheyenne Tooling and Manufacturing Co., Cooperstown, ND

EPA calculated penalty	\$436,000
Collected	\$ 60,150

R.O. Banks Tool & Manufacturing Co., Wahpeton, ND

EPA Calculated Penalty	\$105,000
Collected	\$ 28,000

Rugby Manufacturing, Rugby, ND

EPA Collected	\$ 40,000
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Newman Signs, Jamestown, ND

EPA Calculated Penalty	\$ 25,000
Collected Environmental Bill Board Program	

Lucus Western, Jamestown, ND

EPA Calculated Penalty	\$2 million
Collected	\$243,000

Melroe Ingersoll-Rand - Information not available  
In excess of \$200,000

Proposed Actions:

- City of Gwinner
- City of Mandan
- City of Jamestown
- City of West Fargo/Federal Beef
- Dakota Catalyst, Williston, ND
- William Lang Jewel Bearing Plant, Rolla, ND

**TESTIMONY IN SUPPORT OF SENATE BILL NO. 2178  
BY  
FRANCIS SCHWINDT  
CHIEF OF THE ENVIRONMENTAL HEALTH SECTION  
NORTH DAKOTA DEPARTMENT OF HEALTH  
701.328.5150**

The North Dakota Department of Health requested Senate Bill 2178 to update penalty provisions under North Dakota's air pollution (N.D.C.C. ch. 23-25) and water pollution (N.D.C.C. ch. 61-28) laws. These updates are necessary to satisfy federal requirements for state assumption and retention of delegated federal programs under the Federal Clean Air Act and Water Pollution Control Act. The proposed amendments relate only to the penalty sections of North Dakota's air and water pollution laws. I will give you a very brief history of these laws, and then give you a brief summary of the reasons for the proposed changes and why they are necessary.

The Federal Clean Air Act is the principal source of statutory authority for controlling air pollution. North Dakota's air pollution statutes, rules, and standards follow the federal statutes and regulations. Originally enacted in 1963, the Clean Air Act was amended in 1970, 1977 and 1990. The 1970 amendments established the basic program for controlling air pollution that remains in effect today.

North Dakota's Air Pollution Control Act was originally enacted in 1969, with major changes being made to that law in 1975 to allow the state to take primacy of federal programs delegated to the states under the 1970 amendments to the Clean Air Act. Primacy simply means that the state takes authority and responsibility for programs under the Clean Air Act, and is given federal funding to run those programs, provided the state adopts, through statutes and rules, the requirements for implementing and enforcing the program. Attached to my testimony is a list of the air programs that the Department of Health has primacy for under the Clean Air Act.

The penalty provisions of North Dakota's air pollution law were last amended in 1975. The Environmental Protection Agency (EPA) has asked the Department to make changes to this law in order for the Department to take primacy for the Title V operating permit program. This is the new air permitting program that was established under the

1990 Amendments to the Clean Air Act for large air pollution sources such as power plants, oil refineries, etc. These changes will also allow the Department to retain primacy under its other air pollution programs as those programs periodically come up for review under the Clean Air Act. Section 23-25-10 is patterned after the penalty provisions in the Clean Air Act at 42 USCA § 7413, a copy of which is attached to this testimony.

The Federal Water Pollution Control Act was first enacted in 1956 and in 1965 was strengthened to require states to adopt water quality standards for interstate waters. In 1972 additional major changes to this Act were enacted by Congress, which is now generally called the Clean Water Act. North Dakota first adopted its Water Pollution Control Act in 1967 as chapter 61-28 of the North Dakota Century Code. The last changes to the penalty provisions of North Dakota's Water Pollution Control Act were made in 1973. There have been many significant changes to the Federal Clean Water Act since then. The EPA has requested the Department to make several changes to the penalty provision of North Dakota's water pollution law, N.D.C.C. § 61-28-08, in order for the Department to take primacy under § 307 of the Clean Water Act for the National Pretreatment Program. This program regulates industries that discharge their wastewater to municipal treatment systems for further treatment. These changes will also allow the Department to retain primacy of the other programs the Department has under the Clean Water Act as they periodically come up for review. N.D.C.C. § 61-28-08 is patterned after the penalty provisions of the Clean Water Act at 33 USCA § 1319, a copy of which is attached to this testimony.

Let me briefly go over the specific proposed changes with you. Section 1 of the bill addresses the revisions to the air pollution law and section 2 of the bill addresses the revisions to the water pollution law.

In section 1 of the bill, the following revisions were made:

Existing subsection 1 has been deleted as it is outdated. The administrative hearing process is spelled out in N.D.C.C. ch. 28-32 and the Department handles any legal action through an assistant attorney general assigned to the Department. The present language also makes it difficult to use the injunctive relief remedy.

