United States
Environmental Protection
Agency

Office of
Enforcement and
Compliance Assurance

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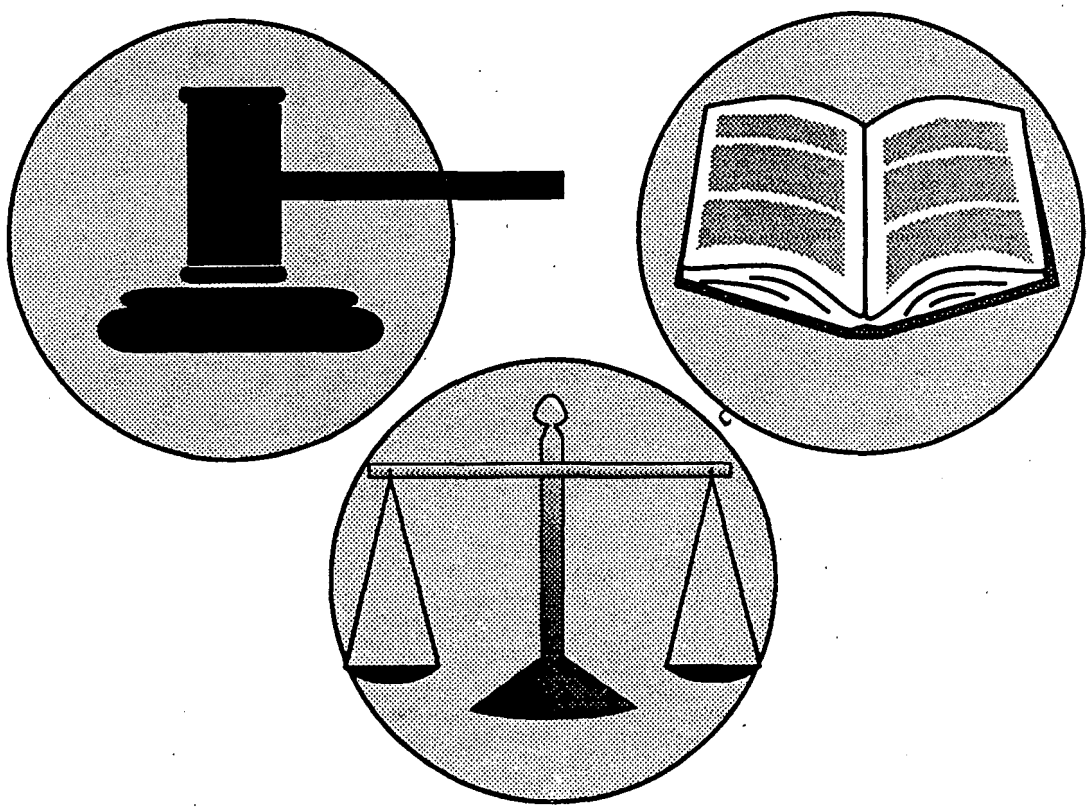
EPA

Administrative Hearings And Trials



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C.1

ADMINISTRATIVE LAW ENFORCEMENT AT EPA

EFFICIENCY - VOLUME - COMPLIANCE

Michael J. Walker
Enforcement Counsel
Toxics Litigation Division
U.S. EPA

1. Administrative law enforcement is an important tool in federal environmental compliance efforts.[1] The efficiency and streamlined aspects of administrative enforcement make it an attractive option to traditional district court activity.[2]

[Example: no equivalent in Canada....yet]

2. **The roots of "administrative" agencies are old...**[3]

o Constitutional "separation of powers"

Checks & Balances

- Congress - writes the laws
- President - carries out the laws
- Courts - interpret the laws

o regulation of everyday commerce, new technology, created pressure to faster and more informed decision making and dispute resolution.

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[1] In addition to EPA, many federal agencies have administrative law enforcement authorities. Some of these include: the Occupational Safety & Health Administration, (OSHA), Federal Aviation Administration, (FAA), Federal Trade Commission, (FTC), Food & Drug Administration, (FDA) and Department of Agriculture, (USDA).

[2] See, for example: High Stakes on a Fast Track: Administrative Enforcement at EPA; Federal Bar Journal.

[3] For example, regulation of commercial ferry-boat traffic and safety in the steam boat industry in the 1800's led to the development of the United States Coast Guard and Federal Trade Commission.

EPA in 1992

- **writes** regulations & policies
- **inspects/files** administrative suits
- **interprets the laws**: through the Administrative Law Judges and the Administrator of EPA

Is It A Fair System? YES

o Administrative Procedure Act creates safeguards and separations of functions.

o Potential Court oversight to curb abuses

o Offers "specialized" and "knowledgeable" interpretation of federal programs

- issues are adjudicated by a judge who understands the program and vocabulary

3. Typical Steps in an Administrative Penalty Action

A. Identify Violation[4]

o civil only[5]

o legal tests: **preponderance of the evidence**: not beyond a reasonable doubt; **more likely than not.**

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[4] EPA has administrative law enforcement authorities in the majority of federal environmental statutes, including the Clean Air Act, (CAA), Clean Water Act, (CWA), Resource Conservation and Recovery Act, (RCRA), Emergency Planning & Community Right-To-Know Act, (EPCRA), Comprehensive Emergency Response, Compensation and Liability Act, (CERCLA), Toxic Substances Control Act, (TSCA), Asbestos Hazard Emergency Response Act, (AHERA), and the Federal Insecticide, Fungicide and Rodenticide Act, (FIFRA).

[5] Most actions can only seek civil penalties and a commitment to achieve and maintain compliance. With the exception of RCRA, for example, Administrative Law Judges lack the authority to issue compliance orders in the majority of EPA environmental statutes.

B. **Issue civil complaint**[6]

- o clearly state the violations[7]
- o propose penalty ($1,000 to $15,700,000)
- o EPA considers several factors:[8]
  - extent, nature & circumstances of violation
  - gravity of harm or potential harm
  - size of business
  - effect of penalty on business[9]
- o offer opportunity for hearing
  - "on the record"
  - before an impartial Administrative Law Judge

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[6] More than 4,000 administrative enforcement actions are issued annually.

[7] Failure to state a violation with specific clarity may be grounds for dismissal by the Administrative Law Judge

[8] Each statute has different, specific factors that must be considered. To effectively implement an administrative penalty program in ten regional offices, most EPA enforcement programs develop statute-specific penalty policies or enforcement response policies. This guidance is an attempt to endure that civil penalties for the same or similar violation are the same throughout the United States.

[9] EPA has sought and collected civil penalties from state and local units of government; school and universities; hospitals; and non-profit entities. Consideration is given to the specific financial condition of an individual entity.

C. Offer to settle[10]

- o The Consolidated Rules of Practice[11] encourage settlement.
- o EPA must obtain compliance or an enforceable schedule to achieve compliance[12]
- o must collect a substantial portion of the proposed penalty[13]

D. **Opportunity for hearing**

- o Administrative Procedures Act of 1946
  - "on the record"
  - impartial Administrative Law Judge
  - written decision on merits and law

E. **May Appeal To Federal Courts**[14]

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[10] Historically, more than 96% of all filed cases settle. This trend may shift as higher fines become more common place.

[11] See: 40 CFR Part 22, et seq. Specifically, 40 CFR § 22.18(a), Settlement policy. The Agency **encourages settlement of a proceeding at any time** if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The respondent may confer with the complainant concerning settlement whether or not the respondent requests a hearing. (Emphasis added in bold type-face)

[12] Generally, administrative civil penalty actions are quite successful in securing compliance or correcting violations. In addition, penalty credits for environmental beneficial projects give the Agency the opportunity to enhance the overall compliance program at individual facilities and corporations.

[13] In fiscal year, $31.9 million was collected in administrative civil penalties. This represents 44% of all EPA federal penalty dollars collected.

[14] Generally, very few cases are ever appealed to federal courts. (approximately 6-10 per year).

4. General Advantages of Administrative Enforcement

A. Rapid deployment of resources and actions

- ability to tailor the right "size" violation to the appropriate "type" of violation.
- low key actions avoid angry constituents

B. Technical issues are presented to a more "informed" judiciary.

C. Very limited opportunities for delay

- abbreviated "discovery"
- expanded use of motion practice

D. Lower transaction costs

- for the government
- for the respondent

E. More flexibility in terms of settlement

F. Ability to effective use press to promote compliance through deterrence.

TYPES OF ADMINISTRATIVE HEARINGS CONDUCTED WITHIN EPA

1. **Personnel**

   a. Merit Systems Protection Board (MSPB) (5 CFR §1201 et seq.)
   b. Equal Employment Opportunity Commission (EEOC) (29 CFR §1614)

2. Listing or Delisting (40 CFR Part 15) (Clean Air and Water Quality Acts matters only) (CA §306, 42 USC §7606) CAA §508, 33 USC §1368).

3. Hearings Conducted Under the Consolidated Rules of Practice governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits. 40 CFR 22.

   a. FIFRA Section 14 (a) (7 USC §1361(a)
   b. Clean air Act, Section 211 (42 USC §7545)
   c. Marine Protection Research and Sanctuaries Act, Section 105(a) and (f) (33) USC §1415(a))
   d. Solid Waste Disposal Act as amended (RCRA), Section 3008 (42 USC §6928)
   e. TSCA, Section 16(a) (15 USC §2615(a)).

4. Debarment and Suspension Under EPA Assistance Programs (40 CFR Part 32)

5. Assessment and Collection of Noncompliance Penalties under the Clean Air Act (Section 120 of CAA, 42 USC §7420; 40 CFR Part 66 makes 40 CFR Part 22 applicable once a hearing is granted)

6. Control of Air Pollution from Mobile Sources (40 CFR Part 85, motor vehicles).

7. Spill Prevention Control and Countermeasure (SPCC) Hearings (40 CFR Part 114) (Under authority of Sections 311(j) and 501(a) of the CWA, 33 USC 1321(j), 1361(a).

8. Procedures for Decision Making Under the Clean Water Act as amended (Water Quality Act of 1987), RCRA, SDWA (UIC) and CAA (PSD permits).

   a. Public hearings under 40 CFR §124.12, Part of proceedings to veto state-issued NPDES permits.

   b. Evidentiary Hearing for EPA-Issued NPDES Permits (40 CFR §124 subpart E)

   c. Non-Adversary Panel Procedures (40 CFR §124 subpart F, applies to some NPDES permits, draft RCRA, or draft UIC permits)

9. Safe Drinking Water Act (SDWA) (42 USC §300F et seq.)

   a. Review of State-Issued Variances and Exemptions (40 CFR §142 Subpart C)

   b. Federal Enforcement (40 CFR §142 Subpart D)

   c. Variances and Exemptions issued by EPA (40 CFR Subparts E & F)

   d. New Civil Administrative Penalty Authorities

      1. Underground Injection Control (UIC)
      2. Public Water Supply (PWS)

10. FIFRA - Registration, Classification, Cancellation and Other Procedures (in HQ)

11. Ocean Dumping Permits (40 CFR 220 et seq.)

12. SARA, Section 109 - no regulations issued as yet.

13. RCRA, Corrective Action Orders for Interim Status Facilities; 40 CFR Part 24.

14. EPCRA (Emergency Planning; Community Right to Know Act) Toxic Chemical Release Inventory Actions; 40 CFR Part 22.

15. Equal Access to Justice Act; Procedures for Adjudication of Claims for "prevailing parties" in cases where EPA's claim was not "substantially justified". 40 CFR 17.

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION OR SUSPENSION OF PERMITS

Subpart A—General

Subpart B—Parties and Appearances

Subpart C—Prehearing Procedures

Subpart D—Hearing Procedure

Subpart E—Initial Decision and Motion to Reopen a Hearing

Subpart F—Appeals and Administrative Review

Subpart G—Final Order on Appeal

Subpart H—Supplemental Rules

AUTHORITY: 15 U.S.C. 2615; 42 U.S.C. 7413(d), 7524(c), 7545(d), 7547(d), 7601 and 7607(a); 7 U.S.C. 136(l) and (m); 33 U.S.C. 1319, 1415 and 1418; 42 U.S.C. 6912, 6928 and 6991(e); 42 U.S.C. 9609; 42 U.S.C. 11045

SOURCE: 45 FR 24363, Apr. 9, 1980, unless otherwise noted.

Subpart A—General

§ 22.01 Scope of these rules.

(a) These rules of practice govern all adjudicatory proceedings for:

Fines

(1) The assessment of any civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act as amended (7 U.S.C. 1361(a));

(2) The assessment of any administrative penalty under sections 113(d)(1), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (CAA) (42 U.S.C. 7413(d)(1), 7524(c), 7545(d) and 7547(d)).

Permit Suspension

(3) The assessment of any civil penalty or for the revocation or suspension of any permit conducted under section 105 (a) and (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a));

Compliance Orders

Corrective Action Orders

(4) The issuance of a compliance order or the issuance of a corrective action order, the suspension or revocation of authority to operate pursuant to section 3005(e) of the Solid Waste Disposal Act, or the assessment of any civil penalty under sections 3008, 9006 and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6928, 6991(e) and 6992(d)), except as provided in 40 CFR parts 24 and 124.

(5) The assessment of any civil penalty conducted under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a));

(6) The assessment of any Class II penalty under section 309(g) of the Clean Water Act (33 U.S.C. 1319(g));

(7) The assessment of any administrative penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609);

(8) The assessment of any administrative penalty under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA) (42 U.S.C. 11045).

(9) The assessment of any civil penalty conducted under section 1414(g)(3)(B) of the Safe Drinking Water Act as amended (42 U.S.C. 300g-3(g)(3)(B)).

NOTE: SUPPLEMENTAL RULES

(b) The Supplemental rules of practice set forth in subpart H establish rules governing those aspects of the proceeding in question which are not covered in subparts A through G, and also specify procedures which supersede any conflicting procedures set forth in those subparts.

(c) Questions arising at any stage of the proceeding which are not addressed in these rules or in the relevant supplementary procedures shall be resolved at the discretion of the Administrator, Regional Administrator, or Presiding Officer, as appropriate.

DISCRETION TO RESOLV PROCEDURAL DISPUTES

[45 FR 24363, Apr. 9, 1980, as amended at 52 FR 30573, Aug. 17, 1987; 53 FR 12263, Apr 13, 1988; 54 FR 12271, Mar. 24, 1989; 54 FR 21176, May 16, 1989; 56 FR 3787, Jan. 30, 1991; 57 FR 4318, Feb. 4, 1992]

§ 22.02 Use of number and gender.

As used in these rules of practice, words in the singular also include the plural and words in the masculine gender also include the feminine and vice versa, as the case may require.

§ 22.03 Definitions.

(a) The following definitions apply to part 22:

Act means the particular statute authorizing the institution of the proceeding at issue.

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105 (see also Pub. L. 95-251, 92 Stat. 183).

Administrator means the Administrator of the U.S. Environmental Protection Agency or his delegate.

Agency means the United States Environmental Protection Agency.

Complainant means any person authorized to issue a complaint on behalf of the Agency to persons alleged to be in violation of the Act. The complainant shall not be a member of the Environmental Appeals Board, the Regional Judicial Officer, or any other person who will participate or advise in the decision.

Complaint means a written communication, alleging one or more violations of specific provisions of the Act, or regulations or a permit promulgated thereunder, issued by the complainant to a person under §§ 22.13 and 22.14.

Consent Agreement means any written document, signed by the parties, containing stipulations or conclusions of fact or law and a proposed penalty or proposed revocation or suspension acceptable to both complainant and respondent.

Environmental Appeals Board means the Board within the Agency described in § 1.25 of this title, located at U.S. Environmental Protection Agency, A-110, 401 M St. SW., Washington, DC 20460.

Final Order means (a) an order issued by the Administrator after an appeal of an initial decision, accelerated decision, decision to dismiss, or default order, disposing of a matter in controversy between the parties, or (b) an initial decision which becomes a final order under § 22.27(c).

Hearing means a hearing on the record open to the public and conducted under these rules of practice.

Hearing Clerk means the Hearing Clerk, A-110, U.S. Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

Initial Decision means the decision issued by the Presiding Officer based upon the record of the proceedings out of which it arises.

Party means any person that participates in a hearing as complainant, respondent, or intervenor.

Permit means a permit issued under section 102 of the Marine Protection, Research, and Sanctuaries Act.

Person includes any individual, partnership, association, corporation, and any trustee, assignee, receiver or legal successor thereof; any organized group of persons whether incorporated or not; and any officer, employee, agent, department, agency or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

Presiding Officer means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer, unless otherwise specified by any supplemental rules.

Regional Administrator means the Administrator of any Regional Office of the Agency or any officer or employee thereof to whom his authority is duly delegated. Where the Regional Administrator has authorized the Regional Judicial Officer to act, the term *Regional Administrator* shall include the Regional Judicial Officer. In a case where the complainant is the Assistant Administrator for Enforcement or his delegate, the term *Regional Administrator* as used in these rules shall mean the Administrator.

Regional Hearing Clerk means an individual duly authorized by the Regional Administrator to serve as hearing clerk for a given region. Correspondence may be addressed to the Regional Hearing Clerk, U.S. Environmental Protection Agency (address of Regional Office—see appendix). In a case where the complainant is the Assistant Administrator for Enforcement or his delegate, the term *Regional Hearing Clerk* as used in these rules shall mean the Hearing Clerk.

Regional Judicial Officer means a person designated by the Regional Administrator under §22.04(b) to serve as a Regional Judicial Officer.

Respondent means any person proceeded against in the complaint.

(b) Terms defined in the Act and not defined in these rules of practice are used consistent with the meanings given in the Act.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5323, Feb. 13, 1992]

§ 22.04 Powers and duties of the Environmental Appeals Board, the Regional Administrator, the Regional Judicial Officer, and the Presiding Officer; disqualification.

(a) *Environmental Appeals Board.* The Administrator delegates authority under the Act to the Environmental Appeals Board to perform the functions assigned to it in these rules of practice. An appeal or motion under this part directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring any case or motion governed by this part to the Administrator when the Environmental Appeals Board, in its direction, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate the ex parte rules set forth in § 22.08.

(b) *Regional Administrator.* The Regional Administrator shall exercise all powers and duties as prescribed or delegated under the Act and these rules of practice.

(1) *Delegation to Regional Judicial Officer.* One or more Regional Judicial Officers may be designated by the Regional Administrator to perform, within the region of their designation, the functions described below. The Regional Administrator may delegate his or her authority to a Regional Judicial Officer to act in a given proceeding. This delegation will not prevent the Regional Judicial Officer from referring any motion or case to the Regional Administrator. The Regional Judicial Officer shall exercise all powers and duties prescribed or delegated under the Act or these rules of practice.

(2) *Qualifications of Regional Judicial Officer.* A Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or some other Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not be employed by the Region's Enforcement Division or by the Regional Division directly associated with the type of violation at issue in the proceeding. A Regional Judicial Officer shall not have performed prosecutorial or investigative functions in connection with any hearing in which he serves as a Regional Judicial Officer or with any factually related hearing.

(c) *Presiding Officer*. The Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer shall have authority to:

(1) Conduct administrative hearings under these rules of practice;

(2) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders;

(3) Administer oaths and affirmations and take affidavits;

(4) Examine witnesses and receive documentary or other evidence;

(5) For good cause, upon motion or sua sponte, order a party, or an officer or agent thereof, to produce testimony, documents, or other nonprivileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;

(6) Admit or exclude evidence;

(7) Hear and decide questions of facts, law, or discretion;

(8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(9) Issue subpoenas authorized by the Act; and

(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.

DUTIES OF THE PRESIDING OFFICER

- Develop a written record
- Render a written decision

NOTE SCOPE OF DEFINITION

CONDUCT HEARINGS

RULE ON MOTIONS
ISSUE ORDERS

ADMINISTER OATHS

EXAMINE WITNESSES
RECEIVE EVIDENCE

ORDER PRODUCTION
OF TESTIMONY OR DOCUMENTS
(Draw Adverse Inferences)

ADMIT/EXCLUDE EVIDENCE

Hear/DECIDE QUESTIONS OF
✓ FACT ✓ LAW ✓ DISCRETION

REQUIRE ATTENDANCE

ISSUE SUBPOENAS

DO "all other acts" NECESSARY
- to maintain order
- to promote efficiency
- to ensure fairness, impartiality

(d) *Disqualification; withdrawal.* (1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Presiding Officer may not perform functions provided for in these rules of practice regarding any matter in which they (i) have a financial interest or (ii) have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion made to the Regional Administrator request that the Regional Judicial Officer be disqualified from the proceeding. Any party may at any time by motion to the Administrator request that the Regional Administrator, a member of the Environmental Appeals Board, or the Presiding Officer be disqualified or request that the Administrator disqualify himself or herself from the proceeding. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Presiding Officer may at any time withdraw from any proceeding in which they deem themselves disqualified or unable to act for any reason.

(2) If the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Presiding Officer is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (d)(1) of this section shall be assigned to replace him. Assignment of a replacement for Regional Administrator or for the Regional Judicial Officer shall be made by the Administrator or the Regional Administrator, respectively. The Administrator, should he or she withdraw or disqualify himself or herself, shall assign the Regional Administrator from the Region where the case originated to replace him or her. If that Regional Administrator would be disqualified, the Administrator shall assign a Regional Administrator from another region to replace the Administrator. The Regional Administrator shall assign a new Presiding Officer if the original Presiding Officer was not an Administrative Law Judge. The Chief Administrative Law Judge shall assign a new Presiding Officer from among available Administrative Law Judges if the original Presiding Officer was an Administrative Law Judge.

(3) The Chief Administrative Law Judge, at any stage in the proceeding, may reassign the case to an Administrative Law Judge other than the one originally assigned in the event of the unavailability of the Administrative Law Judge or where reassignment will result in efficiency in the scheduling of hearings and would not prejudice the parties.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5324, Feb. 13, 1992; 57 FR 60129, Dec. 18, 1992]

ORIGINAL + 1 copy
Hearing Clerk

§ 22.05 Filing, service, and form of pleadings and documents.

(a) *Filing of pleadings and documents.* (1) Except as otherwise provided, the original and one copy of the complaint, and the original of the answer and of all other documents served in the proceeding shall be filed with the Regional Hearing Clerk.

CERTIFICATE OF SERVICE ALWAYS REQUIRED

(2) A certificate of service shall accompany each document filed or served. Except as otherwise provided, a party filing documents with the Regional Hearing Clerk, after the filing of the answer, shall serve copies thereof upon all other parties and the Presiding Officer. The Presiding Officer shall maintain a duplicate file during the course of the proceeding.

(3) When the Presiding Officer corresponds directly with the parties, the original of the correspondence shall be sent to the Regional Hearing Clerk, a copy shall be maintained by the Presiding Officer in the duplicate file, and a copy shall be sent to all parties. Parties who correspond directly with the Presiding Officer shall in addition to serving all other parties send a copy of all such correspondence to the Regional Hearing Clerk. A certificate of service shall accompany each document served under this subsection.

(b) *Service of pleadings and documents*—(1) *Service of complaint.* (i) Service of a copy of the signed original of the complaint, together with a copy of these rules of practice, may be made personally or by certified mail, return receipt requested, on the respondent (or his representative).

COMPLIANT SERVICE
- *personal service*
- *certified mail*

(ii) Service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name shall be made by personal service or certified mail, as prescribed by paragraph (b)(1)(i) of this section, directed to an officer, partner, a managing or general agent, or to any other person authorized by appointment or by Federal or State law to receive service of process.

FEDERAL AGENCIES

(iii) Service upon an officer or agency of the United States shall be made by delivering a copy of the complaint to the officer or agency, or in any manner prescribed for service by applicable regulations. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii) of this section.

STATE or LOCAL AGENCIES

(iv) Service upon a State or local unit of government, or a State or local officer, agency, department, corporation or other instrumentality shall be made by serving a copy of the complaint in the manner prescribed by the law of the State for the service of process on any such persons, or:

(A) If upon a State or local unit of government, or a State or local department, agency, corporation or other instrumentality, by delivering a copy of the complaint to the chief executive officer thereof;

(B) If upon a State or local officer by delivering a copy to such officer.

(v) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed return receipt. Such proof of service shall be filed with the complaint immediately upon completion of service.

FIRST CLASS SERVICE
for all other pleadings

(2) *Service of documents other than complaint, rulings, orders, and decisions.* All documents other than the complaint, rulings, orders, and decisions, may be served personally or by certified or first class mail.

NOTE: FORM OF PLEADINGS

(c) *Form of pleadings and documents.* (1) Except as provided herein, or by order of the Presiding Officer or of the Environmental Appeals Board, there are no specific requirements as to the form of documents.

(2) The first page of every pleading, letter, or other document shall contain a caption identifying the respondent and the docket number which is exhibited on the complaint.

(3) The original of any pleading, letter or other document (other than exhibits) shall be signed by the party filing or by his counsel or other representative. The signature constitutes a representation by the signer that he has read the pleading, letter or other document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

(4) The initial document filed by any person shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the Regional Hearing Clerk, Presiding Officer, and all parties to the proceeding. A party who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under these rules.

(5) The Environmental Appeals Board, the Regional Administrator, the Presiding Officer, or the Regional Hearing Clerk may refuse to file any document which does not comply with this paragraph. Written notice of such refusal, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any document refused for filing upon motion granted by the Environmental Appeals Board, the Regional Administrator, or the Presiding Officer, as appropriate.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5324, Feb. 13, 1992]

§ 22.06 Filing and service of rulings, orders, and decisions.

All rulings, orders, decisions, and other documents issued by the Regional Administrator, Regional Judicial Officer, or Presiding Officer, as appropriate, shall be filed with the Regional Hearing Clerk. All such documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Environmental Appeals Board. Copies of such rulings, orders, decisions, or other documents shall be served personally, or by certified mail, return receipt requested, upon all parties by the Environmental Appeals Board, the Regional Administrator, the Regional Judicial Officer, or the Presiding Officer, as appropriate.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5324, Feb. 13, 1992]

§ 22.07 Computation and extension of time.

(a) *Computation.* In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday or legal holiday, the stated time period shall be extended to include the next business day.

(b) ***Extensions of time.*** The Environmental Appeals Board, the Regional Administrator, or the Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion (1) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or (2) upon its or his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(c) *Service by mail.* Service of the complaint is complete when the return receipt is signed. Service of all other pleadings and documents is complete upon mailing. Where a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5324, Feb. 13, 1992]

§ 22.08 Ex parte discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, the Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

PUBLIC INSPECTION OF OFFICIAL RECORDS

§ 22.09 Examination of documents filed.

(a) Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during Agency business hours, inspect and copy any document filed in any proceeding. Such documents shall be made available by the Regional Hearing Clerk, the Hearing Clerk, or the Environmental Appeals Board, as appropriate.

(b) The cost of duplicating documents filed in any proceeding shall be borne by the person seeking copies of such documents. The Agency may waive this cost in appropriate cases.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

Subpart B—Parties and Appearances

§ 22.10 Appearances.

Any party may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

NOTE: STANDARD FOR INTERVENTION

§ 22.11 Intervention.

(a) *Motion.* A motion for leave to intervene in any proceeding conducted under these rules of practice must set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific reference to the factors set forth in the foregoing sentence and paragraph (c) of this section, within ten (10) days after service of the motion for leave to intervene.

