U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

EPA Needs to Update Its Pesticide and Chemical Enforcement Penalty Policies and Practices

Report No. 13-P-0431 **September 26, 2013**

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Abbreviations

EPA	U.S. Environmental Protection Agency
ERP	Enforcement Response Policy
ERPP	Enforcement Response and Penalty Policy
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
FY	Fiscal Year
OECA	Office of Enforcement and Compliance Assurance
OIG	Office of Inspector General
PCB	Polychlorinated Biphenyls
TSCA	Toxic Substances Control Act

Cover photo: A farmer mixes herbicide prior to application; the farmer wears complete protection while using the chemicals. (U.S. Department of Agriculture's National Resources Conservation Service photo)

U.S. Environmental Protection Agency
Office of Inspector General

13-P-0431
September 26, 2013

At a Glance

Why We Did This Review

The purpose of this review was to evaluate how the U.S. Environmental Protection Agency's (EPA's) Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and Toxic Substances Control Act (TSCA) enforcement tools achieve intended outcomes; and whether penalty negotiations are managed to protect human health and the environment. This briefing report contains findings and recommendations related to FIFRA and TSCA good faith reductions and ability to pay penalties. FIFRA regulates the distribution, sale and use of pesticides. TSCA provides the EPA with authority to require reporting, recordkeeping and testing requirements, and restrictions to chemical substances and mixtures.

This report addresses the following EPA theme:

- *Taking action on toxics and chemical safety.*

For further information, contact our public affairs office at (202) 566-2391.

The full report is at:
www.epa.gov/oig/reports/2013/20130926-13-P-0431.pdf

EPA Needs to Update Its Pesticide and Chemical Enforcement Penalty Policies and Practices

What We Found

We found that EPA regions differed in how they documented decisions and justified penalties related to FIFRA and TSCA enforcement penalty reductions. EPA regions generally did not consistently determine and document reductions in proposed penalties based on good faith of the violators, and in some regions reductions appeared automatic without adequate justification. The lack of adequate guidance for determining good faith reductions and supporting documentation for good faith reductions creates a risk that violators may not be treated equitably. In addition, EPA may be losing opportunities to fully collect all penalties due.

We found that the EPA lacks a sufficient policy to address violators who are unable to pay FIFRA and TSCA penalties. The current "ability to pay" model and policy are limited to cases where an individual may not have the cash to pay a penalty. However, no guidance exists for applying non-monetary penalty alternatives such as public service for FIFRA and TSCA inability to pay cases when cash is not available to pay a penalty. Also, training for enforcement staff needs to be updated to include more guidance on ability to pay cases. Therefore EPA's enforcement actions for FIFRA and TSCA ability to pay cases may be limited by its outdated policy, model and training, which could impact the regions' consistent handling of the growing number of ability to pay claims being received from individuals.

Recommendations and Planned Corrective Actions

We recommend that the EPA provide adequate guidance for determining a good faith reduction, develop a systematic approach to ensure that justifications for good faith reductions are documented, revise the EPA's ability to pay penalty policy and evaluate the individual violator model, and provide regional staff with updated training for case development.

The Office of Enforcement and Compliance Assurance agreed with two of our five recommendations and provided alternative actions that meet the intent of the remaining recommendations. All recommendations are resolved and open with corrective actions underway. No further response to this report is required.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE INSPECTOR GENERAL

September 26, 2013

MEMORANDUM

SUBJECT: EPA Needs to Update Its Pesticide and Chemical Enforcement Penalty Policies and Practices
Report No. 13-P-0431

FROM: Arthur A. Elkins Jr.

TO: Cynthia Giles, Assistant Administrator
Office of Enforcement and Compliance Assurance

This is a report on the subject evaluation conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

Action Required

You are not required to provide a written response to this final report because you provided agreed-to corrective actions and planned completion dates for the report recommendations. The OIG may make periodic inquiries on your progress in implementing these corrective actions. Should you choose to provide a final response, we will post your response on the OIG's public website, along with our memorandum commenting on your response. You should provide your response as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended.