Existing subsection 2 has been rewritten to make it clear the penalty for a willful

violation applies to rules, orders or other applicable requirements as well as the chapter, any permit condition or limitation and that the fine is per day per violation. The phrase, "in the county jail" has been eliminated as the place of imprisonment to give more flexibility to the courts. The maximum penalty amount for the initial violation has been reduced from \$25,000 to \$10,000, the minimum required by federal law. Existing subsection 2 is now subsection 1.

At EPA's request, a new subsection 2 has been added to provide a penalty for violations that involve criminal negligence. Criminal negligence does not include ordinary negligence of the type covered in most civil lawsuits. Rather, criminal negligence requires a gross deviation from acceptable standards of conduct under conditions where there are substantial risks to other persons or property. The definition of criminal negligence from North Dakota law is incorporated into this bill. That law (N.D.C.C. § 12.1-02-02(1)(d)) defines criminal negligence as follows:

1. For the purposes of this title, a person engages in conduct:
  - d. "Negligently" if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct.

Existing subsection 3 has been revised to add "any permit condition, rule, order, limitation, or other applicable requirement implementing this chapter" to be complete. The words "per day per violation" were added to satisfy EPA requirements. "In the county jail" was also deleted in this subsection.

Existing subsection 4 was revised to allow the Department to fine persons for each violation that occurs on separate days, and to add "rule, order, . . . or other applicable requirement" as required by EPA.

A new subsection 5 was added to provide clear provisions for injunctive relief for actual or threatened violations of any permit condition, rule, order, limitation or other applicable requirement implementing this chapter. The EPA has asked the Department to make clear in its laws that the Department can enjoin threatened violations of the law and to clarify our injunctive authority.

The revisions to the penalty section of the state water pollution law, N.D.C.C. § 61-28-08, are the same as for the state air pollution law, except the water pollution law did not contain the outdated subsection 1 that is in the air pollution law, and subsection 5 was amended to provide clear provisions for injunctive relief as requested by EPA.

Finally, because of the "per day per violation" clarification, which will allow the Department to assess the required penalty for each violation that occurs on each day, the Department has dropped the penalty provisions down to the minimum cash penalties allowed for delegation of primacy under the law for first violations. The proposed changes retain North Dakota's more severe penalties for subsequent criminal violations, although as you will see by comparing those with the federal criminal statutes attached to this testimony, the state criminal penalties are still significantly less than the federal criminal penalties. All of our enforcement activities to date have been civil penalties but we believe the criminal penalties must be strong to deter willful crimes and violations.

In conclusion, the Department requests that Senate Bill No. 2178 be passed to allow the Department to receive final approval and delegation of the Title V Operating Permit Program and the National Pretreatment Program and protect previous delegations.

This concludes the Department's testimony in support of Senate Bill No. 2178 and I will be happy to answer any questions you may have. Assistant Attorney General Lyle Witham, the Department's attorney, is here to answer any specific questions you may have concerning these changes.

### **AIR POLLUTION PROGRAMS DELEGATED BY EPA**

- New Source Review/Prevention of Significant Deterioration of Air Quality
- New Source Performance Standards (NSPS)
- National Emission Standards for Hazardous Air Pollutants (NESHAP)
- (MACT) National Emission Standards for Hazardous Air Pollutants for Source Categories
- Title V Operating Permit Program
- Visibility Protection Program
- Stack Height Program
- Acid Rain

### **WATER QUALITY PROGRAMS DELEGATED BY EPA**

- (NPDES) National Pollutant Discharge Elimination System
- (UIC) Underground Injection Control

**COMPARISON OF PENALTY PROVISIONS  
STATE VERSUS FEDERAL  
Air Pollution Control NDCC 23-25-10  
Section 1. of SB 2178**

Provision	Existing State Law	Proposed State Law	Federal Law	Minimum Federal Monetary Penalty Requirement for State Law
Civil Penalty Section 1. Subsection 4.	Not to exceed <u>\$10,000</u> per day of such violation.	Not to exceed <u>\$10,000</u> per day per violation.	Not more than <u>\$25,000</u> per day for each violation.	Maximum amount not less than <u>\$10,000</u> per day per violation.
Criminal Penalty (willful) Section 1. Subsection 1.	Not more than <u>\$25,000</u> per day of violation, first violation.  Not more than <u>\$50,000</u> per day of violation, second violation.  Imprisonment in the county jail for not more than <u>one</u> year, first violation; <u>two</u> years, second violation.	Not more than <u>\$10,000</u> per day per violation, first violation.  Not more than <u>\$20,000</u> per day per violation, second violation.  Imprisonment for not more than <u>one</u> year, first violation; <u>two</u> years, second violation.	Not more than <u>\$50,000</u> per day per violation, first violation.  Not more than <u>\$500,000</u> per day per violation, second violation.  Imprisonment for not more than <u>five</u> years.	Maximum amount not less than <u>\$10,000</u> per day per violation.
False Statements (knowingly) Section 1. Subsection 3.	Not more than <u>\$10,000</u> .  Imprisonment in the county jail for not more than <u>six</u> months.	Not more than <u>\$10,000</u> per day per violation.  Imprisonment for not more than <u>six</u> months.	Not more than <u>\$250,000</u> per day per violation.  Imprisonment for not more than <u>two</u> years.	Maximum amount not less than <u>\$10,000</u> per day per violation.