(b) *When filed.* A motion for leave to intervene in a proceeding must ordinarily be filed before the first prehearing conference or, in the absence of a prehearing conference, before the initiation of correspondence under § 22.19(e), or if there is no such correspondence, prior to the setting of a time and place for a hearing. Any motion filed after that time must include, in addition to the information set forth in paragraph (a) of this section, a statement of good cause for the failure to file in a timely manner. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding.

(c) *Disposition.* Leave to intervene may be granted only if the movant demonstrates that (1) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (2) the movant will be adversely affected by a final order; and (3) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

PROVISION FOR AMICUS on motion only

(d) *Amicus curiae.* The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Administrator shall issue an order setting the time for filing such brief. If the motion is granted, the Presiding Officer or the Environmental Appeals Board shall issue an order setting the time for filing such brief.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

§ 22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more proceedings docketed under these rules of practice where (1) there exists common parties or common questions of fact or law, (2) consolidation would expedite and simplify consideration of the issues, and (3) consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.

(b) *Severance.* The Presiding Officer may, by motion or sua sponte, for good cause shown order any proceedings severed with respect to any or all parties or issues.

Subpart C—Prehearing Procedures

§ 22.13 Issuance of complaint.

If the complainant has reason to believe that a person has violated any provision of the Act, or regulations promulgated or a permit issued under the Act, he may institute a proceeding for the assessment of a civil penalty by issuing a complaint under the Act and these rules of practice. If the complainant has reason to believe that

(a) A permittee violated any term or condition of the permit, or

(b) A permittee misrepresented or inaccurately described any material fact in the permit application or failed to disclose all relevant facts in the permit application, or

(c) Other good cause exists for such action, he may institute a proceeding for the revocation or suspension of a permit by issuing a complaint under the Act and these rules of practice. A complaint may be for the suspension or revocation of a permit in addition to the assessment of a civil penalty.

§ 22.14 Content and amendment of the complaint.

(a) *Complaint for the assessment of a civil penalty.* Each complaint for the assessment of a civil penalty shall include:

(1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;

(2) Specific reference to each provision of the Act and implementing regulations which respondent is alleged to have violated;

(3) A concise statement of the factual basis for alleging the violation;

(4) The amount of the civil penalty which is proposed to be assessed;

(5) A statement explaining the reasoning behind the proposed penalty;

(6) Notice of respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the amount of the proposed penalty.

A copy of these rules of practice shall accompany each complaint served.

NOTE CAREFULLY THE ESSENTIAL ELEMENTS FOR EVERY COMPLAINT

(b) *Complaint for the revocation or suspension of a permit.* Each complaint for the revocation or suspension of a permit shall include:

(1) A statement reciting the section(s) of the Act, regulations, and/or permit authorizing the issuance of the complaint;

(2) Specific reference to each term or condition of the permit which the respondent is alleged to have violated, to each alleged inaccuracy or misrepresentation in respondent's permit application, to each fact which the respondent allegedly failed to disclose in his permit application, or to other reasons which form the basis for the complaint;

(3) A concise statement of the factual basis for such allegations;

(4) A request for an order to either revoke or suspend the permit and a statement of the terms and conditions of any proposed partial suspension or revocation;

(5) A statement indicating the basis for recommending the revocation, rather than the suspension, of the permit, or vice versa, as the case may be;

(6) Notice of the respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the proposed revocation or suspension.

A copy of these rules of practice shall accompany each complaint served.

(c) *Derivation of proposed civil penalty.* The dollar amount of the proposed civil penalty shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act.

AMENDMENT ONCE BEFORE ANSWER

(d) *Amendment of the complaint.* The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer or Regional Administrator, as appropriate. Respondent shall have twenty (20) additional days from the date of service of the amended complaint to file his answer.

WITHDRAWAL OF COMPLAINTS

(e) *Withdrawal of the complaint.* The complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice, only upon motion granted by the Presiding Officer or Regional Administrator, as appropriate.

§ 22.15 Answer to the complaint.

(a) *General.* Where respondent (1) Contests any material fact upon which the complaint is based; (2) contends that the amount of the penalty proposed in the complaint or the proposed revocation or suspension, as the case may be, is inappropriate; or (3) contends that he is entitled to judgment as a matter of law, he shall file a written answer to the complaint with the Regional Hearing Clerk. Any such answer to the complaint must be filed with the Regional Hearing Clerk within twenty (20) days after service of the complaint.

- *Contests material facts*
- *Contends fine/revocation is inappropriate*
- *Contends entitlement to judgment as a matter of law*

(b) *Contents of the answer.* The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense, (2) the facts which respondent intends to place at issue, and (3) whether a hearing is requested.

CONTENTS OF ANSWER

shall clearly & directly:

- *ADMIT, DENY or EXPLAIN each of the factual allegations to which respondent has knowledge*
- *STATE ANY DEFENSES*
- *STATE FACTS TO BE ARGUED*
- *WHETHER A HEARING IS REQUESTED*

(c) *Request for hearing.* A hearing upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer. In addition, a hearing may be held at the discretion of the Presiding Officer, sua sponte, if issues appropriate for adjudication are raised in the answer.

(d) *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

FAILURE TO ADMIT, DENY or EXPLAIN: CONSTITUTES AN ADMISSION

(e) *Amendment of the answer.* The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.

§ 22.16 Motions.

(a) *General.* All motions, except those made orally on the record during a hearing, shall (1) be in writing; (2) state the grounds therefor with particularity; (3) set forth the relief or order sought; and (4) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by § 22.05(b)(2).

- *BE IN WRITING*
- *STATE GROUNDS*
- *SET FORTH RELIEF REQUESTED*
- *INCLUDE SUPPORTING BRIEF/DOCUMENTS*

(b) *Response to motions.* A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, the Regional Administrator, or the Environmental Appeals Board, as appropriate, may set a shorter time for response, or make such orders concerning the disposition of motions as they deem appropriate.

(c) *Decision.* Except as provided in § 22.04(d)(1) and § 22.28(a), the Regional Administrator shall rule on all motions filed or made before an answer to the complaint is filed. The Environmental Appeals Board shall rule on all motions filed or made after service of the initial decision upon the parties. The Administrator shall rule on all motions filed or made after service of the initial decision upon the parties. The Presiding Officer shall rule on all other motions. Oral argument on motions will be permitted where the Presiding Officer, the Regional Administrator, or the Environmental Appeals Board considers it necessary or desirable.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992; 57 FR 60129, Dec. 18, 1992]

§ 22.17 Default order.

(a) *Default.* A party may be found to be in default (1) after motion, upon failure to file a timely answer to the complaint; (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer; or (3) after motion or sua sponte, upon failure to appear at a conference or hearing without good cause being shown. No finding of default on the basis of a failure to appear at a hearing shall be made against the respondent unless the complainant presents sufficient evidence to the Presiding Officer to establish a prima facie case against the respondent. Any motion for a default order shall include a proposed default order and shall be served upon all parties. The alleged defaulting party shall have twenty (20) days from service to reply to the motion. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default. If the complaint is for the revocation or suspension of a permit, the conditions of revocation or suspension proposed in the complaint shall become effective without further proceedings on the date designated by the Administrator in his final order issued upon default. Default by the complainant shall result in the dismissal of the complaint with prejudice.

(b) *Procedures upon default.* When Regional Administrator or Presiding Officer finds a default has occurred, he shall issue a default order against the defaulting party. This order shall constitute the initial decision, and shall be filed with the Regional Hearing Clerk.

(c) *Contents of a default order.* A default order shall include findings of fact showing the grounds for the order, conclusions regarding all material issues of law or discretion, and the penalty which is recommended to be assessed or the terms and conditions of permit revocation or suspension, as appropriate.

(d) For good cause shown the Regional Administrator or the Presiding Officer, as appropriate, may set aside a default order.

§ 22.18 Informal settlement; consent agreement and order.

(a) *Settlement policy.* The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The respondent may confer with complainant concerning settlement whether or not the respondent requests a hearing. Settlement conferences shall not affect the respondent's obligation to file a timely answer under § 22.16.

(b) *Consent agreement.* The parties shall forward a written consent agreement and a proposed consent order to the Regional Administrator whenever settlement or compromise is proposed. The consent agreement shall state that, for the purpose of this proceeding, respondent (1) admits the jurisdictional allegations of the complaint; (2) admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; and (3) consents to the assessment of a stated civil penalty or to the stated permit revocation or suspension, as the case may be. The consent agreement shall include any and all terms of the agreement, and shall be signed by all parties or their counsel or representatives.

(c) *Consent order.* No settlement or consent agreement shall dispose of any proceeding under these rules of practice without a consent order from the Regional Administrator. In preparing such an order, the Regional Administrator may require that the parties to the settlement appear before him to answer inquiries relating to the consent agreement or order.

CONTENTS OF CACO

1. Admit jurisdiction
2. Admit facts or "neither admit/nor deny"
3. Consent to fine

§ 22.19 Prehearing conference.

(a) *Purpose of prehearing conference.* Unless a conference appears unnecessary, the Presiding Officer, at any time before the hearing begins, shall direct the parties and their counsel or other representatives to appear at a conference before him to consider:

(1) The settlement of the case;

(2) The simplification of issues and stipulation of facts not in dispute;

(3) The necessity or desirability of amendments to pleadings;

(4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;

(5) The limitation of the number of expert or other witnesses;

(6) Setting a time and place for the hearing; and

(7) Any other matters which may expedite the disposition of the proceeding.

(b) *Exchange of witness lists and documents.* Unless otherwise ordered by the Presiding Officer, each party at the prehearing conference shall make available to all other parties (1) The names of the expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony, and (2) copies of all documents and exhibits which each party intends to introduce into evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer. Documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the Presiding Officer. The Presiding Officer shall allow the parties reasonable opportunity to review new evidence.

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer upon motion of a party or sua sponte. The Presiding Officer shall prepare and file for the record a written summary of the action taken at the conference. The summary shall incorporate any written stipulations or agreements of the parties and all rulings and appropriate orders containing directions to the parties.

(d) *Location of prehearing conference.* The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, DC, unless (1) the Presiding Officer determines that there is good cause to hold it at another location in a region or by telephone, or (2) the Supplemental rules of practice provide otherwise.

(e) *Unavailability of a prehearing conference.* If a prehearing conference is unnecessary or impracticable, the Presiding Officer, on motion or sua sponte, may direct the parties to correspond with him to accomplish any of the objectives set forth in this section.

(f) *Other discovery.* (1) Except as provided by paragraph (b) of this section, further discovery, under this section, shall be permitted only upon determination by the Presiding Officer:

NOTE THE STANDARDS

- *can not delay proceedings*
- *info is not otherwise obtainable*
- *info has significant probative value; no fishing expeditions*

(i) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not otherwise obtainable; and

(iii) That such information has significant probative value.

(2) The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that:

(i) The information sought cannot be obtained by alternative methods; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(3) Any party to the proceeding desiring an order of discovery shall make a motion therefor. Such a motion shall set forth;

(i) The circumstances warranting the taking of the discovery;

(ii) The nature of the information expected to be discovered; and

(iii) The proposed time and place where it will be taken. If the Presiding Officer determines that the motion should be granted, he shall issue an order for the taking of such discovery together with the conditions and terms thereof.

(4) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to (i) the inference that the information to be discovered would be adverse to the party from whom the information was sought, or (ii) the issuance of a default order under §22.17(a).

§ 22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. In addition, the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

"ENTITLED TO JUDGMENT AS A MATTER OF LAW"

no genuine issue of material fact exists

IN "ALL OR IN PART"

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all the issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He shall thereupon issue an interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Subpart D—Hearing Procedure

§ 22.21 Scheduling the hearing.

(a) When an answer is filed, the Regional Hearing Clerk shall forward the complaint, the answer, and any other documents filed thus far in the proceeding to the Chief Administrative Law Judge who shall assign himself or another Administrative Law Judge as Presiding Officer, unless otherwise provided in the Supplemental rules of practice. The Presiding Officer shall then obtain the case file from the Chief Administrative Law Judge and notify the parties of his assignment.

(b) *Notice of hearing.* If the respondent requests a hearing in his answer, or one is ordered by the Presiding Officer under § 22.15(c), the Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing. The Presiding Officer may issue the notice of hearing at any appropriate time, but not later than twenty (20) days prior to the date set for the hearing.

(c) *Postponement of hearing.* No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

(d) *Location of the hearing.* The location of the hearing shall be determined in accordance with the method for determining the location of a prehearing conference under § 22.19(d).

LOCATION:

- *County where respondent resides or conducts business*
- *in the relevant EPA regional office*
- *In Washington, D.C.*

§ 22.22 Evidence.

(a) *General.* The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is not admissible. In the presentation, admission, disposition, and use of evidence, the Presiding Officer shall preserve the confidentiality of trade secrets and other commercial and financial information. The confidential or trade secret status of any information shall not, however, preclude its being introduced into evidence. The Presiding Officer may make such orders as may be necessary to consider such evidence *in camera*, including the preparation of a supplemental initial decision to address questions of law, fact, or discretion which arise out of that portion of the evidence which is confidential or which includes trade secrets.

"SHALL ADMIT ALL EVIDENCE"
WHICH IS NOT:
irrelevant
immaterial
unduly repetitious
otherwise unreliable

(b) *Examination of witnesses.* Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in these rules of practice or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

VERIFIED STATEMENTS

(c) ***Verified statements.*** **The Presiding Officer may admit an insert into the record as evidence, in lieu of oral testimony, statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the witness shall deliver a copy of the statement to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the statement shall swear to or affirm the statement and shall be subject to appropriate oral cross-examination upon the contents thereof.**

(e) ***Exhibits.*** **Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.**

AFFIDAVITS

(d) ***Admission of affidavits where the witness is unavailable.*** **The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term "unavailable" shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.**

1L NOTICE

(f) *Official notice.* Official notice may be taken of any matter judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) *Offer of proof.* Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded. Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

[45 FR 24363, Apr 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

§ 22.24 Burden of presentation; burden of persuasion.

The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty, revocation, or suspension, as the case may be, is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

- *BURDEN OF PRESENTATION*
- *BURDEN OF PERSUASION*

§ 22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript order to be kept confidential by the Presiding Officer.

§ 22.26 Proposed findings, conclusions, and order.

Within twenty (20) days after the parties are notified of the availability of the transcript, or within such longer time as may be fixed by the Presiding Officer, any party may submit for the consideration of the Presiding Officer, proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a time by which reply briefs must be submitted. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

Subpart E—Initial Decision and Motion To Reopen a Hearing

§ 22.27 Initial decision.

(a) *Filing and contents.* The Presiding Officer shall issue and file with the Regional Hearing Clerk his initial decision as soon as practicable after the period for filing reply briefs under § 22.26 has expired. The Presiding Officer shall retain a copy of the complaint in the duplicate file. The initial decision shall contain his findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, a recommended civil penalty assessment, if appropriate, and a proposed final order. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward a copy to all parties, and shall send the original, along with the record of the proceeding, to the Hearing Clerk. The Hearing Clerk shall forward a copy of the initial decision to the Environmental Appeals Board.

"shall determine...the penalty... ....in accordance...with any criteria set forth in the Act" and "must consider any civil penalty guidelines issued under the Act."

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, sua sponte, to review the initial decision.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

§ 22.28 Motion to reopen a hearing.

(a) *Filing and content.* A motion to reopen a hearing to take further evidence must be made no later than twenty (20) days after service of the initial decision on the parties and shall (1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk.

(b) *Disposition of motion to reopen a hearing.* Within ten (10) days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Regional Hearing Clerk and serve on all other parties an answer thereto. The Presiding Officer shall announce his intent to grant or deny such motion as soon as practicable thereafter. The conduct of any proceeding which may be required as a result of the granting of any motion allowed in this section shall be governed by the provisions of the applicable sections of these rules. The filing of a motion to reopen a hearing shall automatically stay the running of all time periods specified under these Rules until such time as the motion is denied or the reopened hearing is concluded.

Subpart F—Appeals and Administrative Review

§ 22.29 Appeal from or review of interlocutory orders or rulings.

(a) *Request for interlocutory appeal.* Except as provided in this section, appeals to the Environmental Appeals Board shall obtain as a matter of right only from a default order, an accelerated decision or decision to dismiss issued under § 22.20(b)(1), or an initial decision rendered after an evidentiary hearing. Appeals from other orders or rulings shall lie only if the Presiding Officer or Regional Administrator, as appropriate, upon motion of a party, certifies such orders or rulings to the Environmental Appeals Board on appeal. Requests for such certification shall be filed in writing within six (6) days of notice of the ruling or service of the order, and shall state briefly the grounds to be relied upon on appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may certify any ruling for appeal to the Environmental Appeals Board when (1) the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, and (2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective.

(c) *Decision.* If the Environmental Appeals Board determines that certification was improvidently granted, or if the Environmental Appeals Board takes no action within thirty (30) days of the certification, the appeal is dismissed. When the Presiding Officer declines to certify an order or ruling to the Environmental Appeals Board on interlocutory appeal, it may be reviewed by the Environmental Appeals Board only upon appeal from the initial decision, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest. Such motion shall be made within six (6) days of service of an order of the Presiding Officer refusing to certify a ruling for interlocutory appeal to the Environmental Appeals Board. Ordinarily, the interlocutory appeal will be decided on the basis of the submissions made by the Presiding Officer. The Environmental Appeals Board may, however, allow further briefs and oral argument.

(d) *Stay of proceedings.* The Presiding Officer may stay the proceedings pending a decision by the Environmental Appeals Board upon an order or ruling certified by the Presiding Officer for an interlocutory appeal. Proceedings will not be stayed except in extraordinary circumstances. Where the Presiding Officer grants a stay of more than thirty (30) days, such stay must be separately approved by the Environmental Appeals Board.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

§ 22.30 Appeal from or review of initial decision.

(a) *Notice of appeal.* (1) Any party may appeal an adverse ruling or order of the Presiding Officer by filing a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board and upon all other parties and amicus curiae within twenty (20) days after the initial decision is served upon the parties. The notice of appeal shall set forth alternative findings of fact, alternative conclusions regarding issues of law or discretion, and a proposed order together with relevant references to the record and the initial decision. The appellant's brief shall contain a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review, argument on the issues presented, and a short conclusion stating the precise relief sought, together with appropriate references to the record.

(2) Within fifteen (15) days of the service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or amicus curiae may file and serve with the Environmental Appeals Board a reply brief responding to argument raised by the appellant, together with references to the relevant portions of the record, initial decision, or opposing brief. Reply briefs shall be limited to the scope of the appeal brief. Further briefs shall be filed only with the permission of the Environmental Appeals Board.

(b) *Sua sponte review by the Environmental Appeals Board.* Whenever the Environmental Appeals Board determines sua sponte to review an initial decision, the Environmental Appeals Board shall serve notice of such intention on the parties within forty-five (45) days after the initial decision is served upon the parties. The notice shall include a statement of issues to be briefed by the parties and a time schedule for the service and filing of briefs.

(c) *Scope of appeal or review.* If the Environmental Appeals Board determines that issues raised, but not appealed by the parties, should be argued, it shall give counsel for the parties reasonable written notice of such determination to permit preparation of adequate argument. Nothing herein shall prohibit the Environmental Appeals Board from remanding the case to the Presiding Officer for further proceedings.

(d) *Argument before the Environmental Appeals Board.* The Environmental Appeals Board may, upon request of a party or sua sponte, assign a time and place for oral argument after giving consideration to the convenience of the parties.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

Subpart G—Final Order on Appeal

§ 22.31 Final order on appeal.

(a) *Contents of the final order.* When an appeal has been taken or the Environmental Appeals Board issues a notice of intent to conduct a review sua sponte, the Environmental Appeals Board shall issue a final order as soon as practicable after the filing of all appellate briefs or oral argument, whichever is later. The Environmental Appeals Board shall adopt, modify, or set aside the findings and conclusions contained in the decision or order being reviewed and shall set forth in the final order the reasons for its actions. The Environmental Appeals Board may, in its discretion, increase or decrease the assessed penalty from the amount recommended to be assessed in the decision or order being reviewed, except that if the order being reviewed is a default order, the Environmental Appeals Board may not increase the amount of the penalty.

(b) *Payment of a civil penalty.* The respondent shall pay the full amount of the civil penalty assessed in the final order within sixty (60) days after receipt of the final order unless otherwise agreed by the parties. Payment shall be made by forwarding to the Regional Hearing Clerk a cashier's check or certified check in the amount of the penalty assessed in the final order, payable to the Treasurer, United States of America.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5326, Feb. 13, 1992]

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order shall be filed within ten (10) days after service of the final order. Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to § 22.04(a) and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless specifically so ordered by the Environmental Appeals Board.

[57 FR 5326, Feb. 13, 1992]

TSCA

Clean Air

Subpart H—Supplemental Rules

§ 22.33 Supplemental rules of practice governing the administrative assessment of civil penalties under the Toxic Substances Control Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding consolidated rules of practice (40 CFR part 22), all formal adjudications for the assessment of any civil penalty conducted under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)). Where inconsistencies exist between these Supplemental rules and the Consolidated rules, (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Subpoenas.* (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe the evidence sought as specifically as practicable.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the agency.

§ 22.34 Supplemental rules of practice governing the administrative assessment of civil penalties under title II of the Clean Air Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all proceedings to assess a civil penalty conducted under sections 205(c), 211(d), and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7524(c), 7545(d), and 7547(d)). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Issuance of notice.* (1) Prior to the issuance of an administrative penalty order assessing a civil penalty, the person to whom the order is to be issued shall be given written notice of the proposed issuance of the order. Such notice shall be provided by the issuance of a complaint pursuant to § 22.13 of the Consolidated Rules of Practice.

(2) Notwithstanding § 22.15(a), any answer to the complaint must be filed with the Hearing Clerk within thirty (30) days after service of the complaint.

(c) ***Subpoenas.*** (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of;

(i) The grounds and necessity therefor, and

(ii) The materiality and relevancy of the evidence to be adduced.

Requests for the production of documents shall describe with specificity the documents sought.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by EPA.

[57 FR 4318, Feb. 4, 1992]

§ 22.35 Supplemental rules of practice governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all formal adjudications for the assessment of any civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1261(a)). Where inconsistencies exist between these Supplemental rules and the Consolidated rules, (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Venue.* The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties.

(c) *Evaluation of proposed civil penalty.* In determining the dollar amount of the recommended civil penalty assessed in the initial decision, the Presiding Officer shall consider, in addition to the criteria listed in section 14(a)(3) of the Act, (1) respondent's history of compliance with the Act or its predecessor statute and (2) any evidence of good faith or lack thereof. The Presiding Officer must also consider the guidelines for the Assessment of Civil Penalties published in the FEDERAL REGISTER (39 FR 27711), and any amendments or supplements thereto.

FIFRA

§ 22.36 Supplemental rules of practice governing the administrative assessment of civil penalties and the revocation or suspension of permits under the Marine Protection, Research, and Sanctuaries Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all formal adjudications conducted under section 105(a) or (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a) and (f)). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Additional criterion for the issuance of a complaint for the revocation or suspension of a permit.* In addition to the three criteria listed in 40 CFR 22.13 for issuing a complaint for the revocation or suspension of a permit, complaints may be issued on the basis of a person's failure to keep records and notify appropriate officials of dumping activities, as required by 40 CFR 224.1 and 223.2.

Marine Protection Act

§ 22.37 Supplemental rules of practice governing the administrative assessment of civil penalties under the Solid Waste Disposal Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all proceedings to assess a civil penalty conducted under section 3008 of the Solid Waste Disposal Act (42 U.S.C. 6928) (the "Act"). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Issuance of notice.* Whenever, on the basis of any information, the Administrator determines that any person is in violation of (1) any requirement of subtitle C of the Act, (2) any regulation promulgated pursuant to subtitle C of the Act, or (3) a term or condition of a permit issued pursuant to subtitle C of the Act, the Administrator shall issue notice to the alleged violator of his failure to comply with such requirement, regulation or permit.

(c) *Content of notice.* Each notice of violation shall include:

(1) A specific reference to each provision of the Act, regulation, or permit term or condition which the alleged violator is alleged to have violated; and

(2) A concise statement of the factual basis for alleging such violation.

(d) *Service of notice.* Service of notice shall be made in accordance with § 22.05(b)(2) of the Consolidated Rules of Practice.

(e) *Issuance of the complaint.* (1) Except as provided in paragraph (e)(3) of this section, the complainant may issue a complaint whenever he has reason to believe that any violation extends beyond the thirtieth day after service of the notice of violation.

(2) The complaint shall include, in addition to the elements stated in § 22.14 of the Consolidated Rules, an order requiring compliance within a specified time period. The complaint shall be equivalent to the compliance order referred to in section 3008 of the Act.

(3) Whenever a violation is of a non-continuous or intermittent nature, the Administrator may issue a complaint, without any prior notice to the violator, pursuant to § 22.14 of the Consolidated Rules of Practice which may also require the violator to take any and all measures necessary to offset all adverse effects to health and the environment created, directly or indirectly, as a result of the violation.

(4) Notwithstanding § 22.15(a), any answer to the complaint must be filed with the Regional Hearing Clerk within thirty (30) days after the filing of the complaint.

(f) *Subpoenas.* (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe with specificity the documents sought.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(42 U.S.C. 6901, *et seq.*)

EFFECTIVE DATE NOTE: At 45 FR 79808, Dec. 2, 1980, paragraphs (b), (c), (d), (e)(1) and (3) of § 22.37 were suspended until further notice, effective Dec. 2, 1980.

§ 22.38 Supplemental rules of practice governing the administrative assessment of Class II penalties under the Clean Water Act.

(a) *Scope of these supplemental rules.* These supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), administrative proceedings for the assessment of any Class II civil penalty under section 309(g) of the Clean Water Act (33 U.S.C. 1319(g)).

(b) *Consultation with states.* The Administrator will consult with the state in which the alleged violation occurs before issuing a final order assessing a Class II civil penalty.

(c) *Public notice.* Before issuing a final order assessing a Class II civil penalty, the Administrator will provide public notice of the complaint.

(d) *Comment by a person who is not a party.* A person not a party to the Class II proceeding who wishes to comment upon a complaint must file written comments with the Regional Hearing Clerk within 30 days after public notice of the complaint and serve a copy of the comments upon each party. For good cause shown the Administrator, the Regional Administrator, or the Presiding Officer, as appropriate, may accept late comments. The Administrator will give any person who comments on a complaint notice of any hearing and notice of the final order assessing a penalty. Although commenters may be heard and present evidence at any hearing held under section 309(g) of the Act, commenters shall not be accorded party status with right of cross examination unless they formally move to intervene and are granted party status under § 22.11.

(e) *Administrative procedure and judicial review.* Action of the Administrator for which review could have been obtained under section 509(b)(1) of the Act shall not be subject to review in an administrative proceeding for the assessment of Class II civil penalty under section 309(g).

(f) *Petitions to set aside an order and to provide a hearing.* If no hearing on the complaint is held before issuance of an order assessing a Class II civil penalty, any person who commented on the complaint may petition the Administrator, within 30 days after issuance of the order, to set aside the order and to provide a hearing on the complaint. 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 will immediately set aside the order and provide a hearing in accordance with the Consolidated Rules of Practice and these supplemental rules of practice. If the Administrator denies a hearing under section 309(g)(4)(C) of the Act, the Administrator will provide to the petitioner, and publish in the FEDERAL REGISTER, notice of and the reasons for the denial.