We will post this report to our website at http://www.epa.gov/oig.

If you or your staff have any questions regarding this report, please contact Assistant Inspector General for Program Evaluation Carolyn Copper at (202) 566-0829 or copper.carolyn@epa.gov; or Acting Director for Toxics, Chemical Management, and Pollution Prevention Evaluations Jerri Dorsey at (919) 541-3601 or dorsey.jerri@epa.gov.

Purpose

- The purpose of this review was to evaluate how U.S. Environmental Protection Agency (EPA) Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and Toxic Substances Control Act (TSCA) enforcement tools achieve intended outcomes; and whether penalty negotiations are managed to protect human health and the environment.

- This briefing contains findings and recommendations related to FIFRA and TSCA:
  - Good faith reductions
  - Ability to pay

Background

- FIFRA regulates the distribution, sale and use of pesticides.
- TSCA, which excludes pesticide regulation, provides the EPA with authority to require reporting, recordkeeping and testing requirements; and restrictions to chemical substances and mixtures.
- Enforcing environmental laws is part of the EPA's mission to protect human health and the environment.

Background
Enforcement Response Policies (ERPs)

FIFRA and TSCA enforcement policies level the playing field by providing fair and consistent enforcement of companies nationwide.

- FIFRA
  - To provide fair and equitable treatment of the regulated community, including:
    - Predictable enforcement responses.
    - Fair penalty assessments.
    - Swift resolution of environmental problems.
    - Deterrence of future violations.
- TSCA
  - To assure that penalties are:
    - Equitable and consistent.
    - Eliminate economic incentives to violate.
    - Deter violations.

Background
Lead Paint Disclosure Rule

- This rule requires disclosure of known lead-based paint and/or lead-based paint hazards by persons selling or leasing housing constructed prior to 1978.
- Exposure to lead can contribute to elevated blood lead levels for children living in properties where lead paint exists due to lack of notification of possible existence of lead paint as required by EPA's Lead Rule.
- According to the Centers for Disease Control and Prevention, childhood lead poisoning is the most preventable environmental disease among children under age 6. Even low levels of lead exposure can cause developmental problems such as learning disabilities, decreased intelligence and behavioral problems.

Methodology

- We selected a judgmental sample of 43 out of 290 FIFRA and TSCA Fiscal Year (FY) 2010 closed enforcement cases. This involved 23 FIFRA cases and 20 TSCA cases. The 20 TSCA cases involved 13 Lead Disclosure and 7 PCB (Polychlorinated Biphenyl) cases.
  - FIFRA enforcement penalties analyzed/addressed the sale of unregistered pesticides and label violations.
  - TSCA enforcement penalties analyzed/addressed the improper use and management of PCBs in schools, and the implementation of the Lead Paint Disclosure Rule in households.

Methodology

- We reviewed FIFRA and TSCA statutes, as well as the applicable enforcement policies, processes and criteria.
- We conducted interviews of Office of Enforcement and Compliance Assurance (OECA) staff (specifically, the Waste and Chemical Enforcement Division and the Office of Compliance); as well as enforcement staff from EPA Regions 2, 4, 5, 7 and 10.
- We performed our evaluation from June 2011 to May 2013 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the evaluation to obtain sufficient and appropriate evidence.

Finding
Good Faith Reductions Lacked Support

- We found that EPA regions differed in how they documented and justified reduced penalties for sampled FIFRA and TSCA enforcement cases.
- Specifically, regions in general did not sufficiently document and/or justify good faith reductions to proposed penalties.
- Furthermore, the agency has not provided regions, who administer the enforcement process, guidance or policies that adequately delineate the processes to document the reduction of a penalty, establish the appropriate level of reduction for good faith, and assure that the reductions are in line with behavior of the respondent.

Finding

Good Faith Reductions Lacked Support (cont.)