Provision	Existing State Law	Proposed State Law	Federal Law	Minimum Federal Monetary Penalty Requirement for State Law
<p>Injunctions Section 1. Subsection <u>5</u>.</p>	<p>If after the completion of the administrative hearing process, the department determines that a violation of this chapter, or any rule, regulations, or order of the department issued under this chapter, has occurred, it shall make all of its evidence and findings available to the attorney general for use in any remedial action his office determines to be appropriate, including an action for injunctive relief.</p> <p>Nothing in this chapter shall be construed to deny use of the remedy of injunctive relief where it is deemed appropriate.</p>	<p>Without prior revocation of any pertinent permits, the department, in accordance with the laws of this state governing injunction or other process, may maintain an action in the name of the state against any person to enjoin any threatened or continuing violation of any provision of this chapter or any permit condition, rule, order, limitation, or other applicable requirement implementing this chapter.</p>	<p>Notwithstanding any other provisions of this Act, the Administrator upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare or the environment, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment.</p>	<p>To restrain or enjoin immediately and effectively any person by order or by suit in court from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment to the public health or welfare, or the environment.</p> <p>To seek injunctive relief in court to enjoin any violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit.</p>

**COMPARISON OF PENALTY PROVISIONS  
STATE VERSUS FEDERAL**

Water Pollution Control NDCC 61-28-08  
Section 2. of SB 2178

Provision	Existing State Law	Proposed State Law	Federal Law	Minimum Federal Monetary Penalty Requirement for State Law
Civil Penalty Section 2. Subsection 4.	Not to exceed <u>\$10,000</u> per day of such violation.	Not to exceed <u>\$5,000</u> per day per violation.	Not more than <u>\$25,000</u> per day for each violation.	In at least the amount of <u>\$5,000</u> per day for each violation.
Criminal Penalty (willful) Section 2. Subsection 1.	Not more than <u>\$25,000</u> per day of violation, first violation.  Not more than <u>\$50,000</u> per day of violation, second violation.  Imprisonment in the county jail for not more than <u>one</u> year, first violation; <u>two</u> years, second violation.	Not more than <u>\$10,000</u> per day per violation, first violation.  Not more than <u>\$20,000</u> per day per violation, second violation.  Imprisonment for not more than <u>one</u> year, first violation; <u>two</u> years second violation.	Not less than <u>\$5,000</u> nor more than <u>\$50,000</u> per day for each violation.  Imprisonment for not more than <u>three</u> years.	In at least the amount of <u>\$10,000</u> a day for each violation.
False Statements (knowingly) Section 2. Subsection 3.	Not more than <u>\$10,000</u> .  Imprisonment in the county jail for not more than <u>six</u> months.	Not more than <u>\$5,000</u> per day per violation.  Imprisonment for not more than <u>six</u> months.	Not less than <u>\$5,000</u> nor more than <u>\$50,000</u> per day for each violation.  Imprisonment for not more than <u>three</u> years.	In at least the amount of <u>\$5,000</u> for each instance of violation.

Provision	Existing State Law	Proposed State Law	Federal Law	Minimum Federal Monetary Penalty Requirement for State Law
<p>Injunctions Section 2 Subsection 5.</p>	<p>The department may, in accordance with the laws of this state governing injunctions or other process, maintain an action in the name of the state against any person violating any provision of this chapter, or any rule, regulation or order issued thereunder.</p>	<p>Without prior revocation of any pertinent permits, the department may, in accordance with the laws of this state governing injunction or other process, maintain an action in the name of the state against any person to enjoin any threatened or continuing violation of any provision of this chapter or any permit condition, rule, order, limitation, or other applicable requirement implementing this chapter.</p>	<p>Whenever on the basis of any information available to him the Administrator finds that any person is in violation of . . . . of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.</p> <p>The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance.</p>	<p>To restrain immediately and effectively any person by order or by suit in state court from engaging in any activity which is endangering or causing damage to public health or the environment.</p> <p>To sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit.</p>