[55 FR 23840, June 12, 1990]

§ 22.39 Supplemental rules of practice governing the administrative assessment of administrative penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), administrative proceedings for the assessment of any civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Subpoenas.* (1) The attendance and testimony of witnesses or the production of relevant papers, books, and documents may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of—

(i) The grounds and necessity therefor, and

(ii) The materiality and relevancy of the evidence to be adduced.

Requests for the production of documents shall describe the evidence sought as specifically as practicable.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(c) *Judicial review.* Any person who requested a hearing with respect to a Class II civil penalty under section 109 of CERCLA and who is the recipient of a final order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia or for any other circuit in which such person resides or transacts business. Any person who requested a hearing with respect to a Class I civil penalty under section 109 of CERCLA and who is the recipient of a final order assessing the civil penalty may file a petition for judicial review of such order with the appropriate district court of the United States. All petitions must be filed within 30 days of the date the order making the assessment was issued.

(d) *Payment of civil penalty assessed.* Payment of civil penalties finally assessed by the Regional Administrator shall be made by forwarding a cashier's check, payable to the "EPA, Hazardous Substances Superfund," in the amount assessed, and noting the case title and docket number, to the appropriate regional Superfund Lockbox Depository. Notice of payment must be sent by Respondent to the Hearing Clerk for inclusion as part of the administrative record for the proceeding in which the civil penalty was assessed. Interest on overdue payments shall be collected pursuant to the Debt Collection Act, 37 U.S.C. 3717.

[54 FR 21176, May 16, 1989]

CERCLA

§ 22.40 Supplemental rules of practice governing the administrative assessment of administrative penalties under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA).

(a) *Scope of these Supplemental Rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), administrative proceedings for the assessment of any civil penalty under section 325 for violations of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01 through 22.32) these Supplemental rules shall apply.

(b) *Subpoenas.* (1) The attendance and testimony of witnesses or the production of relevant papers, books, and documents may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefore, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe the evidence sought as specifically as practicable.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to request initiated by the Presiding Officer, fees shall be paid by the Agency.

(c) *Judicial review.* Any person against whom a civil penalty is assessed may seek judicial review in the appropriate district court of the United States by filing a notice of appeal and by simultaneously sending a copy of such notice by certified mail to the Administrator. The notice must be filed within 30 days of the date the order making such assessment was issued. The Administrator shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed.

EPCRA

(d) *Procedures for collection of civil penalty.* If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the United States, the Administrator may request the Attorney General of the United States to institute a civil action in an appropriate district court of the United States to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty on the record. Interest on overdue payments shall be collected pursuant to the Debt Collection Act, 37 U.S.C. 3717.

[54 FR 21176, May 16, 1989]

§ 22.41 Supplemental rules of practice governing the administrative assessment of civil penalties under Title II of the Toxic Substances Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).

(a) Scope of the Supplemental rules. These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all proceedings to assess a civil penalty conducted under section 207 of the Toxic Substances Control Act (the "Act") (15 U.S.C. 2647). Where inconsistencies exist between these Supplemental rules and the Consolidated rules (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) Collection of civil penalty. Any civil penalty collected under section 207 of the Act shall be used by the local educational agency for purposes of complying with Title II of the Act. Any portion of a civil penalty remaining unspent after a local educational agency achieves compliance shall be deposited into the Asbestos Trust Fund established under section 5 of AHERA.

[54 FR 24112, June 5, 1989]

AHERA

Safe Drinking Water Act

§ 22.42 Supplemental rules of practice governing the administrative assessment of civil penalties for violations of compliance orders issued under Part B of the Safe Drinking Water Act.

(a) *Scope of these supplemental rules.* These supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all proceedings to assess a civil penalty under section 1414(g)(3)(B). Where inconsistencies exist between these supplemental rules and the Consolidated rules, these supplemental rules shall apply.

(b) *Definition of "person."* In addition to the terms set forth in 40 CFR 22.03(a) that define *person*, for purposes of this section and proceedings under section 1414(g)(3)(B) of the Safe Drinking Water Act, the term person shall also include any officer, employee, or agent of any corporation, company or association.

(c) *Issuance of complaint.* If the Administrator determines that a person has violated any provision of a compliance order issued under section 1414(g)(1) of the Safe Drinking Water Act, 42 U.S.C. 300g-3(g)(1), he may institute a proceeding for the assessment of a civil penalty by issuing a complaint under the Act and this part.

(4) *Content of the complaint.* A complaint for the assessment of civil penalties under this part shall include specific reference to:

(1) Each provision of the compliance order issued under section 1414(g)(1) of the Act, 42 U.S.C. 300g-3(g)(1), which is alleged to have violated; and

(2) Each violation of a Safe Drinking Water Act regulation, schedule, or other requirement which served as the basis for the compliance order which is alleged to have been violated.

(e) *Scope of hearing.* Action of the Administrator with respect to which judicial review could have been obtained under section 1448 of the Safe Drinking Water Act, 42 U.S.C. 300j-7, shall not be subject to review in an administrative proceeding for the assessment of a civil penalty under section 1414(g)(3)(B) of the SDWA and this part.

[56 FR 3757, Jan. 30, 1991]

§ 22.43 Supplemental rules of practice governing the administrative assessment of civil penalties under section 113(d)(1) of the Clean Air Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all proceedings to assess a civil penalty conducted under section 113(d)(1) of the Clean Air Act (42 U.S.C. 7413(d)(1)). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Issuance of notice.* (1) Prior to the issuance of an administrative penalty order assessing a civil penalty, the person to whom the order is to be issued shall be given written notice of the proposed issuance of the order. Such notice shall be provided by the issuance of a complaint pursuant to § 22.13 of the Consolidated Rules of Practice.

(2) Notwithstanding § 22.15(a), any answer to the complaint must be filed with the Regional Hearing Clerk within thirty (30) days after service of the complaint.

(c) *Subpoenas.* (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of;

(i) The grounds and necessity therefor, and

(ii) The materiality and relevancy of the evidence to be adduced.

Requests for the production of documents shall describe with specificity the documents sought.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by EPA.

[57 FR 4318, Feb. 4, 1992]

APPENDIX TO PART 22—ADDRESSES OF EPA REGIONAL OFFICES

Region I—John F. Kennedy Federal Building, Boston, MA 02203.
Region II—26 Federal Plaza, New York, NY 10007.
Region III—Curtis Building, 6th and Walnut Streets, Philadelphia, PA 19106.
Region IV—345 Courtland Street NE., Atlanta, GA 30308.
Region V—230 South Dearborn Street, Chicago, IL 60604.
Region VI—First International Building, 1201 Elm Street, Dallas, TX 75270.
Region VII—1735 Baltimore Street, Kansas City, MO 64108.
Region VIII—1860 Lincoln Street, Denver, CO 80203.
Region IX—215 Fremont Street, San Francisco, CA 94105.
Region X—1200 6th Avenue, Seattle, WA 98101.

CAA

Hearings Before an EPA Administrative Law Judge

by Judge Gerald Harwood

Editors' Summary: Practice before administrative agencies, especially EPA, has always been an important part of an environmental lawyer's job. Administrative practice is becoming increasingly important. Several statutes have recently been amended to provide for the administrative assessment of civil penalties by EPA. The first step after EPA proposes to assess a civil penalty is generally a hearing before an EPA administrative law judge (ALJ). Judge Harwood, EPA's Chief Administrative Law Judge, describes the role of the ALJ within EPA and the statutes under which adjudicatory hearings most frequently arise. Judge Harwood then outlines the procedures followed in hearings before EPA ALJs, from the administrative complaint through the issuance of an initial decision.

When the Environmental Protection Agency (EPA) proposes to assess a civil penalty against a party for violating the law or regulations or to deny, modify, or revoke a license or permit, due process requires that it first grant the party a hearing on the matter. In most instances such hearings are held before an administrative law judge.[1] The administrative law judge is an employee of EPA who by statute is made largely independent of supervision and control by EPA to ensure the judge's impartiality in presiding over and deciding cases.[2]

The Office of Administrative Law Judges

EPA's administrative law judges constitute a staff office under the Administrator. A Chief Administrative Law Judge has general charge of the office but also presides over cases like the other judges.[3]

The Office is authorized to have seven judges, including the Chief Judge. For reasons that are largely historical, two of the judges are located outside of Washington, D.C., one judge having his office at the Region IV headquarters in Atlanta, Georgia, and the other judge at the Region VII headquarters in Kansas City, Kansas. The remaining judges are located at EPA headquarters in Washington, D.C.

Cases are assigned to the judges by the Chief Judge. Assignments are made in rotation so far as practicable, except that when the workload permits, the judges in Washington, D.C., will be assigned cases that are heard in Washington, D.C., and the judges in Atlanta and Kansas City will be assigned cases that will be heard in their respective cities.

Another factor taken into account in assigning cases is the availability of the judge because of commitments to cases already assigned and the relative size of the judge's workload. Although all judges theoretically start with the same number of cases, for any number of reasons the percentage of cases that actually go to hearing may vary greatly between judges, and some cases will require considerably more work than others. Finally, the Chief Judge may depart from the rotational order to take a case that is of unusual difficulty.

Statutes Providing for Hearings

Hearings before an administrative law judge are provided under numerous statutory provisions. Cases currently arise most frequently under the following statutes:

Clean Air Act §120[4]—assessment of a civil penalty against a stationary source that is not in compliance with any applicable emission requirement.

Clean Air Act §207(c)[5]—hearing on the recall of motor vehicles that do not conform to emission standards.

Clean Water Act §402[6]—hearing on a challenge to a permit regulating the discharge of pollutants into the water.

Resource Conservation and Recovery Act (RCRA) §3008[7]—the assessment of a civil penalty and issuance of a compliance order for failure to comply with requirements relating to the generation, transportation, treatment, storage, and disposal of hazardous waste.

Toxic Substances Control Act (TSCA) §16(a)[8]—the assessment of a civil penalty for failure to comply with the requirements relating to toxic substances.

Marine Protection, Research and Sanctuaries Act

Judge Harwood is the Chief Administrative Law Judge for the United States Environmental Protection Agency. This article was written by the author in his private capacity. No official report or endorsement by the United States Environmental Protection Agency is intended or should be inferred.

1. Administrative law judges preside over hearings that are required by statute "to be determined on the record after opportunity for an agency hearing." Administrative Procedure Act (APA), 5 U.S.C. §554(a), ELR STAT. ADMIN. PROC. 004. The statute may expressly say that the hearing is to be "on the record," or this may be inferred from the nature of the hearing provided. Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 8 ELR 20207 (1st Cir. 1978), *cert. denied*, 439 U.S. 824 (1978). Administrative law judges may also preside over other hearings if requested by EPA.
2. The pay of the administrative law judge is prescribed by the Office of Personnel Management. 5 U.S.C. §5372. The judge can be removed only for good cause established and determined by the Merit Systems Protection Board after a hearing, 5 U.S.C. §7521, and the judge's performance cannot be rated by EPA. 5 U.S.C. §§4302, 4303. The judge's impartiality is assured by a rigorous "separation of functions" that insulates the judge from any supervision or direction by agency employees who have participated in the investigation or prosecution of the case and that also prohibits any ex parte discussion by the judge with any person on any fact in issue. APA, 5 U.S.C. §554(d), ELR STAT. ADMIN. PROC. 004.
3. In addition to the judges, the staff of the Office consists of the hearing clerk, who has custody of the case files, an assistant to the hearing clerk, a legal staff assistant to assist the Chief Judge in the administration of the Office, secretaries, and one attorney advisor.
4. 42 U.S.C. §7420, ELR STAT. 42226.
5. 42 U.S.C. §7541(c), ELR STAT. 42247.
6. 33 U.S.C. §1342.
7. 42 U.S.C. §6928, ELR STAT. RCRA 019.
8. 15 U.S.C. §2615(a).

§105(a) and (f)[9]—the assessment of a civil penalty for violation of the restrictions on ocean dumping and the revocation or suspension of a permit for dumping materials into the ocean.

Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) §3(c)(2)(B)[10]—suspension of a registration because of failure to secure additional data required to maintain a registration of a pesticide.

FIFRA §6[11]—hearing on refusal to register a pesticide, cancellation of a registration, suspension of a registration, changes in the classification of a pesticide and applications under FIFRA §§3 and 18 to modify a previous cancellation or suspension order.

FIFRA §14(a)[12]—assessment of a civil penalty for violations of the Act.

Hearing Procedures

The procedures in a hearing before the administrative law judge depend upon the statute under which the hearing is brought. One basic procedure, however, applies in all cases. All decisions issued by the administrative law judge are reviewed by the Administrator or his delegate, the Judicial Officer.[13] The review can be either discretionary or mandatory, and this again depends upon the statute under which the proceeding is brought.

Hearings Governed by Consolidated Rules

The largest number of cases currently being handled by the administrative law judges are governed by the Consolidated Rules of Practice.[14] These rules apply to proceedings under FIFRA §14(a), RCRA §3008, TSCA §16(a), and Marine Protection, Research and Sanctuaries Act §105.[15] A recent amendment also applies these rules to the assessment of Class II penalties under Clean Water Act §309(g).[16] In addition to general rules applicable to proceedings under each of these provisions, the consolidated rules contain supplemental rules specifically addressed to each provision.[17]

Cases under the consolidated rules are instituted by the issuance of a complaint setting out the acts and practices being questioned.[18] In the case of a complaint under RCRA §3008, the complaint must also contain a compliance order.[19] An administrative law judge is not assigned to the case until an answer is filed. Motions for an extension of time to answer or for other relief filed prior to the answer must be made to the Judicial Officer if the complaint is issued out of Washington, D.C., or to the Regional Administrator, if the complaint emanated from a Regional Office.

Once the case has been assigned to an administrative law judge, the parties are usually directed by the judge to discuss settlement, if this has not already been done, and to report on the status of settlement.[20] If the case cannot be settled, the parties will be directed to exchange their evidence by supplying lists of proposed witnesses with a summary of their expected testimony and copies of documents they intend to introduce into evidence.[21] They may also be directed to furnish such other information as the judge considers relevant. This is almost always done by correspondence, or if it cannot be satisfactorily handled by correspondence, then by a telephone conference. Very rarely do the proceedings under the consolidated rules require prehearing conferences where the parties are personally present. The matter is set down for a hearing once it has been determined that settlement is unlikely. At least twenty days notice of hearing is required.[22] The parties, of course, may still continue with their efforts to settle, and can settle any time up to the commencement of the hearing. Hearings must be held either at the place where the respondent is located or does business, in the city where EPA's Regional Office is located (if the complaint has been issued by a Regional Office), or at EPA headquarters at Washington, D.C., unless there is some good reason for holding it elsewhere.[23] The practice has been in most instances to hold the hearing at the place where the respondent is located or does business.

One special feature to be noted about practice under the consolidated rules is that discovery is not as liberal as it is under the Federal Rules of Civil Procedure where parties are free to engage in discovery and the court gets involved only if a party applies to it for some relief. There is no discovery under the consolidated rules over and above that obtained through the prehearing exchange except to the extent permitted by the judge upon application by a party. In fact, this is generally true of all hearings before EPA.[24]

In proceedings under FIFRA §14(a), there is no authority to issue subpoenas. While this limits the ability of a party to obtain information from someone unwilling to furnish it, it does not leave the party totally without a remedy. In such cases, if a party refuses to produce information in its possession or control, the party requesting the information can ask the judge to draw the inference that the information would be adverse to the position of the party refusing to produce the information.[25] The inference, however, has to flow logically from the nature of the evidence being sought. For example, if a party claims that it lacks the financial resources to pay a penalty but refuses to produce statements of its financial condition, the inference can be drawn that the party does have the means to pay the penalty. It is unlikely, however, that any in-

9. 33 U.S.C. §1415(a) and (f), ELR STAT. 41865.
10. 7 U.S.C. §136a, ELR STAT. FIFRA 005.
11. 7 U.S.C. §136d, ELR STAT. FIFRA 012.
12. 7 U.S.C. §136*l*, ELR STAT. FIFRA 020.
13. Since in most instances review is by the Judicial Officer, reference to the Judicial Officer hereafter will mean the Administrator when the Administrator elects to review a case.
14. 40 C.F.R. §22.
15. 40 C.F.R. §22.01. The consolidated rules also state that they apply to civil penalty cases under Clean Air Act §211. The Judicial Officer, however, has ruled that §211 does not authorize the imposition of administrative penalties. *See* In Re Transportation, Inc., No CAA(211)-27 (Feb. 25, 1982).
16. 33 U.S.C. §1319(g). *See* 52 Fed. Reg. 30671 (Aug. 17, 1987). Class II penalties may reach $125,000. *See* Liebesman & Laws, *The Water Quality Act of 1987: A Major Step Ahead in Assuring the Quality of the Nation's Waters*, 17 ELR 10311, 10317 (Aug. 1987).
17. *See, e.g.*, supplemental rules for civil penalties under RCRA §3008, 40 C.F.R. §22.37.
18. 40 C.F.R. §§22.13 and 22.14.
19. 40 C.F.R. §22.37(e).
20. 40 C.F.R. §22.18.
21. 40 C.F.R. §22.19(b).
22. 40 C.F.R. §22.21(b).
23. 40 C.F.R. §22.19(d).
24. 40 C.F.R. §22.19(f).
25. *See* 40 C.F.R. §22.04(c)(5).

ference could be drawn from the refusal to produce financial statements as to who owns the corporation or whether the stock is held by one individual or several individuals.

Under the consolidated rules, the judge renders an "initial decision." Such a decision becomes the final decision of the EPA unless an appeal is taken by a party or the Judicial Officer elects to review the decision sua sponte within the time allowed in the consolidated rules.[26] The rules also allow for the granting of an accelerated decision (really summary judgment) when a party can demonstrate that there is no dispute as to the material facts and the party is entitled to judgment as a matter of law.[27]

The consolidated rules allow a party to file a motion to reopen an initial decision within 20 days after the initial decision is issued to adduce additional evidence if it is shown that there is good cause why the evidence could not be presented at the hearing.[28] Outside of this limited exception, the administrative law judge has no further jurisdiction over the matter once the initial decision is issued. Requests for extensions of time to appeal or for other relief must be made to the Judicial Officer.[29] Regardless of whether the complaint issued out of the headquarters in Washington, D.C., or out of a Regional Office, all appeals are taken to the Judicial Officer. While the agency has no further appeal to the courts from a final order, the other party may seek judicial review of an adverse order.[30]

One final thing to be noted is that, in assessing a civil penalty, the judge must consider any guidelines that the agency has issued with respect to the assessment of civil penalties under the Act involved. If the judge decides not to follow the applicable guideline, the judge must give reasons for not doing so.[31] This requirement, however, does not apply to the Judicial Officer.[32]

Hearings Not Governed by the Consolidated Rules

The consolidated rules do not apply to all adjudicative hearings conducted by EPA, presumably because the nature of the hearing provided under some statutes makes it desirable to have special rules of practice. A common feature of these proceedings is that they are not instituted by the usual complaint and answer. Instead, the hearing is granted only after a party has demonstrated to EPA that there are factual issues on which the party is entitled to an evidentiary hearing. Like the consolidated rules, the procedures provide for prehearing conferences, limited discovery over and above the prehearing exchange, accelerated decisions, motions, and the like. There are, however, features peculiar to each that will be briefly mentioned.

☐ *Clean Air Act §120:* Proceedings under §120 are brought against a major stationary source (building, structure, or installation) that has not complied with the standards regulating the emission of pollutants into the atmosphere.[33] The penalty assessed is the savings realized by the source in not complying with the standard. The savings, or economic benefit, is computed according to a complex formula, and EPA has developed a computer program for its calculation.[34]

The first step in §120 proceedings is an EPA notice informing the source of the agency's finding of noncompliance. At this point, the source has two options: calculate the penalty following the agency's model, or petition for reconsideration on the ground that the finding of noncompliance is wrong or that the source is entitled to one or more of the exemptions allowed under the statute.[35] The statute requires that EPA act on the petition and hear and determine the matter within 90 days.[36]

EPA has provided for a hearing in two stages. If the source contests the finding of noncompliance or asserts that it is entitled to an exemption, a hearing is first held to determine the source's liability for a penalty, which must be completed and an initial decision issued within 90 days.[37] If found liable, the source must then calculate the penalty. If EPA disagrees with the amount, it recalculates the penalty. The source, if it objects to the recalculation, is then given a hearing on its objections, which must also be completed and decided within 90 days.[38] The 90-day limitation applies only to the decision of the administrative law judge, and the time can be extended if both parties agree. In both the hearing on liability and the hearing on the amount of the penalty an appeal is allowed to the Judicial Officer, who must decide the appeal within 30 days.[39]

☐ *Clean Air Act §207(c):* Another proceeding under the Clean Air Act where an adjudicative hearing is provided is where EPA requires an automobile manufacturer to recall a class or category of motor vehicles when EPA has found that a substantial number of vehicles do not con-

26. 40 C.F.R. §22.27(c).
27. 40 C.F.R. §22.20.
28. 40 C.F.R. §22.28.
29. 40 C.F.R. §§22.27(c), 22.29(c).
30. It depends upon the statute as to whether judicial review is in the district court or in the court of appeals. Civil penalties assessed under TSCA §16 and FIFRA §14 are by statute specifically made reviewable in the court of appeals. *See* TSCA §16(a)(3), 15 U.S.C. §2615(a)(3); FIFRA §16(b), 7 U.S.C. §136n, ELR STAT. FIFRA 022. On the other hand, RCRA has no comparable statutory provision for judicial review of penalties assessed or compliance orders issued under RCRA §3008. Review in such cases has been obtained in the district court. *See* Chemical Waste Management v. United States Environmental Protection Agency, 649 F. Supp. 347, 17 ELR 20521 (D.D.C. 1986).
31. 40 C.F.R. §22.27(b). For FIFRA civil penalty guidelines, *see* Guidelines for the Assessment of Civil Penalties under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as Amended, 39 Fed. Reg. 27711 (July 31, 1974); for RCRA guidelines, *see* Final RCRA Civil Penalty Policy (May 8, 1984), ELR ADMIN. MATERIALS 35089; for the TSCA guidelines, *see* Guidelines for the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act, 45 Fed. Reg. 59770 (Sept. 10, 1980), for the general rules that have been supplemented by the following policy statements: Policy for Violations of the Regulations dealing with Polychlorinated Biphenyls, 45 Fed. Reg. 59776 (Sept. 10, 1980); Recordkeeping and Reporting Rules, TSCA, Sections 8, 12 and 13, Enforcement Response Policy, (May 15, 1987); and Revised Enforcement Response Policy for the Friable Asbsestos-Containing Materials in Schools: Identification and Notification Regulation (June 22, 1984).
For a recent decision by the Judicial Officer discussing the consideration that the administrative law judge must give to the penalty guidelines, *see* A.Y. McDonald Industries, RCRA(3008) Appeal No. 86-2 (July 23, 1987).
32. *See A.Y. McDonald Industries, Inc., supra* note 31.
33. The procedures for hearing cases under Clean Air Act §120 are found at 40 C.F.R. §66.
34. *See* 45 Fed. Reg. 50086 (July 28, 1980), 50 Fed. Reg. 36732 (Sept. 9, 1985). For cases dealing with the assessment of penalties under §120, *see* Duquesne Light Co. v. United States Environmental Protection Agency, 698 F.2d 456, 13 ELR 20251 (D.C. Cir. 1983); Duquesne Light Co. v. United States Environmental Protection Agency, 791 F.2d 959, 16 ELR 20790 (D.C. Cir. 1986); American Cyanamid Co. v. United States Environmental Protection Agency, 810 F.2d 493, 17 ELR 20642 (5th Cir. 1987).
35. 40 C.F.R. §66.66.11-66.13.
36. Clean Air Act §120(b)(5), 42 U.S.C. §7420(b)(5), ELR STAT. 42227.
37. 40 C.F.R. §§66.41-66.43 and 66.93.
38. 40 C.F.R. §66.51-66.54.
39. 40 C.F.R. §66.95.

form to the emission standards though properly maintained or used.[40]

Again, EPA notifies the party that it has been found to be in noncompliance, in this case by sending it a notice of nonconformity and directing it to submit a plan for remedying the nonconformity within 45 days. It should be evident that this may require the recall of thousands of vehicles that have to be corrected in some fashion at the manufacturer's expense in order to bring them into compliance. If the manufacturer disagrees with the finding of nonconformity, he may request a hearing on this issue.[41] This decision is final unless appealed to the Judicial Officer, or unless the Judicial Officer reviews it sua sponte.[42]

☐ *FIFRA §6:* In addition to proceedings for the assessment of civil penalties under §14(a), FIFRA §6 provides for adjudicative hearings on the cancellation or suspension of a registration of a pesticide, on a refusal to register a pesticide, or on a change in the classification of a pesticide (e.g., changing the classification from a general use to restricted use pesticide).[43]

There are two kinds of proceedings involving the cancellation of a pesticide or change in classification. One is where the Administrator issues a notice of intent to cancel the pesticide or change the classification. The other is where the Administrator issues a notice of his intention to hold a hearing to determine whether to cancel the registration or change the classification of a pesticide. In both cases the registrants are sent a copy of the notice and the notice is also published in the *Federal Register.* In the case of a notice of intent to cancel the registration or change the classification, an affected party must request a hearing within 30 days of the receipt of the notice or the date of publication, whichever is later. This 30 day period is jurisdictional. If the request for hearing is not received by EPA within the 30 days, the registration is cancelled or the classification is changed. The time for responding to the notice of intent to hold a hearing is set by the Administrator in the notice.

Cancellation hearings are likely to involve complex issues and numerous parties. The procedures themselves, however, are not too dissimilar from those found in the consolidated rules. One should note that the general practice has been to require the presentation of direct testimony in the form of a written verified statement, with the witness being available for cross-examination. Though EPA is designated as the Respondent in a proceeding brought on a notice of intent to cancel, it has the burden of going forward to present sufficient evidence to make a prima facie case for cancellation. The burden of proof, however, is upon the party supporting the continued registration.[44] The procedures allow for an accelerated decision to be issued in favor of EPA, but make no provision for issuing an accelerated decision against EPA.[45]

The statute also authorizes EPA to suspend a registration during the cancellation hearing if necessary to protect the public against an unreasonable risk of harm.[46] This proceeding is in the nature of a preliminary injunction and is held under an expedited schedule, with 10 days being allowed for the initial decision. An administrative law judge is not required to preside at these hearings, but in practice an administrative law judge has presided.

☐ *FIFRA §3(c):* A party is also given a hearing if a registration is suspended under §3(c)(2)(B)(iv) for failure to supply data to support a registration following a directive by EPA to furnish such data. Again, EPA notifies the registrant of its intention to suspend and the registrant must request a hearing.[47] The issues in such a proceeding are limited to determining whether the registrant has failed to take the action that served as the basis for the notice of intent to suspend and whether EPA's determination as to the disposition of existing stock of the pesticide is consistent with the Act.[48] The hearing must be concluded and the determination made within 75 days after receipt of the request for a hearing.[49]

☐ *Clean Water Act §402:* An adjudicative hearing is also provided on the terms of final national pollutant discharge elimination system (NPDES) permits issued under Clean Water Act § 402.[50] NPDES permits are issued after the affected party and the public have been heard on the terms of the permit (usually first issued as a draft permit). After EPA has issued a final permit, an interested party can request a hearing on its terms.[51] The grant of a hearing is discretionary with EPA, and EPA may decide to deny the hearing if there are no factual issues requiring a hearing.[52] If a hearing is granted, a party is usually limited to the evidence presented and objections made in comments on the draft permit. The administrative record compiled during the comment period must be received and admitted into evidence, but a party can request that a sponsoring witness be made available, and if none is, this can be considered in evaluating the evidence.[53]

☐ *Other Statutes:* Several statutes have been amended recently to provide for adjudicatory hearings for assessment of civil penalties. These include the assessment of civil penalties of up to $5,000 against a public water system under Safe Drinking Water Act §1414(g),[54] and the assessment of civil penalties for violations of certain provisions of the Comprehensive Environmental Response, Compensation, and Liability Act.[55]

40. The procedures governing hearings under Clean Air Act §207(c) are found at 40 C.F.R. §85.1807.

41. 40 C.F.R. §85.1807(b).