- Documentation within case files generally did not clearly delineate why and how reductions for good faith were determined.
    - One region used nothing more than a simple statement for justification. For example one region wrote, "…A 30% reduction is recommended based on respondent's cooperation and good faith efforts to comply."
    - Another regional justification stated, "…We are also giving the 20% reduction for good faith…."
- EPA policy, states: "…In all instances, the facts and rationale justifying penalty reduction must be recorded in the case file and included in any memoranda accompanying settlement." (***A Framework for Statute-Specific Approaches to Penalty Assessment: Implementing EPA's Policy on Civil Penalties,*** February 16, 1984)
- Without adequate documentation to justify reductions, there is no assurance that reduction decisions are consistent across like violators.

Conclusion/Recommendations

Good Faith Reductions

We concluded that the lack of adequate guidance for determining good faith reductions and adequate documentation for good faith reductions creates a risk that violators may not be treated equitably. In addition, EPA may be losing opportunities to fully collect all penalties due.

Recommendations:

We recommend that the Assistant Administrator for Enforcement and Compliance Assurance:

1. Provide guidance for determining good faith reductions.
2. Develop an approach to ensure justifications for good faith reductions are adequately documented.

Conclusion/Recommendations

Good Faith Reductions (cont.)

Agency Response and OIG Evaluation

Agency Response to Recommendation 1:

The agency did not concur with recommendation 1 to update guidance for determining good faith reductions. Based on discussions with the agency on the draft report, it was agreed that the corrective actions to remedy recommendation 2, the re-issuance of GM-88 – "Documenting Penalty Calculations and Justifications in EPA Enforcement Actions" – will also address the condition of inadequate guidance. GM-88 will augment the current FIFRA and TSCA Enforcement Response Penalty Policies (ERPPs). The regions will utilize both the ERPs and GM-88 as guidance to determine and support reductions to penalties for good faith.

OIG Evaluation:

The agency's corrective actions address the intent of the recommendation. Therefore, the OIG considers this recommendation to be resolved.

Conclusion/Recommendations
Good Faith Reductions (cont.)

Agency Response and OIG Evaluation (cont.)

Agency Response to Recommendation 2:

The agency concurs with recommendation 2 and provided a planned corrective action plan and a completion date.

OIG Evaluation:

We concur with this action. The agency provided a corrective action plan and completion date for this action. Therefore, the OIG considers this recommendation to be resolved.

Finding
Challenges Exist for Ability to Pay Cases

We found that the EPA's enforcement actions for FIFRA and TSCA ability to pay cases may be limited by an outdated policy, model and training.

- EPA's ERPP does not prescribe alternatives (such as public service and payment plans) when a penalty cannot be paid.
  - Although alternatives are allowed, the current lead-based paint disclosure ERPP only provides guidance on penalty reductions. It does not include when and how alternatives can be used.
  - Consequently, if EPA does not apply a non-monetary alternative form of payment when a violator is unable to pay, enforcement against noncompliance is absent.

Finding

Challenges Exist for Ability to Pay Cases (cont.)

- EPA's "INDIPAY" economic model is limited in its ability to help teams evaluate claims for FIFRA/TSCA ability to pay cases.
  - INDIPAY is intended to evaluate individual taxpayers' claims of inability to afford penalties, clean-up costs or compliance costs.
  - Currently, the model does not assess an individual's assets.
  - An updated model could help improve the accuracy of the agency's ability to pay claims.

Finding

Challenges Exist for Ability to Pay Cases (cont.)

- EPA does not provide adequate guidance or training on evaluating ability to pay claims for case teams.
  - OECA does not currently provide any case development training.
  - The EPA guidance is inadequate for case teams or financial analysts on how to handle claims for individuals, except for under the Superfund program.
  - Lack of adequate guidance and training could impact the regions' consistent handling of the growing number of ability to pay claims being received from individuals.

Conclusion/Recommendations
Ability to Pay

EPA needs to update its policy to better address violators who are unable to pay penalties.