42. 40 C.F.R. §85.1807(t).

43. The procedures for hearings under FIFRA §6 are found at 40 C.F.R. §164.

44. *See* 40 C.F.R. §164.80. For a discussion of EPA's and the Registrant's burden of proof, *see* Environmental Defense Fund, Inc. v. United States Environmental Protection Agency, 548 F.2d 998, 1012-18, 7 ELR 20012 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 925 (1977).

45. *See* 40 C.F.R. §164.91.

46. FIFRA §6(c), 7 U.S.C. §136d(c), ELR STAT. FIFRA 012.

47. FIFRA §3(c)(2)(B)(iv), 7 U.S.C. §136a(c)(2)(B)(iv), ELR STAT. FIFRA 005.

48. *Id.*

49. *Id.*

50. The procedures for hearings under Clean Water Act §402 are found at 40 C.F.R. §124.71-124.91.

51. 40 C.F.R. §124.74.

52. 40 C.F.R. §124.75.

53. 40 C.F.R. §124.85(d)(2).

54. 42 U.S.C. §300g-3(g), ELR STAT. 41105; *see* Gray, *The Safe Drinking Water Act Amendments of 1986: Now a Tougher Act to Follow,* 16 ELR 10338, 10342 (Nov. 1986).

55. CERCLA §109, 42 U.S.C. §9609, ELR STAT. 44031. *See* Atkeson et al., *An Annotated History of the Superfund Amendment and Reauthorization Act of 1986 (SARA),* 17 ELR 10360, 10403 (Dec. 1986).

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High Stakes on a Fast Track: Administrative Enforcement at EPA

By Michael J. Walker*

Administrative Enforcement is Increasing

Administrative enforcement actions for the collection of civil penalties or the imposition of compliance orders have been a major component of the Environmental Protection Agency's (EPA) compliance program for the Toxic Substances Control Act (TSCA),[1] Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[2] and Resource Conservation and Recovery Act (RCRA)[3] violations for many years. It is significant to note that the *number* of administrative actions is rapidly increasing, along with the size of administrative penalties being proposed and collected. A summary of EPA administrative actions for the past three fiscal years reveals that EPA administrative actions in all but two areas have increased.[4] Increases in administrative enforcement of TSCA and the Safe Drinking Water Act have been particularly dramatic.

In commenting on the increases in these figures, Thomas L. Adams Jr., EPA's assistant administrator for Enforcement and Compliance Monitoring, said, "The record for 1987 reflects a strong commitment by EPA and the Department of Justice (DOJ) to ensure compliance without environmental standards. The higher administrative figures reflect a commitment by the agency to use more aggressively the administrative enforcement powers Congress has provided under most environmental laws." In Fiscal Year (FY) 87 EPA referred 304 cases to the Department of Justice for initiation of civil actions in federal district courts. By contrast, in the same period, EPA filed or issued nearly 3,200 administrative complaints or orders enforcing the same environmental statutes.

Characteristics of EPA's enforcement program include a very low appeal rate (less than one percent of all filed administrative cases are appealed to federal courts), short internal processing times (routine cases can be filed within days of determining a violation), increased efficiency (more cases, higher penalties, enhanced compliance with no appreciable increase in resources expended) and in general, a broad enforcement impact among the regulated community—both geographically and economically. Additionally, large and small businesses are potentially affected. Penalties range from the $2.5 million paid by Chemical Waste Management for TSCA violations in Vickery, OH, to a $500 fine for failure to submit an annual pesticides production report under FIFRA § 7.

Negotiated settlements in the form of administrative Consent Agreements and Orders may contain a variety of settlement conditions and terms that may be legally sufficient to demonstrate compliance, create an enforceable schedule to return a facility to compliance without the need for federal district court intervention or simply collect a civil penalty to deter future violations. EPA has demonstrated that it is possible to seek significant civil penalties in administrative actions. These penalties seek to recover the "economic savings" obtained by violators who fail to comply with federal regulatory requirements, while at the same time deterring further non-compliance. The six largest administrative penalties negotiated by EPA to date have been:

Chemical Waste Management (TSCA/RCRA)	$ 2.5 million
Chemical Waste Management (TSCA/RCRA)	$ 2.1 million
BASF Corporation (TSCA)	$ 1.291 million
American Telephone & Telegraph (TSCA)	$ 1 million
Diamond Shamrock Corp. (TSCA)	$ 900,000
Diamond Shamrock Corp. (TSCA)	$ 800,00

It should be noted that in each of these settlements, total costs associated with environmental compliance audits or site remediation activities associated with these settlements have been estimated to *exceed* the size of the civil penalty.

Despite the potential for large penalties, administrative enforcement has the demonstrated potential for significant cost savings for the regulated community, as well as for EPA. The ability to identify and resolve compliance disputes quickly through informal settlement conferences with agency personnel can avoid the need for substantial counsel fees, drawn-out pleadings practice, negative publicity and delays associated with congested federal district court calendars.

*Michael J. Walker, assistant enforcement counsel, supervises the Toxics Litigation Division, Office of Enforcement, U.S. Environmental Protection Agency (EPA), in Washington, D.C. A 1973 graduate of the University of Wisconsin, he earned his degree in the Biological Aspects of Conservation. He graduated in 1977 from the University of Toledo College of Law. Mr. Walker served as associate regional counsel in the EPA Region V Office for seven years before coming to Washington, D.C., in 1985. As a member of the EPA Institute Faculty, Mr. Walker teaches a survey course on administrative law and practice, which has been attended by more than 300 agency attorneys and professional staff members. The views expressed in this article are the author's and not necessarily those of the U.S. EPA.

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Administrative hearings involving enforcement proceedings before EPA administrative law judges are provided for under a number of federal statutory provisions, including:

- *TSCA § 16(a)*—assessment of a civil penalty for failure to comply with any requirement relating to the manufacture, use, distribution in commerce or disposal of toxic substances;[5]
- *Clean Air Act (CAA) § 120*—assessment of a civil penalty against a stationary source that is not in compliance with permitted emission requirements;[6]
- *FIFRA § 14(a)*—assessment of a civil penalty for the manufacture, sale, distribution or use of pesticides in violation of the act;[7]
- *CAA § 207(c)*—recall of motor vehicles that do not conform to federal emission standards;[8]
- *Clean Water Act (CWA) § 402*—challenge to EPA-issued permits concerning the discharge of pollutants into the waters of the United States;[9]
- RCRA § 3008—assessment of civil penalties and/or the issuance of compliance orders for failure to comply with requirements relating to the generation, transportation, treatment, storage and disposal of hazardous waste;[10] and
- *Marine Protection, Research and Sanctuaries Act (MPRS) § 105(a) and (f)*—assessment of a civil penalty for violation of restrictions on ocean dumping or revocation or suspension of a permit for discharge into the oceans.[11]

Typical Administrative Process at EPA

In accordance with the Administrative Procedure Act (APA),[12] administrative law judges (ALJs) preside over all EPA hearings that are required by statute "to be determined on the record after opportunity for an agency hearing." This is the case where the applicable statute expressly states that the adjudicatory hearing is to be "on the record," or when the requirement for a presiding judge may be inferred from the type of hearing to be provided.[13] In addition, by custom and practice, EPA ALJs may also preside over other types of adjudicatory hearings if requested by the agency.

Administrative Procedures Vary

EPA, like the other federal agencies that conduct adjudicative hearings, has unique and specific rules of practice and procedure. A major disadvantage to a non-agency practitioner representing a respondent in an EPA administrative proceeding may be the lack of familiarity with the basic rules of practice or controlling case law.

ALJ Palmer of the U.S. Department of Agriculture has noted that there are at least 280 different sets of evidentiary rules that apply to adjudicatory proceedings conducted in federal agencies alone. These rule sets typically are three types: they "fully incorporate" the Federal Rules of Evidence, they "merely look" to the Federal Rules as a source of guidance or they "tolerate or even openly embrace, trial by ambush."[14] EPA rules of practice generally look to the Federal Rules for guidance.

In an effort to eliminate confusion over varying procedural requirements involving EPA enforcement actions—both by the private practitioner and by the EPA lawyer—EPA published in 1980 the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation and Suspension of Permits*.[15] The Consolidated Rules were designed to accomplish two purposes. The first purpose was the development of a common set of procedural rules for several enforcement and adjudicatory programs that would reduce paperwork, inconsistency and, ultimately, the burden on people regulated. The second purpose was the improvement of formal administrative adjudicatory procedures through substantive revisions. The Consolidated Rules replaced existing rules of practice that had been previously promulgated for FIFRA, CAA, RCRA, TSCA and the Ocean Dumping Act.

Although the majority of EPA enforcement actions follow the Consolidated Rules, it should not be overlooked that some EPA administrative proceedings are not held under the Consolidated Rules of Practice. For reasons that are in part statutory and in part historic to the development of these programs, the Consolidated Rules are inapplicable to CAA § 120 and § 207(c) proceedings regarding stationary source compliance and certain automotive emission standard recalls, suspension of FIFRA registration under § 3(c), FIFRA cancellation proceedings under § 6 and CWA permit hearings under the National Pollutant Discharge Elimination System.[16]

perceived to pose. Unsubstantiated attacks on the penalty may be counterproductive.

Participate in a Settlement Conference

EPA policy, practice and the Consolidated Rules encourage "informal" settlement conferences.[33] These conferences are very useful, off-the-record opportunities to present settlement options to the government for consideration and for the parties to evaluate the relative strengths and weaknesses of their respective cases.

At the settlement meeting, EPA will be most interested in a demonstration that the facility or corporation has no history of prior violations of the applicable statute (if appropriate) and in a candid discussion of the nature and circumstances of the violation. The failure to demonstrate that violations have not been addressed or corrected may serve as a basis to increase a proposed penalty. Documented efforts to address compliance problems, once they are known to the respondent, goes a long way toward reassuring EPA that the respondent is serious about correcting deficiencies and that the problems do not reflect an attitude of knowing or willfull disregard for regulatory requirements. Moreover, inability to pay the penalty or the effect of the penalty on ability to continue in business are factors to be raised in favor of a decreased penalty; bring copies of signed federal tax returns and supporting schedules.

Frequently, counsel for respondents seek to schedule settlement meetings *prior* to the submission of their Answer and Request for Hearing as a strategy to gain possible insight into the government's case, so that the respondent's Answer will most accurately address any perceived weaknesses or defenses. Respondents seeking to employ such a course of action should be aware that in proceedings brought under the Consolidated Rules of Practice, the government may as a matter of right amend the original complaint once at any time before the Answer is filed and will invariably do so in response to continued violations or recalcitrance. Recalcitrance at the settlement table may result in an amended compliant seeking additional penalties for continuing violations or may reduce or eliminate further consideration of downward adjustment of the penalty amount for "corporate attitude," "cooperation shown to the government" or "other factors as justice may require."

The TSCA enforcement program has been in the forefront of negotiating settlements providing for compliance activities required by law. For example, settlements have been negotiated in which environmental compliance audits were undertaken in exchange for partial penalty mitigation.[34] Other TSCA compliance activities beyond those required by law that have been used to reduce the total amount of the civil penalty have included domestic and international training programs, early retirement of PCB equipment (i.e., removal of PCB transformers) and additional site remediation.

Know Both the Applicable Law and Rules of Practice

One of the most frequent impediments to effective representation of a client in an EPA enforcement proceeding is failure to read and understand the statutory or regulatory provisions that the client is charged with violating, as well as the specific rules of practice that govern the proceeding. As has been referenced earlier, although EPA has made significant efforts to consolidate its rules of practice into one specific section of the *Code of Federal Regulations*,[35] many administrative enforcement programs have unique procedural requirements. The Consolidated Rules have supplemental rules for TSCA,[36] FIFRA,[37] Title II of the CAA,[38] RCRA[39] and MPRS.[40]

Agency practitioners are at an advantage because they work with the statute and rules of practice everyday; thus the infrequent administrative practitioner needs to be careful about reviewing EPA filing deadlines, service requirements or other procedural elements relevant to these proceedings.

Prepare Your Answer Thoroughly and in the Same Detail that You Would for State or District Court

The Consolidated Rules require the Answer to state all arguments which are alleged to constitute the grounds of defense, including facts which the respondent plans to place at issue. A careless or inadequately drafted response to what might be perceived as an "informal" proceeding might provide the basis for an Accelerated Decision, including imposition of the full penalty where "no genuine issue of fact exists and Complainant is entitled to judgment as a matter of law."

Be Sure Your Client Appreciates the Serious Nature of the Violation

While the typical or routine EPA administrative action may involve a relatively modest penalty demand (at least in terms of the gross daily revenue of your client), and selection of an administrative rather than district court proceeding may suggest "informality," it is critical that your client approach the proceedings with the same care and degree of concern that one would face if confronted with proceedings initiated in district court by the United States Attorney. EPA's administrative programs are the backbone of the agency's enforcement presence nationwide and refusal to cooperate in the less formal administrative proceeding may be grounds to escalate the matter to the Department of Justice. Refusal to cooperate or remedy obvious compliance problems may also serve to trigger more detailed examinations of the facility or, perhaps most significant, create an image to the agency of recalcitrance, obstinence or deliberate, willful disregard for regulatory requirements. Once a facility, corporation or even certain staff develops a poor reputation, it is difficult to erase it from the Agency's mental notebook on the company.

Offer Settlement at the Initial Meeting, But Don't Insult EPA

Given the volume of actions that EPA is handling these days, EPA will be anxious to pursue seriously settlement discussions in detail at the first meeting. This is good public policy for EPA and reduces costs incurred by the regulated community. In addition to a tangible demonstration of compliance, the amount of the civil penalty will probably be the major outstanding issue on the table. The most unproductive approach to penalty discussions is to offer a very low "counter-offer" to the EPA penalty. With few exceptions, the proposed penalty will have been calculated from a published or publicly available civil penalty policy and may already reflect substantial mitigation from the statutory per day violation maximum penalties. Unless you have substantial evidence that the penalty is grossly miscalculated or that you have facts that may not be known to EPA, offering an unreasonably low settlement figure might be perceived as bad faith negotiating. Approach EPA settlement negotiations with a recognition that the agency is serious about the penalty amounts.

Hearings Governed by Consolidated Rules

Enforcement cases filed under the Consolidated Rules begin with the filing of a civil complaint and notice of opportunity for hearing, which states with particularity the nature of the violation and the proposed civil penalty.[17] The original complaint is filed with the appropriate hearing clerk and a copy is sent to the respondent by certified mail, return receipt requested along with a copy of the Consolidated Rules of Practice.[18] The recipient of such a complaint has twenty (20) days from the date of service to file an Answer and Request for Hearing.[19] It is important to note that under the Consolidated Rules, 40 CFR 22.15(d), any matter not specifically denied may be deemed to be admitted and used against the respondent.

Following receipt of the Answer, the case is referred by the Hearing Clerk to the Chief ALJ. The Chief Judge will hear the case or assign it to one of the six administrative law judges assigned to EPA.[20] The function of ALJs under the Consolidated Rules is two-fold. First, they must develop an accurate and complete record of the facts relevant to the proceeding. Second, they must render fair and equitable decisions on the merits and record.

By letter or written order, the ALJ will direct the parties to commence settlement discussions and to report in writing before a set time as to the success or failure of such discussions.[21] If it is unlikely that the parties will achieve a settlement, the parties will be directed to prepare a "prehearing exchange" of their evidence. This typically consists of a list of proposed witnesses with a summary of their expected testimony and copies of all exhibits and documents that will be introduced at trial as evidence.[22] Since prehearing meetings between the judge and parties are rare, document exchange, motions and orders substitute for a conference. The use of written prehearing discovery and written or telephone prehearing conferences, saves the parties time and money.

One important element of administrative practice under the Consolidated Rules is that discovery is very limited. Under the Federal Rules of Civil Procedure, discovery through document requests and depositions may continue for months or years adding considerable delay and cost to the process. By contrast, under the Consolidated Rules, there is no discovery beyond that obtained through the prehearing exchange unless further discovery is specifically requested by a party who must obtain an order from the ALJ.[23]

As with the Federal Rules of Civil Procedure, parties may request summary judgment through the granting of an "accelerated decision."[24] Increasing numbers of motions for "partial" accelerated decisions have been filed in cases where the Answer or portions of the Answer admit or acknowledge that there are no genuine disputes as to some or all of the material facts, leaving only the issue of civil penalty for hearing.

By this point in the proceedings, the vast majority of EPA administrative enforcement cases either have been settled or are close to settlement. For cases filed under the Consolidated Rules, settlements take the form of a written "Consent Agreement and Order," in which the respondent (1) admits the jurisdictional allegations of the complaint, (2) admits the facts stipulated in the Consent Agreement or neither admits nor denies the factual allegations contained in the Complaint or (3) consents to the assessment of the civil penalty, permit revocation, suspension or other terms of settlement.[25] The Consent Agreement is signed by the parties or counsel and is forwarded to the Regional Administrator or the Chief Judicial Officer as appropriate.[26]

For the 30 to 50 cases each year that cannot be settled and on which hearings under the Consolidated Rules of Practice are held, the ALJs render "recommended" or Initial Decisions. These decisions may be appealed by either the EPA or the respondent within twenty (20) days of their receipt.[27] If neither party elects to file an appeal, the Initial Decision becomes a Final Decision of the Administrator as a matter of law, unless the administrator elects to review the decision *sua sponte*.[28]

In assessing a civil penalty, the judge "must consider" any guidelines that EPA has developed concerning the statute and violation at issue. Guidelines of this nature exist for the majority of administrative programs.[29] Under Consolidated Rules, ALJs are bound to impose the penalty calculated by EPA personnel involved in bringing the action or to provide specific justification for finding why the calculation is inappropriate.[30] Administrative case law for civil penalties under EPA statutes and the Consolidated Rules is not well settled at this time; however, some ALJs have shown an increasing willingness to apply the agency's penalty calculations.[31] Other judges have imposed penalty amounts different than the amount sought in the complaint without setting forth sufficient reasons for the change. These cases represent the largest category of cases appealed by EPA to the judicial officer.

When an appeal of an initial decision has been filed by either party or when the Administrator issues a notice of intent to conduct review *sua sponte*, the judicial officer, on behalf of the Administrator, issues a Final Order as soon as practicable after the filing of appellate briefs or oral argument. The Final Order may adopt, modify or set aside the findings and conclusions contained in the decision or order being reviewed.[32] In addition, the civil penalty may be increased or decreased from the amount recommended in the Initial Decision, except that it may not be increased in the case of default orders.

With the exception of requests for reconsideration, EPA enforcement officials have no further appeal to the courts from a Final Order. However, depending on the applicable statute, the respondents may seek judicial review of any adverse final decision or order.

Dealing with EPA: Practical Considerations in Assessing a Penalty Demand—Review the Complaint Carefully

Practitioners are advised to evaluate carefully any civil complaint for a number of key issues:

1. Do the facts in the complaint accurately support the penalty demand in the complaint?

2. Are you entitled to consideration of a downward adjustment based on considerations contained in the complaint or other factors that might have been unknown to EPA at the time the complaint was issued?

3. Check the mathematics. Do the proposed penalty figures add up correctly?

At the first settlement meeting, EPA will be prepared to discuss the penalty demand in detail. If you have evidence or factors that demonstrate that the penalty was incorrectly calculated, raise it at the first settlement conference. It is important to keep in mind, however, that in the majority of EPA administrative enforcement programs, EPA seldom seeks the maximum penalty allowed by law, preferring to use civil penalty policies that assess proposed penalties based on the degree of harm to the environment or regulatory scheme that the violations are

Conclusion

In writing about EPA's administrative adjudication authorities, EPA's Chief Judge Harwood noted: "The Agency can only be effective if the public has confidence in the process, a confidence created by the conviction that they have been treated fairly and the outcome is reasonable, even though they may be unhappy about the ultimate judgment."[41] That EPA prevails in 99.9 percent of the cases it brings with fewer than one percent appealed to the Administrator or to district court is evidence that EPA files solid cases with clear and obvious violations.

Thus EPA's administrative enforcement program has been an effective tool to enforce our nation's environmental statutes and regulations.

Consistent with the safeguards provided for in the United States Constitution and the APA, EPA's administrative practice rules provide opportunities for expedited settlement, litigation and adjudication.

The challenge to the agency, the regulated community and the private bar is to maximize opportunities to effectively use—but not abuse—these expedited proceedings to reduce delay and the cost of enforcement actions without impairing the effectiveness of the administrative enforcement program.

FOOTNOTES

[1]15 U.S.C. §§ 2601-29 (Supp. II 1984).

[2]7 U.S.C. *et seq.*

[3]42 U.S.C. § 6901-91i (Supp. II 1984).

[4]Administrative Orders & Civil Complaints Issued by EPA:

	FY85	FY86	FY87
Air—Stationary Sources	122	123	191
Water—National Pollutant Discharge System Permits	1,028	988	1,002
Safe Drinking Water	3	0	212
RCRA	327	255	243
TSCA	733	781	1,051
FIFRA	236	337	360
Total Issued:	2,609	2,626	3,194

Aggregate numbers of administrative cases filed during prior fiscal years are: FY 1980, 901; FY 1981, 1,107; FY 1982, 864; FY 1983, 1,848; FY 1984, 3,124. U.S. EPA Office of Enforcement and Compliance Monitoring, *Summary of Enforcement Accomplishments; Fiscal Year 1987*, April 1988.

[5]15 U.S.C. § 2615(a) (Supp. II 1984). By direct congressional intent, or possibly oversight, TSCA does not give EPA the authority to obtain civil penalties in federal district courts. 15 U.S.C. 2615(a)(2)(A). Thus, although the agency has referred more than forty cases to the Department of Justice involving civil violations of the act or orders issued under the act, since 1978 the vast majority of enforcement actions brought to address TSCA violations totals more than 4,000 administrative actions involving collected civil penalties in excess of $24 million.

[6]42 U.S.C. § 7420 (Supp. II 1984).

[7]7 U.S.C. § 1361 (Supp. II 1984).

[8]42 U.S.C. § 7541(c) (Supp. II 1984).

[9]33 U.S.C. § 1342 (Supp. II 1984).

[10]42 U.S.C. § 6928 (Supp. II 1984).

[11]33 U.S.C. § 1417(a) and (f) (Supp. II 1984).

[12]5 U.S.C. § 556(b) (Supp. II 1984).

[13]*See* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st. Cir.), *cert. denied*, 439 U.S. 824 (1978).

[14]Palmer, *Administrative Hearings for the General Practitioner*, 73 A.B.A.J. 86 (March 1, 1987).

[15]45 Fed. Reg. 24, 363 (1980) (codified at 40 C.F.R. Part 22).

[16]*See* Harwood, *Hearings Before An EPA Administrative Law Judge*, 17 E.L.R. 10441 (1987). *See also*, 42 U.S.C. § 300 g-3(g). *See generally*, Gray, *The Safe Drinking Water Act Amendments of 1986; Now We Have A Tougher Act To Follow*, 16 E.L.R. 103 (Nov. 1986); and Liebestram & Law, *The Water Quality Act of 1987: A Major Step Ahead for Assuring the Quality of the Nation's Waters*, 17 E.L.R. 10311 (Aug. 1987).

[17]40 C.F.R. § 22.13 (1987).

[18]40 C.F.R. § 22.05(b)(1)(ii) (1987).

[19]40 C.F.R. § 22.15(a) (1987).

[20]In addition to Chief Judge Gerald Harwood, EPA's six ALJs are Spencer T. Nissen, Marvin E. Jones, Thomas B. Yost, J.F. Greene, Frank W. Vanderheyden and Henry B. Frazier. All of the EPA ALJs are located in Washington, D.C., with the exception of Judge Jones, who is located in EPA Region VII, Kansas City, MO, and Judge Yost, who is located in EPA Region IV, Atlanta, GA.

[21]40 C.F.R. § 22.19(b) (1987).

[22]40 C.F.R. § 22.21(b) (1987).

[23]40 C.F.R. § 22.19(f) provides for further discovery *only* upon the express order of the Presiding Officer if it meets a three-part test: (i) that such discovery not unreasonably delay the proceeding; (ii) that the information sought to be obtained is not otherwise obtainable and (iii) that such information has significant probative value. Depositions upon oral questions, 40 C.F.R. § 22.19(f)(2), may only be taken on order from the Presiding Officer and will only be allowed on a showing that the information sought cannot be obtained by alternate methods or there is substantial reason to believe that "relevant and probative evidence may not be preserved for presentation by a witness at hearing."

[24]40 C.F.R. § 22.20 (1987).

[25]Absent some major procedural or legal defect, EPA will rarely "dismiss" or "withdraw" a pending civil complaint as a condition of settlement.

[26]The agency's Chief Judicial Officer is Ronald L. McCallum, who, under 40 C.F.R. 22.04(b), has been designated by the Administrator of EPA to sign consent orders in enforcement proceedings, to *sua sponte* review initial or recommended decisions of the Administrative Law Judges and to hear and rule on appeals from initial decisions.

[27]40 C.F.R. § 22.30(b) (1987).

[28]*Id.*

[29]40 C.F.R. § 22.27(b) (1987). For FIFRA civil penalty guidelines, see Guidelines for the Assessment of Civil Penalties under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 39 Fed. Reg. 27711 (July 31, 1974); for RCRA guidelines, see Final RCRA Civil Penalty Policy (May 8, 1984); for the TSCA guidelines, see Guidelines For the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act, 45 Fed. Reg. 59770 (Sept. 10, 1980). For the general rules have been supplemented by the following policy statements: Policy for Violations of the Regulations Dealing with Polychlorinated Biphenyls, 45 Fed. Reg. 59776 (Sept. 10, 1980); Recordkeeping and Reporting Rules, TSCA Section 8, 12 and 13, Enforcement Response Policy, (May 15, 1987); and Revised Enforcement Response Policy for the Friable Asbestos Containing Materials in Schools; Identification and Notification Registration (June 22, 1984).

[30]40 C.F.R. § 22.27(b) (1987).

[31]*See e.g.*, Landfill Service Corporation, RCRA Docket Number VII-86-H-0005, issued by Judge Marvin Jones on November 5, 1987, where the full penalty of $130,560 that was proposed in the complaint for RCRA violations was assessed by the judge after a hearing on the record; and *Cyclops Corporation*, Docket Number RCRA-V-W-85-R-002 where Judge Frank Vanderheyden imposed the full penalty of $98,250.

[32]40 C.F.R. § 22.31(a) (1987).

[33]40 C.F.R. § 22.18(a) (1987).

[34]*See* Danzig, Walker and Price, *Environmental Auditing: Reaching the Bottom Line in Compliance*, ENFORCEMENT J. (National Association of Attorneys General, January, 1987) (Describing settlements involving a variety of types of environmental audits). *See also* In re: Sandoz Chemicals Corporation, TSCA-V-C-05 (December, 1986) (a typical settlement of a TSCA Section 5 violation that was voluntarily disclosed to EPA. As can be noted from the settlement, Sandoz received a 50 percent reduction of the civil penalty for the voluntary disclosure of the violations to EPA. Sandoz received an additional 25 percent reduction of the proposed penalty in recognition of its commitment to undertake a detailed TSCA compliance audit).

[35]40 C.F.R. Part 22 (1987).

[36]40 C.F.R. § 22.33 (1987).

[37]40 C.F.R. § 22.35 (1987).

[38]40 C.F.R. § 22.34 (1987).

[39]40 C.F.R. § 22.37 (1987).

[40]40 C.F.R. § 22.36 (1987).

[41]Harwood, *How Necessary Is the Administrative Law Judge?*, 8 W. NEW ENG. L. REV. 793 (1984).

WALKER'S TIME TESTED SETTLEMENT INDUCERS

SETTLEMENT CONFERENCES - KEY OPPORTUNITIES FOR SETTLEMENT

The conduct and timing of an "informal" settlement conference can have substantial strategic and tactical impact on the outcome of your case; for it is at the important first meeting and subsequent discussions, that the Government will inform your adversary of how serious EPA is about litigating the case.

Many agency attorneys fail to adequately use the informal settlement conference for its intended purpose - to settle the case - and invite additional work and burdens by simply sending the wrong message - that EPA will negotiate indefinitely.

Given the increasing demands of expanding case loads, it is critical that the agency attorneys maximize their limited time and under utilized skills as much as possible. Sending the "right" signal at the informal settlement conference is the important first step.

Agency policy on settlements of administrative actions is set forth in the Consolidated Rules of Practice at 40 CFR §22.18, which states that: **"The Agency encourages settlement of a proceeding anytime a settlement is consistent with the provision and objectives of the Act and applicable regulations. The Respondent may confer with the Complainant whether or not the Respondent requests a hearing."**

Too many Agency practitioners (and outside counsel, too) fall into the trap of using the informal settlement conference for the wrong purpose. It is not a "get acquainted" session before beginning "serious" negotiations. The primary emphasis should be on determining whether a settlement can be reached within a specific time period.

STRATEGIC CONSIDERATIONS

1. Always Schedule After Answer is Received
2. Always Have Client or Technical Team Present
3. Set The Proper Tone For The Meeting
4. Be Prepared
5. Avoid Unnecessary Informality
6. Conduct Settlement Conferences Off the Record
7. Discuss The Administrative Process
8. Release of Inspection Report Is Your Option
9. Conduct a Count By Count Examination of the Complaint & Answer
10. Describe How the Penalty Was Calculated
11. Discuss Penalty Mitigation Factors
12. Be Clear About What EPA Must Have To Settle The Case
13. Discuss Maximum "per day, per violations"
14. Make Them Prove Inability To Pay Claims
15. Use National Penalty Dockets To Distinguish Small Penalties
16. Explain Why EPA Uses Civil Penalty Actions vs. District Court
17. Present A Consent Agreement For Signature
18. MAKE IT EASIER TO SETTLE THAN LITIGATE

1. Always Schedule After Answer is Received

Although some attorneys will disagree, it is generally a good practice to wait until after the Answer has been filed before scheduling a settlement conference. Many plausible reasons have been advanced for agreeing to meet before the Answer is filed, such as a belief that settlement discussions can be encouraged by a less "adversarial" setting or where the respondents claim they lack sufficient information to file a proper Answer.

Keep in mind that since preparing Answers is costly, it makes settlement more appealing; there is often no good reason to warrant a departure from this general rule. With the exception of an extremely unusual Respondent, case or factual setting, never meet or discuss the specific facts of the case until you see and analyze the Answer.

Keep in mind that although the Consolidated Rules of Practice do not prohibit settlement conferences before the Answers are received, the mere fact that such a conference may be requested, scheduled or even held before the 20 day time period has run should not affect Respondent's obligation to file a timely Answer in conformance 40 CFR 22.18. One can not underscore too seriously the problems that postponing answer can create for maintaining the enforcement momentum on the action. If more time is legitimately required to prepare an Answer, make the Respondent seek a brief formal extension of time to file the Answer from the Presiding Officer.

2. Always Have Client or Technical Team Present.

A second strategic consideration for any settlement conference is to have the technical or program representative present for the settlement conference. Close coordination between the lawyer and his or her technical counterparts can not be overstated. Not only will you insure that any technical aspects of identifying compliance problems or achieving compliance will be addressed, having the program representatives present serves to underscore the significant technical and scientific nature of the action and remedy required.

3. Always Set the Proper Tone for Settlement Meeting.

Organization and professionalism are the critical objectives in planning for a settlement conference. As in preparing for any meeting with outside counsel, be certain you have an adequate meeting place so that your conference can proceed without interference or interruptions. Adequate or even suitable meeting space is regrettably at a premium in most governmental offices. Nevertheless, make every effort to obtain a suitable room for the conference where you will feel comfortable. Although local

counsel may invite you to meet at his or her office, and there are no procedural or policy reasons not to, from a strategic standpoint, it is preferable to only conduct settlement conferences within government offices. At a minimum be sure the room is clean. A cluttered, unkempt room will present a disorganized image of EPA and will detract from a strong bargaining posture.

4 Be Prepared

You should always prepare for the meeting by thoroughly re-reading the inspection report, the Complaint, penalty calculation and the Respondent's Answer. Careful preparation of yourself (and program counterpart, as necessary) will insure that you will have the full command of the facts and circumstances of the cases. This is particularly true where many weeks may have passed since you originally reviewed the inspector's report or complaint.

When preparing for the meeting it is a good practice to mark the Complaint margin with notations of "Admit" or "Deny", to facilitate your use and understanding of the Respondent's Answer.

5. Avoid Unnecessary Informality

While cordial handshakes and introductions are nice ways to "break" the ice", keep in mind that your are the representative of the United States Government in an adversarial proceeding. Excessive informality demeans our position as a government lawyer and conveys a message the EPA may not be "really serious" about the merits of the case, recovery of a substantial penalty or negotiation of substantial relief.

Always stress the regulatory context of the settlement conference at the outset, by stressing that agency (or regional policy) is too encourage the settlement of the action, but that EPA is prepared to litigate. Stress the fact that this policy is clearly and directly stated in the Consolidated Rules of Practice at 40 CFR 22.18, where the "Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations".

Emphasize that the Agency is interested in hearing about the Respondent's position, defenses or other claims or information that may not have been evident when he Complaint was filed.

6. Conduct Settlement Conferences Off the Record

Emphasize at the outset that the discussion will be "off the record" and that the sole purpose of the conference is to arrive at a basis for settlement by discussing fully the factual

allegations of the Complaint. Arguments or lectures on the "constitutionality" of EPA, the "political process in America" or legal "war" stories that may be raised by the Respondent should be restricted or cut off at their outset. Keep the Respondent and Counsel to the business of the Complaint. It is also useful to state that the purpose of the conference is to arrive at a possible basis for settlement, but that cases can not be settled until the Respondent can stipulate in the CAFO that they are in full compliance, or are on a schedule to achieve compliance.

When referencing the fact that any information presented during the conference will be considered "off the record", cite the basis for this position as 40 CFR 22.22(a), which recites Rule 408 of the Federal Rules of Evidence.

Rule 408, reprinted here in its entirety states that:

Evidence of (1) furnishing or offering or promising to furnish, or, (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statement made in compromising negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay or proving an effort to obstruct a criminal investigation.

7. Always Discuss the Administrative Process

No informal settlement conference should be complete without a deliberate and carefully orchestrated discussion of the administrative process that will be followed if the matter can not be settled. Most Respondents and many attorneys will be unfamiliar with the administrative process that EPA follows and it will be up to you to carefully detail each and every aspect of the proceeding to them. You may present this information in the context of providing a "service" or "information" to the Respondent or counsel - i.e., "I know you may be unfamiliar with the procedures EPA will follow in processing this complaint, so let me spend a few minutes describing the procedures that are followed under the Consolidated Rules of Practice". You then proceed to give a detailed explanation of the entire administrative process from assignment of the Administrative Law Judge to the potential appeals to the U.S. Supreme Court. Give the explanation in excruciatingly patient detail. Let them know that you are extremely familiar with the procedures and are prepared to litigate the matter to the fullest extent necessary. Repeatedly ask if Counsel or the Respondent has any questions.

A long discussion is particularly useful when the Respondent or client is present. It is important to let them know that this matter is not going to go away by itself and that procedurally, it is very complex.

A useful part of the repertoire of agency attorneys is the development of a frank but lengthy discussion called "The Lecture". This Lecture should be the exposition of the administrative process and is designed to be given in such great detail to perform the twin goals of "education" and "intimidation". Here is a sample outline of the script that can be used. It is useful to include this list in the materials that you take with you to your settlement conference, along with the Consolidated Rules of Practice, relevant Statute and applicable Regulations.

Always inform the Respondent that two courses of action may proceed from the settlement conference. One which can move quickly toward resolution of the case through entry of a Consent Agreement and Final Order. The other course is a lengthy, detailed (costly), and nevertheless direct course of litigation.

TWO COURSES OF ACTION

No Settlement	Settlement
(1) Assignment of Judge by the Chief Judge	(1) Stipulation/Achievement of Compliance
(2) Issuance of Scheduling Letter	(2) Consent Agreement and Order
	(3) Payment of Penalty
(3) Required submission of:	(4) Case Closed

Prehearing Exchange
1. Witness List
2. Exhibits
3. Defenses
4. Statement of Testimony
5. Location of Hearing

(4) Response/Replies to Prehearing Exchange

(5) Prehearing Conference with ALJ

(6) Hearing Procedure

(7) Transcript

(8) Proposed Findings of Fact, Conclusions of Law and Orders

(9) Preparation of Briefs

(10) Preparation of Response Briefs

(11) Initial Decision is rendered

(12) Filing of Appeals (within 45 Days)

(13) Final Decision is rendered

(14) Potential for Appellate Review

NOTE: at each step in the process, emphasis can be made on the potential for increasing costs of litigation and the potential for amended complaints for continuing violations).

8. Release of Inspection Report is Your Option

The decision on whether or not to release the Inspection Report is something that you must approach on a case by case basis. Certainly, never release the report before the Answer is received unless you expect the Respondent to tailor his Answer to the deficiencies and short comings in your inspection report. Release of the inspection report should be used to improve your bargaining position, not detract from it.

Since the inspection report must be produced as part of the prehearing exchange, many practitioners find it useful to present a copy of the report to the Respondent at the first settlement conference. By explaining that the Complainant is under no legal obligation to provide the inspection report until the pre-hearing exchange but is providing this information "in the spirit of settlement" and cooperation, you may gain valuable good will on the part of the Respondent or Counsel. Release of the report may also stimulate more serious settlement discussions as you use the Respondent's Answer with the Inspection Report to demonstrate that the facts are virtually undisputed and the evidence of violations are simple, direct and very compelling.

Another strategy to consider is to circle or underline specific items in a copy of the Inspection Report before photocopying the Inspection Report for release to the Respondent. Highlighting high levels of PCB concentration or other key information adds further weight to the government's position.

Remember to keep the original Inspection Report clean since it will need to be filed with the Hearing Clerk as part of the pre-hearing exchange.

It is also critical that the Respondent have initiated some compliance or corrective action before coming in to meet with EPA, if at all possible. Certainly preparing records, marking PCB equipment or servicing leaks from PCB transformers or hydraulic systems should have been started at the time the inspection was conducted and certainly by the time the complaint was received. Do not entertain or allow any substantive discussions or argument about the rationale or merits of the regulations in question.

In arranging for a settlement conference, request that tangible evidence be brought along to demonstrate that "good faith" compliance with the regulations has been initiated.

Avoid letting the Respondent use the settlement conference as a free seminar on how to achieve compliance. If he persists in asking basic or obvious questions that demonstrate that he has not taken the time to read the subject regulations, inform the Respondent that EPA will be obligated to add a "tuition" fee to the penally, a calculation increase that could be added for bad faith or lack of cooperation, under the penalty policy.

9. Conduct a Count by Count Examination of Complaint and Answer

Since the Respondent has asked for the settlement conference, it is useful to ask them how they wish to proceed sometimes they will prepare
the equivalent of "opening statements" that may be time consuming and irrelevant but serve to give the client or Respondent the feeling that they are getting their "day in court". Sometimes the Respondent or counsel will prepare a detailed response to the factual allegations to the complaint in addition to the general denials in the Answer. By using the Complaint, with annotations in the margin based upon your analysis of the Answer, you should endeavor to steer the discussion to an identification of any contested and non-contested issues. Limiting what needs to be considered as part of the discussion will aid immeasurably in narrowing the focus of your meeting. In trying to keep the discussion limited to contested issues, indicate that the Agency is willing to consider revising the size of the penalty. If adequate and convincing evidence is forthcoming. This willingness to revise the Complaint (if appropriate) should be strongly emphasized as a way to gather additional data about possible weaknesses in your case.

10. Describe How the Civil Penalty was Calculated.

The proper presentation of the civil penalty calculation is frequently overlooked at the settlement conference. By merely indicating that the penalty was calculated in accordance with the relevant civil penalty policy, you miss an important opportunity to discuss the merits of the penalty policy. No Respondent is interested in willingly accepting the logic or effect of a civil penalty policy, since it is a "policy" and not "law". For strategic reasons, it is well worth your time to prepare a detailed description of the civil penalty and how it was calculated. Always have a copy of the appropriate penalty policy available to give the Respondent. It is also worthwhile to prepare a short exhibit showing how the penalty was calculated, using the circumstances of the violation, probability of damages and range or nature of the violation. By stressing the fact that the calculation of the penalty was one "by the book" for purposes of "national consistency" and was based on the facts known to EPA at the time of the inspection or violation, you can shift the burden onto the Respondent to rationalize how a different application of the same policy could result in a lower penalty given the same set of facts.

All penalty policies, despite their intent to be objective, contain numerous subjective factors. It will ultimately be your job to convince the administrative Law Judge of the reasonableness of the penalty, so you may as well practice by "selling" the penalty to the Respondent. Emphasis on the care with which the penalty was calculated is very important, because it can aid in demonstrating how reasonable EPA was in filing the action.

The penalty can be presented by either the attorney or program representative. Since the penalty will require a detailed explanation when it is presented at a hearing, try to use the staff person who will be presenting the testimony to present the penalty at the settlement conference.

Both TSCA and FIFRA have very detailed penalty policies and schedules. Both contain substantial information that can be used at a settlement conference. It is a good practice to maintain a personal copy of the relevant penalty policy for use at settlement conferences. Highlighted specific portions that you will wish to refer to at the settlement conference, such as the statements in the introduction to the policies. The TSCA Civil

Penalty System, for example, states very explicitly that:

The purpose of the general penalty system is to assure that TSCA civil penalties be assessed in a fair, uniform and consistent manner, that the penalties are appropriate for the violation committed; that economic incentives for violating TSCA are eliminated; and that persons will be deterred from committing TSCA violations.

Each of the elements of this paragraph provide a basis for a discussion of the penalty with respect to the specific Respondent.

11. Discuss Penalty Mitigation Factors

Always keep the issue of penalty mitigation open. Advising the Respondent of the types of mitigation projects EPA would be willing to consider will convince the Respondent that EPA will settle the case if the terms are right. TSCA enforcement guidance on innovative settlement conditions is contained within the TSCA Policy Compendium. Other factors that can be stressed are the use of negotiated credits for compliance activities above what is required by law, Environmental Management Audits or other types of compliance or abatement.

In considering the ability to pay issue, insist that the Respondent submit signed personal or corporate tax returns including all schedules. You will need to pay close attention to various costs of doing business, internalized costs and other items that would create useful information at a hearing. The TSCA Civil penalty policy allows the recovery of 4% of the gross sales of the Respondent's operations.

One factor that is often stated is that the facility or Respondent has never been in any trouble with EPA in the past and accordingly should be given a mitigated penalty. While this may be a legitimate issue, the proper response to this remark is to focus attention on the length that the violations have been ongoing. Five years without annual PCB records is very serious, for example.

Some Respondent's will claim that they lack the ability to pay a civil penalty. This is particularly true of schools, municipalities or other types of businesses that are under capitalized. Always insist on being provided with financial data, either in the form of tax returns or operating budgets, in the case of schools or no profit entities. A good strategy to use is to compare the costs of cleanup (or resulting employee or citizen suits) from some chemical that is improperly will judgment or a large cleanup project be funded.

TSCA Section 16 requires EPA to address the Respondent's ability to continue to do business when faced with the imposition of a civil penalty. The precise language of 16(a) states that the administrator "shall take into account" the effect on ability to continue in business. It doesn't mean that a penalty can't be a major impact on the operation. When appropriate, this issue may be best left to the discretion of the Administrative Law Judge following the taking of testimony.

12. Be Clear About What EPA Must Have to Settle The Case

At the conference, three critical items must be identified and addressed; these are:

a. That the Respondent recognize that there is a problem (even if he won't admit it in the CAFO).

b. That evidence of some corrective action has already been initiated by Respondent, and that tangible evidence in the form of photographs or affidavits be produced to demonstrate good faith efforts to get into compliance.

c. That the Respondent demonstrate a commitment to maintain compliance into the future.

Recognition of violations is the first critical consideration. Some Respondents will insist that no law or regulation was "broken" (or that, at a minimum, it was not "willfully or knowingly" done). Always respond with patience but with firmness; those are elements of a criminal action that have no inherent effect on the civil penalty action proceeding. This is a very critical step in the negotiation process. This is emphasized throughout the settlement discussion for two important reasons. First, it will portray the Agency as being extremely amenable to reducing the penalties, if warranted by the evidence and it will also aid in developing a view that EPA is not arbitrary and is willing to give the Respondent "every benefit of the doubt" - consistent, of course with the quality of the evidence and existing settlement policies. Secondly, this approach will help you to discover any unknown flaws or defects in your case. If the Respondent has 7 transformers and your inspector mistakenly wrote down 77, you need to know that.

13. Always Discuss the Maximum "per day, violation"

Section 16 of TSCA provides for civil and criminal penalties for violations of the Act and regulations of up to $25,000 per day, per violation. It is certainly no secret that EPA rarely imposes the maximum fines allowed by the statute on a "per day, per violation" basis, although it certainly is possible to do so. Penalties have been proposed on a per day per violation basis in several cases, as well as on a per month or per year basis, such as where improper disposal constitutes an ongoing violation or where the respondent may not have any annual PCB documents. In those instances, it would be appropriate to assess a penalty for each month that the illegal activity is taking place.

The TSCA Civil penalty policy does not prohibit the assessment of penalties on a per day basis, see 45 Fed. Reg. 59776. The section entitled Continuing Violations recognizes that there is a potential for very large penalties to be assessed in many situation, stating that large penalties will be appropriate for continuing violations while for others, such as late inventory reporting, assessing an additional penalty for each day or violation could yield a penalty assessment for greater than the violation merits. The PCB Penalty Policy at 45 ed. Reg. 59782 establishes specific guidelines for per day, per violation changes by describing the Proportional Penalty Calculation.

14. Evaluate Inability to Pay Claim

Section 16 of TSCA requires that a number of factors be considered in assessing a civil penalty, specifically, the nature circumstances, extent and gravity of the violation or violations and respect to the violator, the ability to pay effect on ability to continue to do business, and history of prior such violations, the degree of capability and such other matters as justice may require. No Respondent wants to pay a penalty, if it can avoid it. Some Respondents will pay "part" of a penalty as part of the cost of doing business, to avoid further publicity or additional costs of litigation. Nearly all will cite "ability to pay" as a factor in trying to reduce penalty liability.

Given the fact that EPA has a very limited ability to obtain and then interpret financial data, it is necessary to limit our focus to several easy to use financial analysis systems. These are the Lexis computer system and personal or Corporate tax returns.

The Lexis system can provide invaluable information, particularly when used in preparation for a settlement conference. Check the recent financial activity of your Respondent by looking in the Lexis-Nexis library marked "all wires" for any stories or news accounts of corporate financial activity. Stories concerning mergers, acquisitions or stock dividends can be printed out and held in reserve in the event the Respondent starts to paint a financial picture that is too bleak. The Lexis search may also reveal business or financial relationships that may not seem obvious at first.

The program person should be knowledgeable about the appropriate civil penalty and its application to the facts in the case. Use them for a detailed discussion of the civil penalty. Where at all possible, use a graphic display of the penalty calculation worksheet, while the program expert walks the Respondent through the details of the calculation.

15. Use of the National Penalty Docket; Distinguishing Small Penalties.

The Respondents may come to a settlement conference with detailed "statistics" on civil penalties that have been complied from the National Penalty Docket, which is maintained by the Compliance Monitoring Staff, Office of Pesticides and Toxic Substances or from various trade publication, such as the Environment Reporter, Chemical Regulation Reporter or other trade publications. In some cases, Respondents may even have copies of Consent Agreements from cases in your Region or other Regions. In all cases, the sole goal of these "statistics" will be to demonstrate that the penalty being sought in their action is too large by comparison or that they are entitled to a low or lower settlement penalty similar to those identified in the statistics. Because the National Docket or other reporters only state the actual settlement penalty amount, the myriad other factors that enter into a settlement, such as risk of litigation, environmental credits, etc. simply do not show up.

When confronted with this type of selective statistical exhibit, it is critical that you place it to the side of the negotiating table and to firmly refuse to deal with it. Stress the fact that their "facts" are a gross over simplification of the individual factors that go into each individual settlement. Stress adherence to the civil penalty policy and the factors that go into its settlement. Do not agree to evaluate the list or to obtain copies of each and every settlement agreement for the

Respondent. It is a waste of your time and the Respondent is free to seek the material under FOIA, where they will be charged for search time and photocopying.

16. Explain Why EPA uses Civil Penalty Actions vs. District Court Action (factors to stress)

In discussing the imposition of the penalty it is useful to emphasize the fact that an injunction action "could have" been initiated, which would have cost a great deal more in terms of legal fees, and so forth. Stressing how this administrative action is really much cheaper can have a big impact on the prospect of settlement.

17. Presentation of Draft CAFO

As time permits, it is a good practice to prepare a draft Consent Agreement for presentation to the Respondent at the time of the settlement conference. Use of a settlement draft may substantially aid in facilitating a settlement.

SAMPLE OF ANNOTATED "COMPLAINANT'S PRE-HEARING EXCHANGE"

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C.

◂—Be formal

IN RE	
IMPERIAL, INC. Shenandoah, Iowa,	Docket No: FIFRA-86-H-08
Respondent	C O M P L A I N A N T ' S P R E - H E A R I N G E X C H A N G E

By Order of this Court, dated July 23, 1986, the parties to this action were directed to file certain responses and documents by September 11, 1986 in the event this matter could not be settled. THis matter has not been settled and accordingly this is Complainant's response to the Order of the Court.

I. WITNESSES TO BE CALLED

Promote—▸ your witnesses

JOHN J. NEYLAN, III Mr. Neylan is the Director of the Compliance Division, Office of Compliance Monitoring, Office of Pesticides and Toxic Substances, U.S. EPA Washington, D.C. Mr. Neylan will testify that EPA initiated correspondence with the Respondent advising same that Cannon Laboratories of Reading, PA had declared bankruptcy and that agency records indicated that a study submitted by the Respondent in support of the registration of Imperial Ready To Use Rat and Mouse Killer, EPA Registration Number 407-288 had been prepared by Cannon. Of specific concern to EPA was that adequate supporting documentation exist in support of registered products. EPA requested that certain registrants of pesticides relying of Cannon data notify EPA as to the availability of all underlying raw data for testing conducted by Cannon, referencing the specific requirement of 40 CFR 169.2(k) that all underlying raw data for testing conducted in support of registration and/or tolerance petitions must be maintained as long as the registration is valid and the producer is in business.

Briefly, Explain your Case;—▸ you have solid data to support the action

Mr. Neylan will testify that on December 12, 1985, Respondent notified EPA that the underlying raw data, interpretations and evaluations thereof were not available and could not be produced. This information resulted in the issuance of this enforcement action. Finally, Mr. Neylan will testify concerning the significance of of Respondent's failure to maintain such data, its gravity and impact on EPA's duty and ability to insure that pesticides are properly registered, manufactured and used within the United States.

Promote—▸

ROSE BURGESS Ms. Burgess is an Environmental Protection Specialist in the Compliance Division, Office of Compliance Monitoring, Office

Use the penalty—▸

of Pesticides and Toxic Substances, Washington, D.C. Ms. Burgess will provide testimony that Respondent is a "producer" as defined by FIFRA and how the penalty was calculated to be assessed in full conformance with EPA's FIFRA civil penalty policy.

Complainant respectfully reserves the right to supplement the list of witnesses upon adequate notice to Respondent.

II. DOCUMENTS AND EXHIBITS

◂—Be Specific

Respondent has included various documents with its Answer. Complainant intends to submit a copy of the test titled Eye Irritation Study N.Z. Albino Rabbits, which was identified by EPA as MRID No. 68004, as soon as it is received from the Pesticides Registration Division. Since Respondent apparently has a copy of this final report, no prejudice will attach from this late submittal EPA has no additional documents to submit at this time, however Complainant respectfully reserves the right to suplement the list of exhibits upon adequate notice to Respondent.

—Show cooperation where possible

III. PLACE OF HEARING

Complainant prefers that the hearing be held in Washington, D.C., as provided for in 40 CFR 22.19(d) and 22.21(d). In the alternative, Complainant does not object to conducting the hearing at a suitable location in the county where the Respondent resides or in Chicago, Illinois where the EPA Region V office is located.

IV. CONSOLIDATION OF HEARING

Complainant does not object to the consolidation of this case with In the Matter MFA Oil Company, Docket No. FIFRA-86-H-09 since the Respondents appear to have a clear corporate relationship, the facts of each case appear to arise out of the same operative facts in that each action concerns the failure of the respondents to maintain the underlying raw data for the identical study; Eye Irritation Study NZ Albino Rabbits, MRID No. 68004, prepared under contract by Cannon Laboratories. Complainant requests that the consolidation be effectuated immediately in the interest of judicial economy.

Answer all—▸ of the P-X issues raised by the Judge

V. RESPONDENT IS A PRODUCER AS DEFINED BY FIFRA

Complainant disputes Respondent's contention that it is not a "producer" as defined by FIFRA. Under FIFRA, "producer" means any person, who produces a pesticide or a device subject to the Act. Respondent holds a registration number for Imperial Ready To Use Rat and Mouse Killer, EPA Registration Number 407-288 which it produces, processes, markets and distributes in the commerce of the

VI. RESPONDENT IS NOT ENTITLED TO A DISMISSAL OF THIS COMPLAINAT

The Court has requested Complainant's position as to matters stated in Respondent's answer, and, in particular, why the Respondent would not be entitled to a dismissal of the Complaint if the facts are as stated in Respondent's answer and attachments thereto.