Recommendations:

We recommend that the Assistant Administrator for Enforcement and Compliance Assurance:

3. Update the existing Lead-Based Paint Disclosure ERPP to include guidance on:
   a. How to evaluate ability to pay claims for individuals, and
   b. When and how to apply alternatives such as payment plans and public service to ability to pay cases.
4. Evaluate the INDIPAY economic model to determine whether revisions would improve applicability to lead paint disclosure cases with individual violators.
5. Provide regional staff with updated training for case development, including evaluation of ability to pay claims.

Conclusion/Recommendations

Ability to Pay (cont.)

Agency Response and OIG Evaluation

Agency Response to Recommendation 3:

The agency provided alternative actions in lieu of the OIG recommendation 3. The agency recommended updating the 1986 “Guidance on Determining a Violator's Ability to Pay a Civil Penalty” guidance instead of the Lead-Paint Disclosure ERPP.

OIG Evaluation:

We concur with the alternative corrective action provided by the agency. Therefore, the OIG considers this recommendation to be resolved.

Conclusion/Recommendations

Ability to Pay (cont.)

Agency Response and OIG Evaluation (cont.)

Agency Response to Recommendation 4:

The agency in its response advised that the INDIPAY model "is not suitable" for these types of real estate fact-specific analyses. However, the agency believes that it is not necessary to update the INDIPAY model to address its limitations relating to the valuation of real estate assets. Based on discussions with the agency, the agency has agreed to update the 1986 "Guidance on Determining a Violator's Ability to Pay a Civil Penalty," which it believes will have more significant impact across the agency than updating the model.

OIG Evaluation:

We concur with the alternative corrective action provided by the agency. Therefore, the OIG considers this recommendation to be resolved.

Conclusion/Recommendations

Ability to Pay (cont.)

Agency Response and OIG Evaluation (cont.)

Agency Response to Recommendation 5:

The agency concurs with recommendation 5 and provided a corrective action plan and completion date.

OIG Evaluation:

We concur with this action. The agency provided a corrective action plan and completion date for this action. Therefore, the OIG considers this recommendation to be resolved.

Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in $000s)	
Rec. No.	Page No.	Subject	Status[1]	Action Official	Planned Completion Date	Claimed Amount	Agreed-To Amount
1	9	Provide guidance for determining good faith reductions.	O	Assistant Administrator for Enforcement and Compliance Assurance	9/30/13		
2	9	Develop an approach to ensure justifications for good faith reductions are adequately documented.	O	Assistant Administrator for Enforcement and Compliance Assurance	9/30/13		
3	15	Update the existing Lead-Based Paint Disclosure ERPP to include: a. How to evaluate ability to pay claims for individuals, and b. When and how to apply alternatives such as payment plans and public service to ability to pay cases.	O	Assistant Administrator for Enforcement and Compliance Assurance	6/30/14		
4	15	Evaluate the INDIPAY economic model to determine whether revisions would improve applicability to lead paint disclosure cases with individual violators.	O	Assistant Administrator for Enforcement and Compliance Assurance	6/30/14		
5	15	Provide regional staff with updated training for case development, including evaluation of ability to pay claims.	O	Assistant Administrator for Enforcement and Compliance Assurance	9/30/14		

[1] O = recommendation is open with agreed-to corrective actions pending
C = recommendation is closed with all agreed-to actions completed
U = recommendation is unresolved with resolution efforts in progress

Appendix A

Agency Response to Draft Report

July 3, 2013

MEMORANDUM

SUBJECT: Response to the Office of Inspector General Draft Report: "EPA Needs to Update Its Pesticide and Chemical Enforcement Penalty Policies and Practices," dated June 6, 2013, Report No. OPE-FY11-0018

FROM: Cynthia Giles
Assistant Administrator

TO: Carolyn Copper
Assistant Inspector General
Office of Program Evaluation

Thank you for the opportunity to respond to the draft findings and recommendations presented in the Office of Inspector General (OIG) Draft Report, "EPA Needs to Update Its Pesticide and Chemical Enforcement Penalty Policies and Practices" (Report). Following is a summary of comments from the Office of Enforcement and Compliance Assurance (OECA), followed by OECA's position on each of the Report's recommendations. For those Report recommendations with which OECA agrees, we propose corrective actions and estimated completion dates. For those Report recommendations with which OECA does not agree, we explain our position and either propose alternatives to those recommendations or, in the case of Recommendation 1, we propose that no further action is needed.

Summary Comments

The TSCA cases addressed in OIG's Report involved the Lead-Based Paint Disclosure Rule. It is important to note that the focus of the lead enforcement program has shifted away from lead disclosure cases and toward renovation, repair, and painting (RRP) cases. As noted in the 2014 National Program Managers' Guidance, 95 percent of lead enforcement resources should be allocated to RRP enforcement. With this shift in focus, OECA has worked with the regions to ensure national consistency in penalty calculations and documentation.

OIG Response: The OIG did not solely review Lead-Based Paint Disclosure Rule cases. The OIG reviewed 43 cases, of which 23 were FIFRA cases, seven were TSCA PCB cases, and 13 were TSCA Lead-Based Paint Disclosure Rule cases. The results of the OIG review disclosed that the lack of guidance and supporting documentation for good faith reductions pertained to both FIFRA and TSCA cases. Recommendations 1 and 2 relate to both FIFRA and TSCA policies.

Recommendation 1: OECA disagrees with the OIG's recommendation that OECA update the criteria in the Lead-Based Paint Disclosure Rule Enforcement Response and Penalty Policy (LBP Disclosure ERPP) for determining good-faith reductions. While the Report states that documentation for good-faith reductions in case files was inadequate, the Report does not identify any specific deficiencies with regard to the criteria themselves. Therefore, rather than revising the guidance related to criteria for good-faith reductions in LBP Disclosure Rule cases, which are increasingly rare, OECA will continue to work with the regions on national consistency in RRP cases.

OIG Response: The OIG met with the agency to discuss the draft findings and recommendations. Based on discussions with the agency, it was agreed that the corrective actions to remedy recommendation 2, the re-issuance of GM-88, "Documenting Penalty Calculations and Justifications in EPA Enforcement Actions," will also address the condition of lack of guidance. GM-88 will augment the current FIFRA and TSCA ERPPs. The regions will utilize both the ERPPs and GM-88 as guidance to determine and support reductions to penalties for good faith. The agency's corrective actions address the intent of the recommendation. Therefore, the OIG considers this recommendation to be resolved.

Recommendation 2: In order to ensure justifications for good faith reductions are adequately documented in case files, OECA will re-circulate GM-88, "Documenting Penalty Calculations and Justifications in EPA Enforcement Actions," to Enforcement Directors and Regional Counsel.

OIG Response: We concur with the corrective action provided by the agency and thus consider this recommendation to be resolved.

Recommendation 3.a: In its Report, the OIG found that "[t]here is no EPA guidance for case teams or financial analysts on how to handle claims for individuals, except for under the Superfund program." *See* Report at 13. To address this finding, the OIG recommends that OECA update the existing LBP Disclosure ERPP to include guidance on how to evaluate ability-to-pay claims for individuals.

OECA disagrees with OIG's statement that there is no EPA guidance on how to handle claims for individuals. In addition to the 1986 "Guidance on Determining a Violator's Ability to Pay a Civil Penalty," the EPA developed the INDIPAY model specifically for the purpose of assisting case teams in evaluating ability to pay claims by individuals. OECA does agree, however, that additional guidance may be needed on whether and the extent to which the EPA should assess a civil penalty where the INDIPAY model assesses an individual's ability to pay as zero.

OIG Response: The OIG revised the final report to more accurately reflect the above statements regarding the lack of guidance. The OIG concurs that additional guidance is needed that adequately addresses the extent to which the EPA should assess a civil penalty where the INDIPAY model assesses an individual's ability to pay as zero.