There does not appear to be any question that Respondent is a registrant of a toxic fumarin pesticide product that is sold and distributed in commerce in the United States. There does not appear to be any dispute that Respondent contracted with Cannon Laboratories to conduct an eye irritation study in support of the registration of the subject product. Respondent claims the study was done for the purpose of "re-registration" not registration. The requirements of 40 CFR 169 et seq. do not create any such distinction.

Finally, Respondent asserts that it did not "refuse" to maintain the required data under Section 8(a) and that "there is some question as to the responsibility for retrieval of the data since Union Carbide was empowered to act on our behalf," presumably in reference to a "power of attorney" statement issued by Imperial to Union Carbide to go to the Reading Airport to retrieve the requisite raw data from Cannon. While Respondent may be offended by the use of the statutory term "refuse" as required by the Act, (intimating that it was really Cannon who was negligent, responsible or culpable for the "refusal") the facts are inescapable that Respondent was unable to produce the underlying raw data upon the lawful request of the Complainant. Accordingly, the action should not be dismissed.

VII. CALCULATION OF PROPOSED PENALTY

Section 14 of FIFRA authorizes the imposition of a civil penalty of up to $5000 for each offense. Based upon the facts alleged in this Complaint, and in accordance with the guidelines for the assessment of civil penalties under FIFRA, section 14(a), 39 Fed. Reg. 27711 (July 31, 1974), Complainant proposed a penalty of $4,200 for failure to maintain books and records required under Section 8(a) of FIFRA. In the absence of credible evidence to the contrary, Respondent was placed in Category V which includes businesses with annual gross sales of greater than $1,000,000.

◄—Use the Penalty Policy

Respectfully submitted,

Michael J. Walker
Counsel for Complainant
Special Litigation Division

Dated: 9/6/88

C E R T I F I C A T E O F S E R V I C E

←Be sure to Certify

I hereby certify that the original document entitled: COMPLAINANT'S PRE-HEARING EXCHANGE in this matter, Docket No. FIFRA-86-H-08 was sent by post-paid United States Mail to the Hearing Clerk and that true and corect copies were sent by post paid United States Mail to the Court and Respondent all at the following addresses:

Ms. Bessie Hammiel
Hearing Clerk (A-110)
U.S. EPA
401 M Street SW
Washington, D.C. 20460

Hon. Gerald Harwood
Chief Administrative Law Judge
U.S. EPA (A-110)
401 M Street SW
Washington, D.C. 20460

Mr. D.E. Haberehl
Executive Vice President
Imperial, Inc.
P. O. Box 98
W. Sixth Avenue
Shenandoah, Iowa 51601-0098

Dated: 9/10/86

Michael J. Walker

ENVIRONMENTAL AUDITING: REACHING THE BOTTOM LINE IN COMPLIANCE

by

Allen J. Danzig,*
Michael J. Walker,**
and Courtney M. Price***

I. Introduction

In developing compliance strategies under the environmental statutes, the United States Environmental Protection Agency (EPA) has found that traditional administrative and judicial enforcement efforts are not always sufficient to achieve a high level of compliance from all regulated entities, including industry, municipalities, and federally-owned facilities. This has become particularly apparent under the environmental programs that regulate hazardous wastes and toxic substances. To address this issue, EPA has explored the concept of environmental auditing as an innovative approach to promote increased compliance by the regulated community.

"Environmental auditing is a systematic, documented, periodic, and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." *1/* Auditing has been more broadly defined as "an independent appraisal of a corporation's environmental control systems and its environmental assets and liabilities to enable management to make rational decisions relating to environmental matters." *2/* Audits can be used to "verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated material and practices." *3/*

Many corporate auditing programs, which began as checks on compliance status, have evolved into more comprehensive audits of environmental management control systems to assess environmental risks. For example, in reviewing a corporate management system for polychlorinated biphenyls (PCBs), an audit may analyze the system and procedures for handling, storing, marking, cleaning up spills, inspecting, record keeping, and annual inventorying. The audit could also look for risks not yet identified.

Audits should not be confused with the compliance monitoring activities required by environmental laws, regulations, or permits. Audit programs do not replace the inspection programs of regulatory agencies: they evaluate direct compliance activities, such as obtaining permits, installing controls, monitoring compliance, reporting violations, and keeping records.

This article will describe EPA's efforts to encourage environmental auditing by regulated entities. First, it discusses the evolution of government and corporate interest in environmental auditing, including the benefits gained by firms that have instituted auditing programs. The article then discusses EPA's efforts to promote environmental auditing through policy statements in this area. Finally, the article discusses major settlement agreements that contain environmental auditing provisions.

II. Evolution of Corporate Environmental Auditing Programs

Environmental auditing programs were developed for sound business reasons, primarily to assist regulated entities in evaluating compliance and in managing existing and potential pollution control problems, rather than merely reacting to environmental crises. A highly toxic cloud of methyl isocyanate released from the Union Carbide plant in Bhopal, India, which claimed about 2,000 lives, resulted in about 200,000 injuries, and led to damage claims of billions of dollars, is the most dramatic example of a situation that has caused some companies to reassess their environmental and safety problems. Auditing programs also evolved, in part, from Securities and Exchange Commission (SEC) enforcement case settlements that required environmental auditing. *4/* As a result of these developments, several hundred major corporations in the country have voluntarily developed environmental audit programs.

The benefits of environmental auditing are tangible and significant. First, firms face potential civil and criminal liability under state environmental laws and environmental statutes administered by EPA, such as the Clean Air Act, *5/* the Clean Water Act, *6/* the Resource Conservation and Recovery Act (RCRA), *7/* the Superfund Amendments and Reauthorization Act of 1986, *8/* and the Toxic Substances Control Act (TSCA). *9/* Violators also face potential environmental liability for violations of certain

SEC disclosure requirements *10/* as well as toxic tort liability.

Audits may be needed especially where a company wants to obtain pollution liability insurance or to purchase, sell, lease, or modify facilities. The company must be aware of any real or potential liabilities associated with a transaction to ensure that undisclosed liabilities will not affect future operations. Thus, an environmental audit provides corporate management with assurance that potential problems have been addressed before serious accidents, government enforcement, or private lawsuits occur.

Second, firms can save money by assessing potential environmental violations and risks as well as by making capital spending decisions to correct violations, to reduce risks, and to maintain proper operation of treatment systems.

Third, an environmental auditing program can result in an improved relationship between a firm, regulatory agencies, and the public, particularly where audit-discovered violations are identified and corrected within a relatively short period. In developing an appropriate enforcement response, EPA may give some consideration to expeditious, good faith efforts to achieve compliance. *11/*

Finally, regulatory agencies such as EPA obtain significant benefits from environmental auditing programs. These benefits include better assurances of compliance from regulated entities, more efficient use of government inspection and enforcement resources, improved cooperation with companies, better compliance information, and useful information about audit systems.

Regulated entities have perceived some risks in developing auditing programs. Audit reports may generate information on violations of a pollution control statute that may not be otherwise discovered by a regulatory agency during its normal compliance monitoring activities. Such information could form the basis for an EPA or state enforcement action or a citizen suit brought by private citizens. An audit report can also create potential criminal liability where the government can establish that corporate officials knew of violations. Of course, a well-run audit program should expeditiously correct identified violations and other potential liabilities.

Audit reports may contain trade secrets about the company's production process. Thus, firms may attempt to limit governmental access to such reports, particularly if they contain information not required to be reported under one of the environmental statutes.

In developing an approach to encourage the growth of environmental auditing, EPA has sought to recognize the legitimate concerns of regulated entities while preserving its enforcement prerogatives.

III. Development of EPA Environmental Auditing Policy

EPA's interest in environmental auditing evolved from recognition of mutual gains to be derived by the regulated community and the federal government. The Agency originally considered mandatory auditing programs requiring firms to hire external auditors to certify compliance with permits and other requirements. However, EPA rejected this concept. Regulated entities have strongly objected to using audits as an additional regulatory program or requirement. EPA subsequently considered less structured methods to encourage achievement of auditing goals. EPA has encouraged auditing through participation in numerous auditing conferences, workshops, and seminars sponsored by EPA, states, localities, trade associations, and professional organizations. EPA's policy in this area is contained in two documents, the *Environmental Auditing Policy Statement* and the *Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements* (hereinafter the "*Policy on Environmental Auditing in Settlements*").

A. The Environmental Auditing Policy Statement

1. Encouraging environmental auditing

The *Environmental Auditing Policy Statement* initially provides that: "it is EPA policy to encourage the use of environmental auditing by regulated entities [including federal facilities] to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards." *12/* While state and local regulatory agencies have independent jurisdiction over regulated entities, EPA encourages states to adopt the *Environmental*

Auditing Policy Statement and approach auditing in a consistent manner. EPA also encourages regulated entities to adopt sound environmental management practices that improve environmental performance, including programs that ensure the adequacy of internal systems to achieve, maintain, and monitor compliance.

The policy further states that EPA will not dictate or interfere with the environmental practices of private or public organizations and will not prescribe minimum requirements for audit programs. Nonetheless, to provide some guidance to regulated entities, the policy outlines the common elements of effective audits:

> (1) explicit management support for environmental auditing and commitment to follow up on audit findings;
>
> (2) an environmental audit function independent of audited activities;
>
> (3) adequate team staffing and auditor training;
>
> (4) explicit audit program objectives, including scope, resources, and frequency;
>
> (5) a process that collects, analyzes, and interprets documents and information on compliance and management effectiveness sufficient to achieve audit objectives;
>
> (6) specific procedures to promptly prepare candid, clear, and appropriate written reports on audit findings, corrective actions, and schedules for implementation; and
>
> (7) quality assurance procedures to assure that the environmental audits are accurate and thorough.

The policy emphasizes that ultimate responsibility for the environmental performance of the facility lies with top management, and that independent internal or third-party auditors should conduct the audit. Corporate officials have agreed that top management support and responsibility for environmental decisions are critical to successful auditing programs. *13/*

2. Agency requests for audit reports

Second, the policy addresses the extent to which EPA may make requests to obtain audit reports. In addressing this issue, EPA has attempted to balance the use of its broad authority to obtain compliance-related information with the concerns of regulated entities on the extent of Agency access to and use of audit information.

EPA can obtain audit-generated information in several ways. The major environmental statutes authorize EPA to require extensive monitoring, record keeping, and reporting schemes relating to compliance with these laws. *14/* Pursuant to this authority, EPA has promulgated regulations on monitoring, record keeping, and governmental access. *15/* Thus, required reporting data, such as a Clean Water Act discharge monitoring report, must be reported to EPA or a state agency, although it does not have to be reported as part of the audit. The Agency can obtain access to information that is relevant to an authorized enforcement investigation, including information used to prepare audits and the audit reports themselves, either administratively or through discovery in civil litigation.

Recognizing that routine Agency requests may have some inhibiting effects on auditing programs, the policy statement provides that "EPA will not routinely request environmental audit reports." *16/* At the same time, EPA maintains its authority to request and receive information in audit reports under the various environmental statutes. EPA may request such reports where consent decrees contain audit provisions with reporting requirements, where a company's management practices are raised as a defense, or where state of mind is a relevant element of inquiry. Importantly, the policy recognizes that regulated entities have continuing obligations to monitor, record, or report information required under environmental statutes, regulations, or permits, and that EPA has access to that information.

Industry commentors on the *Environmental Auditing Policy Statement* felt that access to audit reports should be limited to bad faith efforts to conceal evidence of violations or criminal investigations. However, such a limited set of circumstances could appear to offer a defense to those unwilling to provide required or requested information and thus limit

circumstances where EPA would request audit reports.

Nonetheless, while the Federal Rules of Civil Procedure would generally favor disclosure of audit information, *17/* a company may attempt to demonstrate that one of the exceptions to the discovery rules applies. These include the attorney-client privilege, the work product doctrine, and the privilege for self-evaluative documents. However, it may not be practical to bring the entire audit process within one of these exceptions given the regulated entity's interest in developing corporate-wide support and technical expertise for an audit program.

3. EPA enforcement response to environmental auditing

In addressing the impact of environmental audit programs on EPA's enforcement response, EPA examined the extent to which it could reduce the potential disincentives for auditing and still maintain a strong enforcement program.

The environmental statutes and case law generally allow EPA flexibility in developing enforcement responses to environmental violations. Several courts have held that the duty to find a violation is not mandatory. *18/* Where EPA makes a finding that a violation exists, EPA generally must take some type of formal enforcement action (*i.e.*, either administrative or judicial) under the Clean Water Act, *19/* under the Clean Air Act, *20/* or under RCRA. *21/* All statutes authorize EPA to choose the type of formal enforcement response and to obtain substantial penalties.

The *Environmental Auditing Policy Statement* provides that "EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental management practices." *22/* While audits may complement inspections, they do not provide a substitute for regulatory oversight. However, facilities with a good compliance history may be subject to fewer inspections. *23/*

Similarly, EPA states that it will not reduce its enforcement responses or offer other incentives in exchange for auditing. However, the Agency explains that, in developing a particular enforcement response to violations, "EPA policy is to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct environmental problems." *24/* Reasonable efforts to avoid noncompliance, expeditious correction of environmental problems discovered through audits or other means, and implementation of measures that will prevent the recurrence of these problems may be considered by EPA as honest and genuine efforts to assure compliance.

EPA has also provided additional guidance on enforcement response in related policy statements and has agreed to use some enforcement discretion in negotiating consent decrees with audit provisions.

The *Agencywide Compliance and Enforcement Strategy* directs EPA to select enforcement responses on a case-by-case basis after considering (1) the gravity of the violation in terms of environmental impact and effect on EPA's ability to carry out its programs; (2) the reasons why the violation occurred; and (3) the nature of the violator, including its compliance record and the economic benefit it gained as a result of the violation. *25/* Many EPA program-specific enforcement policies further set enforcement priorities for certain categories of violations. *26/* Moreover, EPA policy sets categories of violations for which cash penalties must be paid.

Although it does not explicitly address auditing, EPA's *Policy on Civil Penalties* also provides some guidance for calculating penalties in administrative and judicial enforcement actions where the violator agrees to perform an activity, such as an audit, as part of a settlement. At a minimum, the penalty must remove the economic benefit for failure to comply and obtain an additional amount to reflect the seriousness or gravity of the violation. The gravity component of the penalty can be adjusted to reflect the following factors: (1) degree of willfulness; (2) history of noncompliance; (3) ability to pay; and (4) degree of cooperation. Statute-specific penalty policies also discuss these adjustment factors. *27/* Expeditious correction of past compliance problems may result in some mitigation.

Thus, a company's willingness to set up an environmental auditing program as part of a settlement as well as to expeditiously correct

new audit-discovered violations, could show cooperation, potentially allowing partial mitigation of the penalty amount.

EPA consent decree guidance also recognizes that defendants may agree to take certain actions above and beyond those necessary to meet statutory requirements in order to offset a cash penalty as long as this type of agreement is explicitly noted in the decree. *28/* The *TSCA Settlement with Conditions Policy 29/* appears to allow for some type of mitigation if the remedy includes an audit. This policy provides that EPA may agree to remit a portion of the proposed civil penalty where the violator agrees to take extensive and specific remedial actions. The remedial actions may be related not only to the violations discovered by the Agency but also to other current violations that have not yet been discovered, *e.g.*, through an audit of other company facilities where similar violations are suspected.

B. Policy on Audit Provisions as Remedies in EPA Enforcement Settlements

In addition to encouraging voluntary development of auditing programs, EPA has achieved numerous settlements that require environmental audits. Audits can be an effective and efficient use of enforcement resources in obtaining compliance. EPA has broad authority to negotiate an audit provision in a consent decree as part of its authority to require self-monitoring as a remedy for violators. *30/* EPA may obtain remedies not expressly authorized by statute or required under EPA regulations where the decree's terms do not violate the statute's express prohibitions.

Traditional EPA settlement agreements have required correction of specific violations and have assessed penalties. Settlements typically include the following provisions: (1) requiring compliance with applicable statutes or regulations and committing the defendants to a particular remedial course of action by a set date; (2) scheduling a timetable for achieving compliance that requires the greatest degree of remedial action as quickly as possible, including interim dates to allow for Agency monitoring of defendant's progress; (3) monitoring, reporting, and sampling provisions; (4) requiring site entry and access and document review; (5) assessing civil penalties for statutory violations; and (6) assessing stipulated penalties for violating the consent decree. *31/* These settlements may fail to address the lack of a company policy encouraging continuing compliance with environmental laws and regulations as well as the absence of procedures that would effectively implement such a policy. *32/*

Under the *Environmental Auditing Policy Statement* and the *Policy on Environmental Auditing in Settlements*, EPA may propose auditing provisions in consent decrees and in other settlement negotiations where

- a pattern of violations can be attributed, at least in part, to the absence or poor functioning of an environmental management system; or
- the type or nature of violations indicates a likelihood that similar noncompliance problems may exist or occur elsewhere in the facility or at other facilities operated by the regulated entity. *33/*

EPA generally has negotiated two types of audits: compliance audits and management audits. Compliance audits involve an independent assessment of the current status of a party's compliance with applicable statutory and regulatory requirements. *34/* EPA has negotiated compliance audits where it finds that violations discovered at a facility may likely be found elsewhere in a party's operation. In such cases, the companies have agreed to review the compliance status of all corporate facilities to ensure that similar violations do not exist and to certify to EPA that all facilities are in compliance. Where a firm does not accurately certify compliance, and EPA subsequently discovers violations at the certified facilities, EPA can proceed with a criminal enforcement action based on knowing and willful falsification of reports.

Management audits involve an independent evaluation of a party's environmental compliance policies, practices, and controls. Such evaluation may encompass the need for (1) a formal corporate environmental compliance policy and procedures for implementation of that policy; (2) educational and training programs for employees; (3) equipment purchase, operation, and maintenance programs; (4) environmental compliance officer programs (or other organizational structures relevant to compliance); (5) budgeting and planning systems for

environmental compliance; (6) monitoring, record keeping, and reporting systems; (7) in-plant and community emergency plans; (8) internal communications and control systems; and (9) hazard identification and risk assessment. *35/*

Management audits have been negotiated where EPA believed that a pattern of violations resulted in large part from a lack of, or poor functioning of, corporate environmental management or operational controls. *36/* In developing such controls, a company may be required to go beyond a review of facility compliance status and examine its entire environmental management policies, procedures, and organizational structure and programs affecting all company employees and operations. *37/*

The *Policy on Environmental Auditing in Settlements* states that EPA will not dictate the details of a party's internal management system. However, EPA should generally withhold approval of an audit plan for a defendant with an extensive history of noncompliance unless the plan requires the following:

- use of an independent third-party auditor not affiliated with the audited entity;
- adherence to detailed audit protocols; and
- more extensive Agency role in identifying corrective action. *38/*

The policy addresses several other issues that come up in settlement. It directs Agency negotiators to reserve EPA's right to review audit-related documents. Next, the policy notes that reductions of penalty amounts cannot go below those authorized by Agency penalty policy. In no case will a party's agreement to audit result in a penalty amount lower than the economic benefit of noncompliance. However, "stipulated penalties [should] only apply to those classes of audit-discovered violations whose surrounding circumstances may be reasonably anticipated." *39/*

The policy further states that audit provisions will not affect Agency inspection plans. Such plans and liability for violations other than those contained in the underlying enforcement actions are unaffected by the settlement. Finally, regarding audit-generated data claimed as confidential, EPA will treat such information as it treats other confidential business information, *i.e.*, in accordance with 40 C.F.R. Part 2.

IV. EPA Use of Auditing in Consent Decrees

EPA has recently negotiated environmental audit provisions in numerous settlement agreements. Most auditing provisions are contained in administrative settlement agreements under TSCA and RCRA.

In TSCA cases, EPA generally has negotiated environmental audit provisions for polychlorinated biphenyl (PCB) violations where EPA suspected similar violations at other company facilities that were not the subject of the immediate enforcement action. Under TSCA, for facilities with PCBs, the regulated entities generally have no affirmative duty to obtain federal use permits, discharge permits, or waste manifests, so a particular facility in a company may have little contact with the regulatory agency. Other company facilities also may not be familiar with TSCA requirements and may have TSCA violations. In RCRA cases, EPA has negotiated audit provisions to address inadequate hazardous waste management practices, including monitoring, reporting, and record keeping requirements.

In re Owens-Corning Fiberglas Corp. 40/ and *In re Crompton & Knowles Corp. 41/* involved TSCA administrative enforcement actions for PCB violations that resulted in settlement agreements involving compliance audit provisions. In *Crompton*, EPA alleged that the company had failed to (1) affix the required PCB warning label transformers; (2) inspect, record, and report leaks to EPA; and (3) develop and maintain records on the disposition of PCB and PCB items at the facility.

The consent agreement and final order in *Crompton 42/* assessed a civil penalty and required the company to take the following actions in a compliance audit: (1) certify to EPA that it had conducted an inventory of PCBs, PCB items, heat transfer systems, and hydraulic systems at each of its twenty-eight facilities; (2) submit a written report for each facility specifying the location and quantity of PCBs, PCB items, heat transfer systems, and hydraulic systems at each of its twenty-eight facilities; (3) describe the audit at each facility; and (4) within sixty days of the effective date of the consent decree, certify by a responsible corporate official that each facility is in

compliance with PCB regulations, including the basis upon which it would certify compliance.

Owens-Corning involved a similar PCB compliance audit for sixty-three facilities *43/* while the audit in *In re Potlatch Corp.* covered forty-eight company facilities. *44/* The compliance audits in *EPA v. Chem-Security Systems, Inc. 45/* were limited to the facility at issue in the administrative enforcement actions and required Chem-Security to conduct four quarterly TSCA (PCB) and RCRA compliance audits and to send the audit reports to EPA.

In *In re Diamond Shamrock Chemical Corp., 46/* EPA alleged that the company failed to notify EPA of its intention to manufacture a chemical substance not on the TSCA inventory and used for commercial purposes an illegally manufactured substance. The consent agreement and order required the company to perform a TSCA compliance audit of all of its forty-three facilities, to evaluate the TSCA compliance status facilities, and to report TSCA violations discovered at those facilities. *47/* In addition to reviewing PCB compliance, the audit required Diamond Shamrock to assess compliance with several other TSCA record keeping and reporting requirements and to report all discovered TSCA violations to EPA.

In *In re Union Carbide Corp., 48/* EPA alleged that Union Carbide manufactured and used for a commercial purpose a chemical substance without the required premanufacturing notice and thus was not on the TSCA inventory in violation of sections 5 and 15 of TSCA. As part of the settlement agreement, Union Carbide agreed to prepare over the following year (1) an educational program designed to reemphasize premanufacturing notice compliance that will be presented to a broad company audience; and (2) subsequent to the completion of such education program, implement a program of not less than five test inputs to monitor responses for TSCA compliance. *49/* Such a program will allow the corporation to assess the compliance capability under actual business conditions by responding to artificially created violations.

EPA has negotiated management environmental audits in several administrative settlements with Chemical Waste Management, Inc. (CWM). In *In re Chemical Waste Management 50/* (Kettleman Hills facility), EPA alleged that CWM committed numerous RCRA violations, including failure to implement an adequate groundwater monitoring system, failure to implement an unsaturated zone monitoring program, failure to develop an adequate closure plan, failure to make substantial modifications to the facility, as well as violations of section 15 of TSCA. CWM agreed to perform a compliance and management audit covering all RCRA and TSCA requirements at the facility.

The *Kettleman Hills* consent agreement and final order *51/* included an audit that provided for an independent third-party auditor to submit a proposal for the scope of work to EPA to audit waste operations and environmental management systems at the facility and in CWM's corporate environmental management department. Within one year after obtaining a written agreement on the scope of work for the audit, the auditor was required to submit written reports to EPA on RCRA and TSCA compliance. These reports would

(1) identify and describe the facility's existing waste management operations, including management systems, policies, and prevailing practices;

(2) evaluate such operations, systems, practices and policies, identifying strengths and weaknesses; and

(3) identify and describe areas of waste management operations and environmental management systems that could be significantly improved, including personnel training, corporate management and lines of authority, operations and maintenance procedures, interim stabilization, and quality control and assurance.

Within ninety days after CWM's receipt of these reports, CWM was required to submit to EPA the portion of the report containing findings and recommendations of the auditor, CWM's evaluation of each option, and specific actions the company would take, as well as a schedule for implementation.

The administrative consent agreements in *In re Chemical Waste Management 52/* (Emelle facility) and in *In re Chemical Waste Management 53/* (Vickery facility) involved similar management audit requirements to address RCRA and TSCA violations. In *In re BASF*

Systems Corporation, where it appeared that the foreign corporate parent of a violator contributed in part to circumstances involving the violation, EPA has required that auditors include measures to insure that the foreign parent is apprised of TSCA import and certification requirements and that it implement measures to ensure that TSCA requirements are met. *54/*

In proposing environmental audit provisions in consent decrees, EPA has addressed concerns on EPA access to audit-generated information and the appropriate EPA response to violations discovered by an audit. Of course, where an audit is conducted pursuant to a settlement agreement, EPA has required greater access to audit data than under a voluntary audit program to ensure compliance with the settlement. EPA has generally reserved its right to inspect defendant's facilities to determine the accuracy of compliance verifications and other submittals. *55/* In addition, audits may identify and document violations that may otherwise have gone unnoticed by a regulatory agency. In some settlements, reporting of audit-discovered violations has been limited to that necessary to ensure compliance with the terms of the settlement or as otherwise authorized by regulation or statute. *56/* Some audits have required reporting of all audit-generated violations to EPA. *57/*

An audit report may also include information on matters other than the immediate environmental issues, such as the production process, that the company would wish to keep confidential. In some cases, defendants have been permitted to assert a business confidentiality claim with respect to information submitted in compliance with the settlement. *58/* Another settlement specifies that audit-reported information would be treated as confidential by EPA to the extent authorized by TSCA and RCRA. *59/*

EPA has assessed penalties in all audit-related settlements for past violations or those violations that were the subject of the original enforcement action. *60/* To encourage environmental auditing in settlement agreements, EPA has been willing to limit somewhat its use of audit reports in prospective enforcement actions. In some settlements, EPA has reserved all enforcement rights regarding prospective violations. *61/*

Recognizing the significant benefits of continuous compliance at audited facilities, EPA has agreed in certain settlements that the results of an audit would not be used by EPA as direct evidence of violations; however, EPA is not precluded from enforcing against violations discovered independently of the audit. *62/* In *In re Chemical Waste Management* (Kettleman Hills facility) EPA allowed a six-month grace period after completion of the audit to correct audit-discovered violations with no stipulated penalties, while EPA allowed a six-month grace period after the settlement date to discover and remedy violations in *In re Diamond Shamrock Chemical Corp.* After this time period, EPA could enforce against such violations. *63/*

However, grace periods will probably only be considered where the government will achieve significant compliance benefits from the settlement. A grace period does not preclude EPA from bringing an enforcement action to enforce the consent agreement or to seek injunctive relief to abate a condition that may present an imminent and substantial endangerment or an imminent hazard under TSCA. *64/* For example, in a settlement with BASF Systems Corporation, EPA and BASF agreed that BASF would pay the sum of ten thousand dollars as a stipulated maximum penalty for each chemical discovered as the result of the audit determined to be in violation of sections 5, 8, or 13 of TSCA, on the condition that the chemical does not represent a substantial risk to health or to the environment. *65/* For chemicals that represent a substantial risk, EPA reserved the right to seek a penalty in accordance with its published guidelines.

EPA may adjust its enforcement response where a company provides more compliance information on its facilities than the Agency would have obtained through its compliance monitoring programs and where subsequent violations are quickly corrected. This could apply, in particular, where audit-discovered violations involve little or no economic benefit or savings to the violator under agency penalty policy, such as various TSCA reporting and record keeping violations. However, where a new violation does involve economic savings, EPA will seek to assess a penalty that reflects such savings, although it may provide some adjustment for the gravity aspect of the violation. To do otherwise would not be fair to the numerous

companies within the same industrial category who have paid for the costs of pollution control and would place complying facilities at a competitive disadvantage.

V. Conclusion

Environmental auditing is playing a growing role in the Nation's efforts to achieve continuous compliance with environmental laws. EPA has encouraged the use of environmental auditing by regulated entities through its auditing policies and through the use of audit provisions in appropriate settlement agreements. Audit programs serve regulated entities' interests in long-term cost savings and improved cooperation with regulatory agencies, while they complement the compliance efforts of regulatory agencies.

EPA recognizes the legitimate interests of regulated entities in limiting disclosure of certain audit-generated information and in taking enforcement responses that recognize defendants' genuine compliance efforts. However, EPA will continue to seek environmental audit provisions in consent deerees, particularly where a pattern of multi-facility compliance and environmental management problems exists. Moreover, by maintaining a strong enforcement program and penalty deterrent, EPA will encourage new voluntary environmental audit programs.

Footnotes

* Attorney, Office of Enforcement and Compliance Monitoring, United States Environmental Protection Agency.

** Attorney, Office of Enforcement and Compliance Monitoring, United States Environmental Protection Agency.

*** Partner - Rivkin, Radler, Dunne, and Bayh, Washington, D.C. Formerly Assistant Administrator for Enforcement and Compliance Monitoring, U.S. Environmental Protection Agency.

The views expressed in this article are the personal views of the authors. No official support or endorsement by the United States Environmental Protection Agency is intended or implied. An earlier version of this article appeared in the Loyola of Los Angeles Law Review, Vol. 19: 1189 (1986), *Environmental Auditing: Developing a "Preventive Medicine" Approach to Environmental Compliance* by Courtney M. Price and Allen J. Danzig.

1/ U.S. Environmental Protection Agency, Environmental Auditing Policy Statement, 51 Fed. Reg. 25004, 25006 (July 9, 1986).

2/ Reed, *Environmental Audits and Confidentiality: Can What You Know Hurt You as Much as What You Don't Know?*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,303 (Oct. 1983).

3/ Environmental Auditing Policy Statement, *supra* note 1, at 25006.

4/ *See, e.g., In re* Occidental Petroleum Corp. [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) par. 82,622, 83,356 n.34 (1980).

5/ 42 U.S.C. §§ 7401-7642 (1982). For example, the Clean Air Act § 113(b) provides up to $25,000 civil penalties per day of violation. CAA § 113(b), 42 U.S.C. § 7413(b). Section 113(c) provides criminal penalties of $25,000 and jail terms of up to one year for certain knowing violations. *Id.* § 113(c), 42 U.S.C. § 7413(c).

6/ 33 U.S.C. §§ 1251, 1319(b),(c) (1982).

7/ 42 U.S.C. §§ 6901, 6928 (1982).

8/ 42 U.S.C. §§ 9601, 9606-9607 (1986).

9/ 15 U.S.C. §§ 2615 (a) and (b) (1976).

10/ *See* Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1982). SEC regulations require all publicly held companies to disclose the effects of compliance with, and legal proceedings under, federal and state law through public filings to the SEC. Regulation S-K, Item 101(c)(1)(xii), 17 C.F.R. § 229.101(c)(1)(xxi)(1985); Instruction 5 to Item 103, 17 C.F.R. § 299.103 (1985).

11/ *See* Environmental Protection Agency, A Framework for Statute-Specific

Approaches to Penalty Assessments--Implementing EPA's Policy on Civil Penalties 19-20 (1984) [hereinafter cited as Implementing EPA's Policy on Civil Penalties].

12/ Environmental Auditing Policy Statement, *supra* note 1, at 25004.

13/ *See, e.g.*, Freedman, *Organizing and Managing Effective Corporate Environmental Protection Programs*, Envtl. Forum, May 1984, at 40-41.

14/ *See, e.g.*, CWA § 308, 33 U.S.C. § 1318 (1982); CAA § 114, 42 U.S.C. § 7414 (1982).

15/ *See, e.g.*, Clean Water Act--National Pollutant Discharge Elimination System (NPDES) regulations, 40 C.F.R. § 122 (1985).

16/ Environmental Auditing Policy Statement, *supra* note 1, at 25007.

17/ Fed. R. Civ. P. 26(b)(1) states: Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party ... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

18/ Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977); Caldwell v. Gurley Ref. Co., 533 F. Supp. 252 (E.D. Ark. 1982). *Contra* South Carolina Wildlife Fed'n. v. Alexander, 457 F. Supp 118 (D.S.C. 1978).

19/ *See* South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 131 (D. S.C. 1978); People *ex rel.* Scott v. Hoffman, 425 F. Supp. 71, 77 (S.D. Ill. 1977). *But see* Sierra Club v. Train, 557 F.2d 485, 490 (5th Cir. 1977).

20/ *See* Council of Commuter Orgs. v. Metropolitan Transit Auth., 683 F.2d 663 (2d Cir. 1982); Luckie v. Gorsuch, 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,400 (D. Ariz. 1983); Conoco, Inc. v. Gardebring, 503 F. Supp. 49, 51 (N.D. Ill. 1980). *Contra* Kentucky *ex rel.* Hancock v. Ruckelshaus, 497 F.2d 1172, 1177 (6th Cir. 1974), *aff'd on other grounds sub nom.*, Hancock v. Train, 426 U.S. 167 (1976); New England Legal Found. v. Costle, 475 F. Supp. 425, 436 (D. Conn. 1979), *aff'd in part, rev'd in part*, 632 F.2d 936 (2d Cir. 1980).

21/ *See* Luckie v. Gorsuch, 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,400 (D. Ariz. 1983).

22/ Environmental Auditing Policy Statement, *supra* note 1, at 25007.

23/ *Id.*

24/ *Id.*

25/ Environmental Protection Agency, Agencywide Compliance and Enforcement Strategy and Strategy Framework for EPA Compliance Programs (1984) at 25.

26/ For example, under the RCRA *Enforcement Response Policy*, p. 6-14 (1984), a primary enforcement priority is all Class I groundwater violations. Class I violations involve a release or threatened release of hazardous wastes to the environment, failure to assure groundwater protection, proper post-closure care, or delivery of wastes to a permitted interim status facility. *Id.* at 11.

27/ *See, e.g.*, Environmental Protection Agency, Final RCRA Civil Penalty Policy 16-21 (1984).

28/ Environmental Protection Agency, Guidance for Drafting Judicial Consent Decrees 18 (1983).

29/ *TSCA Settlement with Conditions*, in TSCA Compliance/Enforcement Guidance Manual app. A (1984).

30/ *See, e.g.*, CWA § 308, 33 U.S.C. § 1318 (1982); CAA § 114, 42 U.S.C. § 7414 (1982).

31/ Guidance for Drafting Judicial Consent Decrees, *supra* note 28, at 10-18, 22-24.

32/ *See* Mays, *Environmental Audits: A New Enforcement Tool*, EPA Journal, June 1985.

33/ Policy on Environmental Auditing in Settlements at 2.

34/ *Id.* at 3.

35/ *Id.*

36/ Mays, *supra* note 32, at 27.

37/ Mays, *Environmental Audits: Addressing Root Causes*, Chem. Week, May 29, 1985, at 4.

38/ Policy on Environmental Auditing in Settlements, *supra* note 33, at 5.

39/ *Id.* at 6.

40/ Administrative Complaint, *In re* Owens-Corning Fiberglas Corp., No. TSCA-V-C-101 (EPA Reg. V filed Feb. 14, 1983).

41/ Administrative Complaint, *In re* Crompton & Knowles Corp., No. TSCA-PCB-82-0108 (EPA Reg. II filed July 29, 1982).

42/ *In re* Crompton & Knowles, No. TSCA-PCB-82-0108, at app. B (EPA Reg. II Sept. 17, 1985) (Consent Agreement and Final Order).

43/ *In re* Owens-Corning Fiberglas Corp., No. TSCA-V-C-101, app. at 6-7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

44/ *In re* Potlatch Corp., No. TSCA-V-C-137, at 4 (EPA Reg. V. Aug. 3, 1983) (Consent Agreement and Final Order).

45/ EPA v. Chem-Security Sys., Inc., No. 1085-07-42-2615P at 3-6 (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order).

46/ Administrative Complaint, *In re* Diamond Shamrock Chem. Corp., No. TSCA-85-H-03 (EPA Headquarters filed Mar. 18, 1985).

47/ *In re* Diamond Shamrock Chem. Corp., No. TSCA-85-H-03, Audit Agreement (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

48/ Administrative Complaint, *In re* Union Carbide Corp., No. TSCA-85-H-06 (EPA Headquarters filed June 17, 1985).

49/ *In re* Union Carbide Corp., No. TSCA-85-H-06, at 6-7 (EPA Headquarters Feb. 26, 1986) (Consent Agreement and Order). Similar TSCA violations formed the basis for an audit in *In re* BASF Wyandotte Corp., No. TSCA-V-C-410 (EPA Reg. V filed Apr. 25, 1986) (Consent Agreement and Final Order). The audit required BASF to review thirteen facilities and certify that all chemicals required to be listed on the TSCA Chemical Substances Inventory were so listed. *Id.* at 2-3.

50/ *See In re* Chemical Waste Management, Inc., No. RCRA-09-84-0037 (EPA Reg. IX July 3, 1984) (Determination of Violation, Compliance Order, and Notice of Right to Request Hearing); *In re* Chemical Waste Management, Inc., No. RCRA-09-84-0037, at 5-26 (EPA Reg. IX June 6, 1985) (Amended Determination of Violation, Compliance Order, and Notice of Right to Request a Hearing). *In re* Chemical Waste Management, Inc., No. TSCA-09-84-0009 (EPA Reg. IX filed June 6, 1985) (Administrative Complaint and Notice of Hearing).

51/ *In re* Chemical Waste Management, Inc., Nos. RCRA-09-84-0037, TSCA-09-84-0009 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order) (Kettleman Hills facility).

52/ *In re* Chemical Waste Management, Inc., TSCA-84-H-03, at 16-20 (EPA Reg. IV Dec. 19, 1984) (Consent Agreement and Final Order).

53/ *In re* Chemical Waste Management, Inc., Nos. TSCA-V-C-307, RCRA-V-85R-019, at 5-9 (EPA Reg. V Apr. 5, 1985) (Consent Agreement and Final Order).

54/ *In re* BASF Systems Corporation, No. TSCA-85-H-04, at 6 (EPA Headquarters, May 28, 1986) (Consent Agreement and Final Order).

55/ *See, e.g., In re* Owens-Corning Fiberglas Corp., No. TSCA-V-C-101, app. at 6-7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

56/ *See, e.g.,* EPA v. Chem-Security Sys., Inc., No. 1085-07-42-2615P (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order); *In re* Owens-Corning Fiberglas Corp., No. TSCA-V-C-101 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

57/ *See, e.g., In re* Diamond Shamrock Chem. Corp., No. TSCA-85-H-03, Audit Agreement, at 2-3 (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

58/ *See, e.g., In re* Owens-Corning Fiberglas Corp., No. TSCA-V-C-101, at 7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

59/ *In re* Chemical Waste Management, Inc., Nos. RCRA-09-84-0037, TSCA-09-84-0009 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order) (Kettleman Hills facility).

60/ *See, e.g., In re* Chem-Security Sys., Inc., No. 1085-07-42-2651P, at 4 (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order).

61/ *See, e.g., In re* BASF Wyandotte Corp., No. TSCA-V-C-410, at 2, 4 (EPA Reg. V filed Apr. 25, 1986) (Consent Agreement and Final Order); *In re* Chem-Security Sys., Inc., No. 1085-07-42-2615P, at 5-6 (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order).

62/ *In re* Chemical Waste Management, Inc., Nos. RCRA-09-84-0037, TSCA-09-84-0009, at 7 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order).

63/ *Id. See also In re* Diamond Shamrock Chem. Corp., No. TSCA-85-H-03, Audit Agreement, at 8 (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

64/ *In re* Diamond Shamrock Chem. Corp., No. TSCA-85-H-03, Audit Agreement, at 8 (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

65/ *In re* BASF Systems Corporation, No. TSCA-85-H-04, at 6 (EPA Headquarters May 28, 1986) (Consent Agreement and Final Order).

A SHORT PRIMER ON MOTIONS FOR ACCELERATED DECISION

Michael J. Walker
Enforcement Counsel

o Successful administrative law enforcement involves **both** the knowledge of and effective use of the Consolidated Rules of Practice (40 CFR Part 22, et seq.) and supporting administrative precedent.[1]

o Supporting administrative precedent can be obtained through the Enforcement Document Retrieval System (EDRS) and each Regional Hearing Clerk.

o Aggressive litigation -- through strategic motion practice -- is the key to effective and timely settlements on terms favorable to the government.

o Motions to strike affirmative defenses can be effective in keeping the record clear of frivolous issues and send a clear signal that the agency is serious about litigating.

See: EPA Motion to Strike 52 Affirmative Defenses
Chemical Waste Management, Inc. Kettleman Hills, CA facility; Docket No. RCRA-09-84-0037.

Judge Marvin Jones granted this motion 12 days after it was filed, sending a clear signal to CWM that settlement was a preferred option. This case settled for $2.1 million dollars.

NOTE: Motions to strike are governed by 40 CFR §22.16.

The "tests" for striking affirmative defenses are:

1. insufficiency as a matter of law;
2. immateriality;
3. redundancy or surplusage;
4. lack of jurisdiction

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[1] Note: the cases and material cited herein is meant to be illustrative and not exhaustive. Many motions, orders and accelerated decisions in TSCA, FIFRA, RCRA and EPCRA may be found in the EDRS system.

5. frivolous purpose or use for an improper purpose, such as to delay the resolution of the proceedings.

See how the CWM motion deals with each "defense" in the chart on page two of the Memorandum of Authorities.

o Motions opposing discovery can also be effective in keeping cases moving.

NOTE: Administrative "discovery" is provided for in the Rules through the pre-hearing exchange, 40 CFR §22.19. Additional discovery may be obtained only by authorization of the Court, after informal efforts have been exhausted. 40 CFR §22.19(f). Citing Silverman v. Commodity Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977), Judge Vanderheyden held that there is no "basic constitutional right to pretrial discovery in administrative hearings." See: Eastman Chemicals Division, Eastman Kodak Company, Order of Judge Frank Vanderheyden, Docket No. TSCA-88-H-07.

o Motions for accelerated decisions can be very effective in moving cases toward settlement.

o The Consolidated Rules of Practice at 40 CFR §22.20 provide that:

The presiding officer
(ALJ or Regional Presiding Officer)

upon motion[2] of any party

or **sua sponte**[3] (on their own motion)

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[2] Generally, 95% of all motions for Accelerated Decision are filed by the Complainant.

[3] Judge Yost has become aggressive about sua sponte identifying situations appropriate for Accelerated Decisions as a method to keep his docket moving. In one case, Pasadena Power, Docket No. TSCA-09-89-0004, Judge Yost ordered Region 9 attorney David Jones to draft a "written decision, consistent with" the findings of liability and penalty. Submitting a draft accelerated decision on diskette could help move more cases.

may **at any time**[4]

render an **accelerated decision**[5]

in **favor of the complainant or respondent**

as to **all**[6],[7] or **any part of the proceeding**,[8]

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[4] Note that "any time" is not liberally construed. Some motions for accelerated decision brought a few weeks before the case was set for trial have been rejected where the respondent did not have sufficient time to file a response as provided for in the rules. Such motions are rarely, if ever, granted at trial either.

[5] See Rainbow Paint & Coatings attached to this Primer as a representative example.

[6] Many judges have been unwilling to grant accelerated decisions on both liability and penalty. See Wofford College; Docket No. TSCA-IV-86-0281, believing that the respondent should have its day in court on the issue of penalty. Other Judges, such as Vanderheyden in Rainbow Paints & Coatings, Docket No. EPCRA VII-89-T-609; and Rohr Industries, Docket No. EPCRA-1089-04-08-325; Judge Yost in Potomac Chemicals; Docket No. FIFRA-III-342-C; John Book; Docket No. IF&R VII-1081C-91P and Gentre Laboratories; Docket No. FIFRA-09-0645-C-89-10 have granted motions for both liability and penalty. The Rohr case (in EDRS) is the leading example to be followed, since it relied on admissions of the Respondent for establishing liability and an extensive affidavit of the Case Development Officer regarding penalty.

[7] See Hosho Somerset Corporation; Docket No. I.F.& R. III-345C. Accelerated decision on liability; Judge Greene sent the parties to the settlement table, despite EPA's stipulation that it would accept a mitigated penalty based on settlement information on financial issues.

[8] Note the majority of Accelerated Decisions will not deal with both liability and penalty. See Airtacs Corporation; Docket No. TSCA-III-472; Milford Academy; Docket No. AHERA-I-89-1104; Environmental Abatement & Control; Docket No. VII-88-T-556A; Dixie USA; Docket No. FIFRA 88-H-04; Honig Chemical; Docket No. EPCRA-II-89-0104; Colonial Processing; Docket No. II EPCRA-89-0114; Harmak Grain Co. Docket No. IF&R VIII-150C; Wego Chemical; Docket No. II-TSCA-8(a)-88-0228; Shield Brite Corporation; Docket No. FIFRA-90-H-02.

without **further hearing** or upon such limited additional information such as **affidavits**,[9] as he (or she) may require,

if **no genuine issue of material fact exists**[10]

and a party is **entitled to judgment as a matter of law**,[11]

as to **all or part**[12] of the proceeding

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[9] See Rohr, Docket No. EPCRA 1089-04-08-325, supra, for the leading example of an effective affidavit on the issue of penalty.

[10] Note: this is the key; through the statements or admissions in the Answer or pre-hearing exchange, the movant must demonstrate that he or she has met the test of "no genuine issue of law or fact."

[11] Because "summary judgement" is a significant determination, the facts and issues must be carefully and deliberately pled in a straightforward manner, to avoid any appearance of over reaching.

[12] Knowing that some judges (Nissen, Greene) rarely if ever will grant a motion as to penalty based on legal and philosophical reasons, you can save time by not briefing these issues for such judges. Exceptional facts or circumstances may warrant a different approach.

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

In the Matter of	:	
DIC AMERICAS, INC.	:	Dkt. No. TSCA-II-8(a)-90-0109
Respondent	:	

Toxic Substances Control Act, 15 U.S.C. § 2601 et seq. Section 8(a), 15 U.S.C. § 2607; section 16, 15 U.S.C. § 2615(a); section 15(3)(B), 15 U.S.C. § 2614(3)(B); 40 C.F.R. § 710.33(a): (1) The appropriate civil penalty to be assessed in this matter is the amount proposed by complainant, such proposal being in accord with authority and no extenuating circumstances appearing. (2) In this case, because the failure to file reports deprived the inventory data base of information respecting chemical substance imports, the appropriate amount of the penalty must be determined in accordance with the potential for harm.

APPEARANCES:

Katherine Yagerman, Esquire, Office of Regional Counsel, Environmental Protection Agency, Region II, 26 Federal Plaza, New York, New York 20460; for complainant.

Vincent E. Gentile, Esquire, Cohen, Shapiro, Polisher, Shiekman and Cohen, Princeton Pike Corporate Center, 1009 Lenox Drive, Building Four, Lawrenceville, New Jersey 08648; for respondent.

BEFORE: J. F. Greene
Administrative Law Judge

Decided: December 30, 1993

DECISION AND ORDER

This matter arises under sections 8, 15, and 16 of the Toxic Substances Control Act ("TSCA," or "the Act"),, 15 U.S.C. §§ 2607, 2615, and 2614, as well as 40 C.F.R. § 710.33(a) of the implementing regulations. The complaint charged respondent with five violations of section 15(3(B) of the Act, for failure or refusal to comply in a timely manner with 40 C.F.R. § 710.33(a), which requires that persons who import for commercial purposes 10,000 or more pounds of a chemical substance listed in the "Master Inventory File" of chemical substances maintained by the U. S. Environmental Protection Agenccy (EPA) pursuant to § 8(b) of the Act submit a report to EPA.[1] The form for this report, the Partial Updating of the Inventory Data Base Production and Site Report ("Form U") was required to be completed and submitted for each chemical substance so imported during the importer's latest complete fiscal year prior to August 25, 1986, no later than December 23, 1986. Complainant moved for partial "accelerated decision" as to liability, asserting that no issue of material fact remained and that complainant was entitled to judgment as a matter of law. The motion was granted.[2]

The issue of appropriate penalty for the violations found could not be resolved, and went to trial. Complainant seeks a

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[1] See 40 C.F.R. § 710.25.

[2] **Order Granting Motion for Partial "Accelerated Decision"**, January 3, 1993, attached hereto.

penalty of $85,000 for the violations found in the five counts of the complaint.[3]

Complainant argues forcefully and at length that the penalty for failure to file Form U's must be severe enough to deter noncompliance and casual attitudes toward section 8(a) filing requirements, stating that anything less undermines both Congressional intent that chemical substances in commerce should be regulated, and the ability of EPA to carry out its responsibilities under the Act. Complainant urges, citing relevant authority, that the seriousness of section 8(a) violations must be determined at the time the violation occurs, and must not be based upon fortuitous circumstances in a given instance that no particular harm may result because the chemicals in question were not dangerous, or for some other reason. Complainant points out that the data base which was deprived of information as a result of respondent's failure to file Form U's is utilized extensively in risk assessment and other regulatory determinations, is "dispersed among many agency and governmental bodies,"[4] and is also used by state governments, at least one international agency,[5] and, in a different version, by the public. In other words, "(T)he relevant

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[3] Complainant sought judgment as to the amount of the penalty, but this motion was denied.

[4] Complainant's brief at 11; see also TR 64-66, where complainant's witness testified that about 18 federal government agencies utilize the data.

[5] The Organization for Economic Cooperation and Development, TR 64.

inquiry in instances of nonreporting under TSCA is not actual harm but rather the potential for harm caused by the absence of data 'reasonably required by the Administrator'".[6]

Finally, complainant asserts that EPA guidance documents (Guidance for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act, 45 Federal Register 59770, September 10, 1980; and Recordkeeping and Reporting Rules in TSCA Section 8, 12, and 13 Enforcement Response Policy) have been followed in calculating the penalty proposed herein, based upon the nature, circumstances, extent, and gravity of the violation, after which a variety of "adjustment" factors were considered. These factors include ability to pay the calculated amount and to continue to du business, history of prior violations, vulpability, and "such other factors as justice may require." Complainant's witness testified that the ability to pay and to continue in business were not factors in the calculation because respondent had not raised them and there was no reason to believe that respondent could not pay the amount proposed. Further, there was no history of prior violations of the Act, and no reason to believe that culpability should be considered as a mitigating factor because any good faith efforts to comply had been offset, in the witness's opinion, by respondent's failure to comply promptly with the reporting requirement during the three months following the issuance of the complaint.[7] Accordingly, no further

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[6] Complainant's brief, at 14.

[7] TR 181-182.

adjustments in the penalty calculation were made by complainant because no other factors recognized by the guidance documents seemed appropriate for consideration.

Respondent's position, to summarize, is that no actual harm has been shown to have been caused by respondent's failure to file, that significant improvements in respondent's compliance system have been made, and that the penalty is excessive in these circumstances.

Complainant's evidence and brief are persuasive as to the importance of calculating the penalty based upon the probability of harm where, as here, it is really not possible to determine whether depriving the inventory data base of certain information has caused harm in a particular instance. What is clear, however, is the importance, in the statutory scheme here, of maintaining as complete a data base as possible. Further, formal agency policy as set forth in the guidance documents appears neither unfair nor unreasonable in specifying that penalties for such violations should be based upon the violations being regarded as "significant." The penalty proposed is appropriate here, where no circumstances out of respondent's control have been shown, and where there was a three-month delay between issuance of the complaint and compliance by respondent, and where lack of compliance in the first instance may fairly be attributed to insufficient vigilence on respondent's employees' part. Respondent must be commended for instituting a new recordkeeping arrangement and demonstrating that its system will now operate in a more

efficient manner, but the expense of doing this cannot be set off against the properly calculated penalty. Respondent has ably presented a sympathetic case, and careful effort has been made to determine whether any showing which could form the basis of a reduction in penalty has been made. However, none appears on the facts of this case. Accordingly, it is found that the penalty proposed by complainant is appropriate and reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Complainant correctly applied guidelines set forth in the Guidlines and Enforcement Response Policy documents, wherein failures to report of the type found here are to be treated as "significant" with a high probability of harm resulting from the violation. This guidance is neither unfair nor unreasonable in the circumstances of failures to report information that will be added to the inventory data base, when the result is that the data base is deprived of information.

2. The penalty proposed conforms to EPA guidance documents, is fair and reasonable in the circumstances here, and is properly based upon the probability of harm at the time of the issuance of the complaint where, as here, the actual harm is absence of complete information from respondent's facility in the inventory data base.

3. Based upon the violations found previously in this matter, respondent is liable for a civil penalty in the amount of $85,000.

ORDER

Respondent is liable for a civil penalty in the amount of $85,000, and shall pay such civil penalty in the form of a cashier's or certified check payable to the United States of America, within 60 days from the date of this Order. The payment shall be mailed to

Regional Hearing Clerk
EPA Region II
c/o Mellon Bank
Post Office Box 360188M
Pittsburgh, Pennsylvania 15251

Administrative Law Judge

December 30, 1993
Washington, D. C.

the relationship of a particular chemical structure, the kind of effects you see in either test animals usually, and there's -- there can be some patterns discerned that would allow you to estimate for chemicals for which you don't have any testing information because there's a related structure that has test data on it, and this is, in particular, used in the New Chemicals Program under Section 5, which is premanufactured notification under TSCA.

Q Is TSCA regulatory activity limited to chemical substances known to be toxic?

A No. We're responsible for trying to assess possible risks from the entire universe of chemical substances that are subject to TSCA. So, for example, with new chemicals, there's no requirement of test data been developed. They actually only have to provide information that they have available to them. So we're looking at new chemicals, and we don't know if they're toxic, but we can review them and use, for example, the structural activity relationship estimates to guide further action under Section 5 on new chemicals.

Also, when we have inadequate -- when there's inadequate data to assess risk, we can try to collect it under Section 8, if it's available, or we can use Section 4 to have it developed in testing manner.

Q What concerns might EPA have then with chemical substances not known to be toxic?

A We're responsible for -- under Section 8(b) to establish an inventory and maintain it of what the chemicals in commerce are, so the inventory under Section 8(b) is not a list of toxic chemicals. It is a list of the chemicals that are in commerce, and so it's our responsibility to maintain an awareness of what those chemicals are and maintain a vigilance about available information to assess the hazard and exposure, because new information can be obtained that would change assessment, and we're constantly re-reviewing and reassessing chemicals all the time based on new information that we receive.

Q Could you explain what the master inventory file is, and approximately how many chemical substances would be included in that

in order to invite them to stakeholders dialogues, we called them, to get their input to our formulation of risk reduction strategies for their chemicals.