OECA plans to update the 1986 "Guidance on Determining a Violator's Ability to Pay a Civil Penalty." As part of that effort, OECA will consider whether more guidance is needed on (1) how to evaluate ability-to-pay claims in enforcement cases against individuals, and (2) when to allow a respondent/defendant to pay a civil penalty in installments and how best to structure settlement agreements with delayed payment schedules.

OIG Response: We concur with the alternative corrective action provided by the agency and thus consider this recommendation to be resolved.

Recommendation 3.b: After finding that EPA's LBP Disclosure ERPP "does not prescribe alternatives (such as public service and payment plans)," the OIG recommends that OECA update the LBP Disclosure ERPP "to include when and how to apply alternatives such as payment plans and public service to ability to pay cases." (*See* OIG Draft Report at 11 and 15.)

This OIG recommendation appears to be drawn from references in the EPA's 1984 "A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties" (Framework or "GM-22") to the Agency's consideration of "a delayed payment schedule" or "non-monetary alternatives, such as public service activities" when a violator cannot afford to pay a civil penalty. (*See* Framework at 23.)

Delayed Payment Schedules

OECA plans to update the 1986 "Guidance on Determining a Violator's Ability to Pay a Civil Penalty." As part of that effort, OECA will consider whether more guidance is needed on (1) how to evaluate ability-to-pay claims in enforcement cases against individuals, and (2) when to allow a respondent/defendant to pay a civil penalty in installments and how best to structure settlement agreements with delayed payment schedules.

Non-monetary Alternatives

Since issuing the 1984 Framework, the EPA issued the 1998 Supplemental Environmental Projects (SEP) Policy. A SEP is a beneficial environmental project a respondent/defendant agrees to undertake as part of an enforcement settlement. The project must be one that the respondent/ defendant is not already required to perform. As a matter of fiscal law, SEPs must have a nexus to the underlying violation and cannot augment the EPA's or another agency's appropriations. Provided a project meets the conditions of the SEP Policy, the EPA may consider a respondent/defendant's agreement to perform a SEP as a factor in determining the civil penalty to be assessed. Furthermore, EPA has provided specific guidance on the SEPs that may be appropriate in cases involving violations of lead-based paint rules under TSCA.[1]

Finally, TSCA Section 16(a)(2)(C), 15 U.S.C. § 2615(a)(2)(C), authorizes the Administrator to compromise, modify or remit, with or without condition, any civil penalty that may be imposed

[1] *See* August 2010 "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule" (LBP Consolidated ERPP) at 26 and Appendix D.

under this section. The EPA has issued policy on implementing this subsection.[2] As discussed in the August 2010 LBP Consolidated ERPP, an example of this policy would be the remittance of a portion of the unadjusted gravity-based penalty developed for violations of the RRP rule in consideration of the violator's acceptance of the suspension or revocation of the its LBP certification or training authorization. According to the LBP Consolidated ERPP, the violator would still be liable for a penalty for any economic benefit accrued as a result of the violation(s). In addition, the terms of the remittance and suspension or revocation must be incorporated in a Compliance Agreement and Final Order. Finally, the LBP Consolidated ERPP notes that TSCA Section 16(a)(2)(C) may also be used to remit penalties if respondent completes projects similar to those implemented under the SEP Policy.

Rather than revise the LBP Disclosure ERPP, OECA proposes to evaluate whether additional guidance is needed to clarify whether "non-monetary alternatives, such as public service activities," must meet the SEP Policy.

OIG Response: We concur with the alternative corrective action provided by the agency and thus consider this recommendation to be resolved.

Recommendation 4: In support of Recommendation 4 -- that OECA evaluate the INDIPAY model "to determine whether revisions would improve the applicability to lead disclosure cases with individual violators" -- the OIG found that "[c]urrently, the model does not assess an individual's assets." We disagree with this finding and the OIG's recommendation that changes to INDIPAY are necessary to "assess an individual's assets." Contrary to the OIG's draft finding, the INDIPAY model *does* take into account an individual's assets in assessing an individual's ability to pay based on information provided by the respondent/defendant. The reason the model is not equipped to provide the user with the assessed value of an individual's specific assets is that such determinations are very case-specific and based on market value. For example, the market value of real estate is based on an evaluation of the property (e.g., square footage, purpose, condition, improvements) and an assessment of its value in the market in which it is located at a particular point in time.

Because the model is not suitable for this kind of fact-specific analysis, OECA proposes that no further action is needed to update the INDIPAY model. Where appropriate in a particular case, the EPA may engage an expert to assess the value of a respondent/defendant's assets. If EPA decides to expend resources in a given case to estimate the value of specific assets, such values can then be loaded into the model to fine-tune the ability-to-pay analysis of a particular individual.

OECA will consider whether more guidance is needed on how to evaluate ability-to-pay claims in enforcement cases against individuals, as part of OECA's update of the Agency's 1986 "Guidance on Determining a Violator's Ability to Pay a Civil Penalty."

[2] *See* Appendix C, TSCA Enforcement Policy and Guidance Documents; Memorandum, "Settlement with Conditions," A.E. Conroy II (November 16, 1983).

OIG Response: As noted by the agency in its response, the current model "is not suitable" for these types of fact-specific analysis. However, the agency believes that it is not necessary to update the INDIPAY model to address its limitations relating to the valuation of real estate assets. Based on discussions with the agency, the agency has agreed to update the 1986 "Guidance on Determining a Violator's Ability to Pay a Civil Penalty," which it believes will have more impact than updating the model. We concur with the alternative corrective action provided by the agency and thus consider this recommendation to be resolved.

Recommendation 5: As indicated, OECA plans to update the 1986 "Guidance on Determining a Violator's Ability to Pay a Civil Penalty." Once that updated guidance is issued, OECA will provide training on evaluating a violator's ability to pay a civil penalty to reflect the new guidance.

OIG Response: We concur with the corrective action provided by the agency and thus consider this recommendation to be resolved.

In Agreement

No.	Recommendation	High-Level Intended Corrective Action(s)	Estimated Completion by Quarter and FY
2	Develop a systematic approach to ensure justifications for good faith reductions are adequately documented.	OECA will re-circulate to the Enforcement Directors and Regional Counsel existing guidance on the documentation of penalties in case files. *See* memorandum dated August 9, 1990, "Documenting Penalty Calculations and Justifications in EPA Enforcement Actions," from the former Assistant Administrator for Enforcement, James M. Strock.	4th Quarter of FY 2013
5	Provide regional staff with updated training for case development, including evaluation of ability to pay claims.	OECA plans to update the 1986 "Guidance on Determining a Violator's Ability to Pay a Civil Penalty." Once that updated guidance is issued, OECA will provide training on evaluating a violator's ability to pay a civil penalty to reflect the new guidance.	4th Quarter of FY 2014

Not in Agreement

No.	Recommendation	Agency Explanation/Response	Proposed Alternative Recommendation
1	Update criteria for determining good faith reductions.	The criteria for determining good faith reductions are sound and readily accessible in the Lead-Based Paint Disclosure Rule ERPP.	No further action proposed.
3.a.	Update Lead-Based Paint Disclosure ERPP to include guidance on how to evaluate ability to pay for individuals.	The issue of how to evaluate ability to pay claims for individuals is not limited to the enforcement of TSCA's Lead-Based Paint Disclosure Rule. Rather, whether a violator can afford to pay a civil penalty in addition to correcting noncompliance can arise in the enforcement of other environmental requirements under TSCA and other statutes. Because this issue is cross-media in nature, it should be addressed on a cross-media basis in lieu of revising the Lead-Based Paint Disclosure Rule ERPP.	OECA plans to update the 1986 "Guidance on Determining a Violator's Ability to Pay a Civil Penalty." As part of that effort, OECA will consider whether more guidance is needed on (1) how to evaluate ability-to-pay claims in enforcement cases against individuals, and (2) when to allow a respondent/defendant to pay a civil penalty in installments and how best to structure settlement agreements with delayed payment schedules. 3rd Quarter of FY 2014
3.b.	Update Lead-Based Paint Disclosure ERPP to include guidance on when and how to apply payment plans in ability to pay cases.	The issues of when to consider and how to structure delayed penalty payments are not limited to lead-based paint disclosure cases but can arise regardless of which statutory penalty authority is being enforced.	OECA plans to update the 1986 "Guidance on Determining a Violator's Ability to Pay a Civil Penalty." As part of that effort, OECA will consider whether more guidance is needed on (1) how to evaluate ability-to-pay claims in enforcement cases against individuals, and (2) when to allow a respondent/defendant to pay a civil penalty in installments and how best to structure settlement

			agreements with delayed payment schedules. 3rd Quarter of FY 2014
3.b.	Update Lead-Based Paint Disclosure ERPP to include guidance on when and how to apply "alternatives…such as public service in ability to pay cases."	This OIG recommendation appears to be drawn from a reference in EPA's 1984 "A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties" (Framework) to "non-monetary alternatives" when a violator cannot afford to pay a civil penalty. (*See* Framework at page 23.) In 1998, EPA issued the Supplemental Environmental Projects (SEP) Policy. A SEP is a beneficial environmental project a respondent/defendant agrees to undertake voluntarily as part of an enforcement settlement. The project must be one that the respondent/ defendant is not already required to perform. As a matter of fiscal law, SEPs must have a nexus to the underlying violation and cannot augment EPA's or another agency's appropriations.	Rather than revise the Lead-Based Paint Disclosure ERPP, OECA proposes to evaluate whether additional cross-media guidance is needed to clarify whether "non-monetary alternatives, such as public service activities" must meet the SEP Policy. 2nd Quarter of FY 2014
4	Evaluate the INDIPAY economic model to determine whether revisions would improve applicability to lead paint disclosure cases with individual violators.	This recommendation is based on the OIG's draft finding that "[c]urrently, the [INDIPAY] model does not assess an individual's assets." We disagree with this finding and the OIG's recommendation that changes to INDIPAY are necessary to "assess an individual's assets." The INDIPAY model *does* take into account an individual's assets in assessing an individual's ability	3rd Quarter of FY 2014

		to pay based on information provided by the respondent/defendant. The model is not the appropriate tool for assigning a dollar value to an individual's specific assets, which is fact-specific and based on market value. OECA will consider whether more guidance is needed on how to evaluate ability-to-pay claims in enforcement cases against individuals, as part of OECA's update of the Agency's 1986 "Guidance on Determining a Violator's Ability to Pay a Civil Penalty." *See* response to Recommendation 3.b.	

Contact Information

If you have any questions or concerns regarding this response, please contact the OECA Audit Liaison, Gwendolyn Spriggs, at 202-564-2439.

Attachment

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Susan O'Keefe, OECA/OCE
Caroline Makepeace, OECA/OCE
Lauren Kabler, OECA/OCE
Gwendolyn Spriggs, OECA/OAP

Appendix B

Distribution

Office of the Administrator
Assistant Administrator for Enforcement and Compliance Assurance
Assistant Administrator for Chemical Safety and Pollution Prevention
Agency Follow-Up Official (the CFO)
Agency Follow-Up Coordinator
General Counsel
Associate Administrator for Congressional and Intergovernmental Relations
Associate Administrator for External Affairs and Environmental Information
Principal Deputy Assistant Administrator for Enforcement and Compliance Assurance
Deputy Assistant Administrator for Chemical Safety and Pollution Prevention
Audit Follow-Up Coordinator, Office of Enforcement and Compliance Assurance
Audit Follow-Up Coordinator, Office of Chemical Safety and Pollution Prevention