Q Does the use of the IUR data within your office always lead to formal rule-making decisions?

A No, it does not. It allows us to make decisions on other -- other than regulatory activities, as well.

Q Could you explain again -- I think you maybe touched on this previously -- what some of those nonregulatory decisions might be?

A Kinds of nonregulatory decisions would be to -- would be in the pollution prevention arena, to either contact the company to discuss our concerns or alert them to our concerns about particular risks or pollution prevention initiatives that we've become aware of that might be successful with their particular chemicals.

Q Is the IUR data as to any one chemical typically reviewed one time by your office, several times, how often?

A We constantly reassess chemicals when we

obtain new information, either of hazard-type or something that would change the characterization of the exposure to the chemical. Also, I'm aware that other offices that have an interest and use the IUR information might also carry out assessment for their own programmatic needs.

Q Could you explain the reason for a 10,000-pound reporting threshold under the Inventory Update Rule?

A Basically, the threshold was created mostly from a standpoint of balancing the information reporting burden with the need for the information and some consideration of the amount of loss -- information loss that we were getting at that level.

Q If a company reports 10,001 pounds of a chemical, is that report meaningful?

A It certainly can be meaningful. Both the nature of the chemical and its use and applications can be significant at small scale.

For example, if a compound persists or bioaccumulates -- by a persistence I mean within the environment so that it is not rapidly decayed or destroyed within the environment, small

and they are usually quite interested in the profile kind of documents that we do prepare.

Q Does anyone within EPA but outside of the TSCA program offices have direct access to the data?

A Anyone in the Federal Government can attain access to the complete IUR data that would include the confidential portions of it.

Q Is there any use of the IUR data within an international context?

A Yes.

The Organization for Economic Cooperation and Development, OECD, has developed a program which is aimed at high production volume chemicals worldwide to identify those which have the most significant data gaps on them, to develop a program to share the cost and burden of doing testing worldwide, and in establishing that grouping of high production volume chemicals, the U.S., in its participation in that particular activity, used the inventory update information to input to that, and the program is called the Screening Information Data Set Programs, SIDS, and this has been a pretty

A I'm aware that states have asked and received information to help them in initiating or implementing their own environmental programs.

Q Does the public have access to this information?

A Are there -- there is a sanitized version that is without the confidential business information in it. That is available to the public.

Q Does your office have a policy with respect to public availability?

A The Toxic Substance Control Act is a pretty broad and powerful information gathering authority. It's always been a policy in the implementation of TSCA to make information as widely available as possible.

Q Are there other information systems like CUS that can be relied on in its place?

A For the chemicals that we're looking at, generally, the answer is no. This -- the IUR information is generally regarded in the Federal regulatory community that has to deal with chemical risks as the most reliable and authoritative source of this kind of information.

Testing Committee is?

A Yes. The Interagency Testing Committee is a committee created by Congress in 1976 under Section 4(e) of the Toxic Substance Control Act.

defines ITC

Q What federal agencies are named as statutory members of ITC?

A There are several statutory members on ITC. These include the Department of Commerce, President's Counsel on Environmental Quality, U.S. Environmental Protection Agency, National Cancer Institute, National Institute for Environmental Health Sciences, and National Institute for Occupational Safety and Health, and National Science Foundation and Occupation Safety and Health Administration.

Q Are there other federal agencies that are presently --

A Yes. Before the committee had its first meeting, February 5th, 1977, they recognized there were other federal agencies that had expertise in chemical testing, and before their first meeting, they invited the Consumer Product Safety Commission, the Food and Drug Administration, Department of Defense and Department of Interior, to participate in the first meeting, and '79 and '80, they invited the

ITC?

A The statutory functions of the ITC include, first of all, to control the priorty testing list under Section 43 of the Toxic Substances Control Act. This is basically a list of chemicals that the Committee considers, and then recommends for testing to the Administrator of the Environmental Protection Agency.

The second function is a rather cost-effective function, to facilitate coordination of chemical testing among the U.S. Government organizations represented on the Committee, and to enhance information exchange to promote cost-effective use of the U.S. Government's chemical testing resources.

Q What are the statutory factors the ITC must use to select chemicals for the list?

A When Congress created the ITC, they listed eight statutory factors the Committee must consider. The first factor is the quantities of the chemical that's manufactured. The other factors include the numbers of individuals exposed, duration of exposure, extent of human exposure, the structural relationship of the chemical to a known toxin, the

Environmental Protection Agency, which is directed by Congress to implement the testing recommendations of the Interagency Testing Committee.

Q How are the data which are developed as a result of ITC recommendations used?

A They have several uses. One of the most important uses is by industry, in revising their material testing data sheets, that are data sheets sent to customers and users, processors, distributors, to advise them of the health effects of the particular chemical or the adverse ecological effects, or any warnings that users and workers should be aware of when handling the chemical. And this is one important use of the data.

The other uses of the data are made by the individual agencies that are participating on the Committee, and these include regular current uses of the data, for example, EPA using the data in their water programs when they develop national pollutant discharge elimination system permits.

Q Does the IUR or the CUS data base provide any information necessary to satisfy any of the statutory criteria?

A Yes, it provides information to satisfy

the first criteria that Congress listed, that is, quantities of chemicals manufacturered.

Q Are any of the chemicals reviewed by ITC on other large well-known lists of chemicals?

A Yes, and they are on there because -- they are on several large lists. These include the Clean Air Act Amendments that were enacted in 1990, Agency for Toxic Substances and Disease Registry List of Chemicals in Hazardous Waste Sites, and Toxic Release Inventory, which is in Section 313 of the Emergency Planning, Community Right-To-Know Act.

Just to give you some idea of the number of chemicals that are on those lists that have been reviewed or recommended by the ITC, approximately 75 percent of the chemicals on the Clean Air Act have been reviewed or recommended by ITC; approximately 70 percent of the chemicals on the DSDR list have been recommended or reviewed by ITC; and approximately 73 percent of the chemicals on the Toxic Release have been reviewed or recommended by ITC.

Q You stated that you have testified before Congress. Has Congress ever shown any interest in the production-volume data, specifically?

A Yes, they have. In fact, one of the questions we were repeatedly asked -- and I was repeatedly asked by Congress during testimony -- was related to the development of the IUR, and the fact that the original inventory was developed in 1977 and it was made publicly available after that. The Interagency Testing Committee had to rely on that inventory for a number of years, and as the Committee -- as time progressed and the Committee relied on that information, it became more and more obvious that that information was outdated and there was a need to develop a more recent source of production data.

This is one of the factors, I believe, that influenced the EPA to revise the inventory update, to develop the Inventory Update Rule, to revise the information.

Q Do any other U.S. government agencies other than the ITC use production-volume data?

A Yes. I would like to illustrate, giving you a few examples of some of the agencies on the Committee and how they use the information.

The National Toxicology Program believes that the information in the Inventory Update Rule

production information on mixtures of chemicals, polymers, different groups of chemicals that might be excluded from the Inventory Update Rule report and the Interagency Testing Committee not only looks at discrete chemicals reported in the Inventory Update Rule, but also reacting mixtures and other groups of chemicals for which the International Trade Commission has information.

And if there is ever a question of validity of the information that's contained in the U.S. International Trade Commission, the information that is in the Inventory Update Rule is always used as the standard.

Q How often is the information in the Inventory Update Rule revised?

A Information is revised every four years, currently, unless that changes.

Q And are there any other sources you could use to get that information that's provided by the IUR?

A Not for discrete organic chemicals, because that's the only reliable source of not only production information, but plant-site information, as well.

Q Could you explain how often the ITC or individual members of the ITC might have reason to look at the data on testing of chemical substances?

A I can tell you, from personal experience, I look at the data base established by the Inventory Update Rule two or three times a week, and many times this is in response to a question from agencies that are on the ITC; oftentimes it's in response to examining chemical groups and determining whether the groups are commercially significant.

Q If a particular company did not submit a Form U report as to Chemical A, and the ITC did some screening and/or review of that chemical and had some decision-making activity, would the ITC have any interest, after that point of decision-making, in that data that was not reported?

A Yes, in general, they would, and I think it is important to understand the processes that the Committee uses, in order to answer that particular question. When chemicals are screened for ITC consideration, we basically look at about 36,000 discrete organic chemicals produced in the United States. This excludes polymers and reaction mixtures and other chemical groups more difficult to

characterize and to test.

When we screen these chemicals, the primary factor we use is production volume. Then, for those chemicals that are passing that initial screening, they are reviewed. The information that's used there from the Inventory Update Rule is plant-site information, numbers of plant sites, and locations of plant sites. If the Committee then decides that there is data needed for those particular chemicals that are reviewed, they are then considered further and programs recommended to the Administrator of the U. S. Environmental Protection Agency for chemical testing.

So, that's, in essence, how we use the information, and yes, information would be important.

Q In general, then, could you summarize the nature of the use of the IUR data by the ITC?

A Yes, I could. The Inventory Update Rule data that is used by the ITC to provide a significant source of production data, it is the only recent and reliable source of production data that the Interagency Testing Committee has available to it, and it is, as Congress intended, one of the key, if not the key factor used by the Interagency Testing

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
GUNLOCKE CO., INC. (THE),	)	Docket No. II TSCA-PCB-92-0228
	)	
Respondent	)	

Toxic Substances Control Act. Where respondent failed to comply with two orders of the Administrative Law Judge requiring respondent to (1) show cause why it had not provided complainant with a counter offer and with information regarding proposed supplemental environmental projects as alleged in the status report and to (2) show cause why an order on default should not be taken against it for failure to respond to the first order, respondent was found to be in default pursuant to 40 C.F.R. § 22.17 to have admitted the violations charged, and assessed the full amount of penalty proposed in the complaint.

ORDER ON DEFAULT

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: February 3, 1994

APPEARANCES:

For Complainant:

Richard J. Weisberg, Esquire
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region II
26 Federal Plaza
New York, New York 10278

For Respondent:

Lynne A. Monaco, Esquire
Nixon, Hargrave, Devans & Doyle
Clinton Square
P.O. Box 1051
Rochester, New York 14603

INTRODUCTION

This proceeding was initiated under section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a), by issuance of a complaint on December 20, 1991, charging respondent, The Gunlocke Company, Inc. (respondent), with violations of TSCA and regulations promulgated thereunder. An answer to the complaint was served on February 7, 1992. The answer, in paragraph 24, included a purported motion to dismiss Count 2 of the complaint. The motion to dismiss Count 2 was denied on March 19, 1992. Complainant and respondent each served a prehearing exchange on August 3, 1992.

Respondent's answer and prehearing exchange contested the amount of penalty sought and requested a hearing. The answer admitted in paragraph 12 that respondent had transformers at its facility during 1978-1988 that may have contained PCBs. The answer also admitted in paragraph 15 that respondent cannot locate records of inspection for its transformers for the time period of April 1983 through September 1984. The answer otherwise specifically denied many of the allegations in the complaint.

Count 1 of the complaint charged respondent with failure to maintain records of quarterly inspections and maintenance history for two PCB transformers, in violation of 40 C.F.R. § 761.30(a)(1)(xii). Count 2 of the complaint charged respondent with failure to compile and maintain annual documents on the disposition of its PCBs and PCB Items, in violation of 40 C.F.R. § 761.180(a). A civil penalty in the amount of $54,600 was sought by complainant.

FINDINGS OF FACT

Respondent owns and operates a facility located at One Gunlocke Drive, Wayland, New York 14572. Respondent is a "person" as that term is defined in 40 C.F.R. § 761.3.

Following the issuance of the complaint, the matter was assigned to the below Administrative Law Judge (ALJ) on March 11, 1992. By order dated March 19, 1992, the parties, failing settlement, were directed to exchange certain prehearing information consisting of witness lists, documentary evidence and arguments supporting their respective cases no later than May 19, 1992. By oral motion, complainant sought and received from the ALJ extension of the prehearing exchange deadline until August 3, 1992. Complainant and respondent then filed their prehearing exchanges on August 3, 1992.

Settlement negotiations ensued. According to complainant's status report of November 3, 1992, respondent agreed during the settlement discussion to soon provide complainant with a counter offer and with additional detailed information, including summaries, of proposed supplemental environmental projects, which information was not forthcoming. On November 27, 1992, respondent was ordered to show cause why it had not provided complainant with the promised counter offer and information regarding proposed supplemental environmental projects. Respondent never replied to the order. On January 11, 1993, respondent was ordered to show cause why an order on default should not be issued against it for failure to respond to the order served on November 27, 1992. This

was sent by certified mail, with a return receipt shown in the file. Respondent failed to respond to the order of January 11, 1993. On March 4, 1993, an order was issued directing complainant to submit, within 35 days, a draft of a proposed order on default against respondent for review, possible revision and signature by the ALJ. A copy of this order was sent to respondent by certified mail, with a return receipt shown in the file.

On April 27, 1993, complainant notified the ALJ and respondent that the Environmental Protection Agency (EPA) was reviewing this matter to determine where there have been lapses or other problems in certain information collection request approvals granted by the Office of Management and Budget under the Paperwork Reduction Act (PRA). In a status report dated August 19, 1993, EPA determined that the violations alleged in the complaint were not impacted by the PRA.

CONCLUSIONS OF LAW

Pursuant to section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a), complainant has the authority to institute enforcement proceedings concerning violations of regulations promulgated pursuant to section 6(e) of TSCA, 15 U.S.C. § 2605(e), and set forth at 40 C.F.R. Part 761. Respondent's answer to the complaint does not raise any questions which could support a decision that complainant has failed to establish a prima facie case, or justify the dismissal of the complaint.

An examination of the prehearing exchange documents submitted by complainant buttresses the allegations in the complaint that

respondent (1) failed to maintain records of quarterly inspections and maintenance history for two PCB transformers and (2) failed to compile and maintain annual documents on the disposition of its PCBs and PCB Items. Complainant has established a prima facie case to support the allegations in the complaint that respondent has violated 40 C.F.R. § 761.30(a)(1)(xii) and 40 C.F.R. § 761.180(a). Respondent's failure to comply with the order of November 27, 1992 and its failure to show good cause amounts to a default and constitutes an admission of all facts alleged in the complaint and a waiver of a hearing on the factual allegations. 40 C.F.R. § 22.17(a).

ULTIMATE CONCLUSION

TSCA specifies that in assessing a penalty the Administrator shall take into account the nature, circumstances, extent and gravity of the violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require. Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B). Respondent by its default, however, has waived the right to contest the penalty which shall become due and payable without further proceedings.

The penalty proposed in the complaint is $54,600, comprising $52,000 for Count 1 and $2,600 for Count 2. This penalty amount is consistent with the provisions of 15 U.S. C. § 2615(a) and the Polychlorinated Biphenyls (PCB) Penalty Policy of April 9, 1990.

The gravity of the alleged violations of TSCA, including the actual or potential harm to humans and the environment resulting from respondent's purported illegal conduct, is incorporated within the scope of the terms "extent" and "circumstances" as used below. As stated in the Guidelines for the Penalty Policy (guidelines):

> 'Circumstances' is used in the penalty policy to reflect on the probability of the assigned level of 'extent' of harm actually occurring. In other words, a variety of facts surrounding the violations as it occurred are examined to determine whether the circumstances of the violation are such that there is a high, medium, or low probability that damage will occur . . . .

Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy, 45 Fed. Reg. 59,770, 59,772 (1980) (original emphasis). The guidelines further specify that:

> 'Gravity' refers to the overall seriousness of the violation. As used in this penalty system, 'gravity' is a dependent variable, i.e., the evaluation of 'nature,' 'extent,' and 'circumstances' will yield a dollar figure on the matrix that determines the gravity based penalty.

Id. at 59,773.

The Guidelines also provide the following means of determining the gravity of illegal conduct:

> The probability of harm, as assessed in evaluating circumstances, will always be based on the risk inherent in the violation as it was committed. In other words, a violation which presented a high probability of causing harm when it was committed (and/or was allowed to exist) must be classified as a 'high probability' violation and penalized as such,

> even if through some fortuity no actual harm resulted in that particular case. Otherwise some who commit dangerous violations would be absolved. Similarly, when harm has actually resulted from a violation, the 'circumstances' of the violation should be investigated to calculate what the probabilities were for harm occurring at the time of the violation. The theory is that violators should be penalized for the violative conduct, and the 'good' or 'bad' luck of whether or not the proscribed conduct actually caused harm should not be an overriding factor in penalty assessment.

Id. at 59,772 (original emphasis).

Count 1 of the complaint alleges that respondent violated 40 C.F.R. § 761.30(a)(1)(xii) by failing to maintain records of quarterly visual inspections and maintenance history for two PCB transformers, serial numbers 42782 and 42783, for the following time periods.

October 1982 - December 1982
January 1983 - March 1983
April 1983 - June 1983
July 1983 - September 1983
October 1983 - December 1983
January 1984 - March 1984
April 1984 - June 1984
July 1984 - September 1984
October 1984 - December 1984

Each time period enumerated above for which there is no record of quarterly visual inspections and maintenance history constitutes a separate violation. Under the limits on multiple violations imposed by the penalty policy, however, complainant assessed penalties based on only four violations under Count 1.

The penalty policy provides that the extent of a non-disposal violation is "significant" where the amount of PCBs involved is at

least 220 gallons but not more than 1,100 gallons. Respondent's two PCB transformers contained a total of about 851 gallons of PCBs.

The penalty policy also provides that the circumstance level of a major use violation is 2. A major use violation is defined in the penalty policy as "[f]ailure to inspect PCB Transformers or to keep records of such inspections."

The circumstance 2 matrix level is based on the probability that respondent's alleged illegal conduct is likely to cause damage. This matrix level also reflects alleged violations which the EPA considers to be the most likely to result in improper disposal. Furthermore, the circumstance 2 matrix level reflects that respondent's alleged violations seriously impair the EPA's ability to monitor (data-gathering) or evaluate chemicals (hazard assessment).

Under the gravity-based penalty matrix, the penalty amount for a violation that is circumstance level 2 and of significant extent is $13,000. The total assessed penalty for the four violations cited under Count 1 is therefore $52,000.

Count 2 of the complaint alleges that respondent violated 40 C.F.R. § 761.180(a) by failing to develop and maintain annual documents on the disposition of respondent's PCBs and PCB Items for the period July 2, 1978 through December 31, 1978 and for the years 1979 through 1988.

Each time period enumerated above for which annual documents were not developed and maintained constitutes a separate violation.

Under the limits on multiple violations imposed by the penalty policy, however, complainant assessed penalties based on only two violations under Count 2. These violations are for (1) 1988 and (2) the years 1987 and earlier.

The penalty policy provides that the extent of a non-disposal violation is "significant" where the amount of PCBs involved is at least 220 gallons but not more than 1,100 gallons.

The penalty policy also provides that the circumstance level of a minor recordkeeping and manifesting violation is 6. A minor recordkeeping and manifesting violation is defined in the penalty policy as "the occasional omission of minor data due to clerical error, or partially missing records where the person responsible can substantiate the correct records upon request." Complainant assessed the alleged violations under Count 2 as circumstance level 6, based on respondent having provided complainant with reconstructed annual document logs for the pertinent time periods prior to issuance of the complaint.

The circumstance 6 matrix level is based on the probability that there is a small likelihood that damage will result from respondent's alleged illegal conduct. This matrix level also reflects alleged violations in which the EPA considers the risk to the environment and human health to be minimal. Furthermore, the circumstance 6 matrix level reflects that respondent's alleged violations impair the EPA's ability to monitor (data-gathering) or evaluate chemicals (hazard assessment) in a less than important way.

Under the gravity-based penalty matrix, the penalty amount for a violation that is circumstance level 6 and of significant extent is $1,300. The total assessed penalty for the two violations under Count 2 is therefore $2,600.

ORDER

IT IS ORDERED, pursuant to section 16(a) of TSCA, 15 U.S.C. § 2615(a), that respondent, The Gunlocke Company, Inc., be assessed a civil penalty of $54,600.

Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within sixty (60) days after the final order is issued. 40 C.F.R. § 22.17(a).

EPA - Region II
Regional Hearing Clerk
P.O. Box 360188M
Pittsburgh, PA 15251

Pursuant to 40 C.F.R. § 22.17(b), this order constitutes the initial decision in this matter. Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the Administrator elects to review this decision on her own motion, this decision shall become the final order of the Administrator. 40 C.F.R. § 22.27(c).

Frank W. Vanderheyden
Administrative Law Judge

Dated: February 3, 1994

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication. Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	
Burlington Northern Railroad Company	)	CAA Appeal No. 93-3
	)	
Docket No. CAA VIII-92-12	)	
	)	

[Decided February 15, 1994]

FINAL DECISION AND ORDER

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

BURLINGTON NORTHERN RAILROAD COMPANY

CAA Appeal No. 93-3

FINAL DECISION AND ORDER

Decided February 15, 1994

Syllabus

U.S. EPA Office of Enforcement has appealed an Initial Decision in an enforcement action brought under Section 113(d) of the Clean Air Act. The Initial Decision assessed a $25,000 penalty, the statutory maximum, for a single violation of the Montana State Implementation Plan. The violation concerned the open burning of creosote-treated railroad ties. The Office of Enforcement objects to the presiding officer's calculation of economic benefit because it credited the cost of open burning of the ties against the costs that would have been incurred had the ties been lawfully disposed of. Recalculation of the economic benefit component of the penalty would not affect the amount of the penalty assessed since the statutory cap is controlling in any event.

Held: The Initial Decision is modified to eliminate language providing for a credit for the costs of open burning. The Board does not believe that this case is an appropriate vehicle for resolving the issue of whether such a credit is permissible. Since the outcome of this proceeding is unaffected by this issue, the language can be modified without deciding the issue. Because of the Office of Enforcement's concerns about the precedential effect of the original language, such a modification is appropriate.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

U.S. EPA Office of Enforcement (OE) has appealed the Initial Decision of the presiding officer, Chief Administrative Law Judge Gerald Harwood, in this Clean Air Act enforcement action. This appeal is pursuant to 40 C.F.R. § 22.30(a) and was timely filed on December 16, 1993. [1]

I. *BACKGROUND*

The enforcement action giving rise to this appeal was brought by U.S. EPA Region VIII against Burlington Northern Railroad Company (BNRR) under Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d). In its complaint, the Region sought a penalty of $65,530 for alleged violations of the Montana State Implementation Plan, arising from the open burning of creosote-treated railroad ties. A hearing on the alleged

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[1] Respondent, Burlington Northern Railroad Company, filed a notice of cross-appeal on December 30, 1993, which was dismissed as untimely. Order Dismissing Cross-Appeal (January 5, 1994).

violations was held in Helena, Montana, on June 15-16, 1993, and an Initial Decision issued on November 24, 1993. In his Initial Decision, Judge Harwood found Respondent liable for the violations but reduced the penalty assessed to $25,000.

In arriving at this penalty amount, Judge Harwood calculated that the "preliminary deterrence amount" would be $25,384 and that no upward adjustments would be appropriate. Initial Decision at 25-26. However, based on his determination that there was only one violation lasting one day, [2] he reduced this amount to the statutory maximum of $25,000 per violation per day as provided in § 113(d)(1), 42 U.S.C. § 7413(d)(1). *Id.*

As part of his calculation of the preliminary deterrence amount, Judge Harwood calculated what he felt was the economic benefit to BNRR of its noncompliance. He stated as follows:

> The EPA computed $2,212, as the economic benefit realized by BNR from the violation. This is based on an estimated cost of $11.08, a tie to haul the ties to an industrial furnace for incineration. The study from which this cost was derived also estimated a cost of $2.60, per tie for open-burning, or a total of $520 for the 200 logs. The economic benefit would appear to be the difference between the costs. Consequently, this component of the penalty is reduced to $1,692.

Id. at 23-24 (footnotes omitted). This calculation of economic benefit is the sole issue raised by EPA on appeal.

More specifically, the Office of Enforcement argues that Judge Harwood should not have subtracted the $520 from the $2,212 in calculating the economic benefit because no credit should be given for illegal expenditures (here, the illegal open burning of the ties). Brief in Support of the Environmental Protection Agency's Notice of Appeal

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[2] The Region had argued that since BNRR burned ten separate piles of railroad ties, there were ten separate violations. Judge Harwood found that under the circumstances presented here, the burning of the ten piles constituted only a single violation. Initial Decision at 22-23. The Region did not appeal this determination.

of Initial Decision (OE Brief) at 5-8. OE thus argues that the economic benefit component of the penalty should be recalculated as $2,212. BNRR opposes this recalculation. BNRR Brief in Opposition to EPA's Notice of Appeal of Initial Decision (BNRR Brief) at 2. Both parties acknowledge that resolution of this appeal can have no effect on the amount of the penalty since the statutory maximum will be controlling in any event. OE Brief at 1 n.1; BNRR Brief at 1 n.1.

II. *DISCUSSION*

The initial question logically presented by this appeal is why OE would want to appeal an Initial Decision if the appeal can have no effect on the outcome of the proceeding, *i.e.*, the amount of the penalty assessed. OE explains that it has filed this appeal "because the ALJ's interpretation of the statute has ramifications in every case in which an economic benefit of noncompliance is assessed." OE Brief at 1 n.1. OE further asserts that the ALJ's holding, if upheld, could force EPA to change its current policy and methodology for calculating the economic benefit component of penalties. *Id.* at 1. OE's apparent concern is that if the Initial Decision had not been appealed, it would become a final order of this Board under 40 C.F.R. § 22.27(c), assuming the Board did not elect, sua sponte, to review the decision. [3] As a final order of the Board, the Initial Decision might be cited as Board precedent in future cases.

It is not necessary, however, to address this concern directly or to delve into the exact precedential effect of an unappealed initial decision. It is sufficient to note here that the decision has been appealed and neither party has questioned whether Judge Harwood's rationale respecting open burning costs is appealable under 40 C.F.R. § 22.30(a) ("[a]ny party may appeal an adverse ruling or order of the

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[3] 40 C.F.R. § 22.27(c) provides:

> (c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, sua sponte, to review the initial decision.

Presiding Officer * * *."). Rather, our concern is that the Board does not want to be drawn routinely into parsing the language of an initial decision assessing a penalty when neither party has appealed the amount of the penalty assessment. As explained below, we think that the burdens engendered by such an exercise can be avoided in this instance without prejudice to either party, but while also eliminating the concerns that apparently prompted OE's appeal.

Turning to the substance of the appeal, OE argues that Judge Harwood did not fully consider EPA penalty guidelines (including the *BEN User's Manual* [4] and *BEN User's Guide*) and did not provide specific reasons for not assessing the penalty recommended in the complaint. OE Brief at 3. [5] BNRR replies that Judge Harwood adequately explained his penalty determination and properly exercised his discretion in calculating the penalty. BNRR Brief at 2-3. BNRR further states that the guidelines relied upon by EPA have not been adopted as regulations and therefore do not have the force of law, and that neither the *BEN User's Manual* nor the *BEN User's Guide* were mentioned at the hearing or in any of the pleadings or briefs filed by EPA. *Id.* at 4.

A review of the Initial Decision shows no indication that Judge Harwood intended to depart from the EPA's Clean Air Act Stationary Source Civil Penalty Policy (Policy), dated October 25, 1991. While he indicated that he was only required to consider the Policy, not follow it, the methodology he applied clearly purported to follow the Policy. *See* Initial Decision at 22-26. More specifically, his discussion of the economic benefit component explains how he adjusted EPA's computation but does not indicate that he was intending to depart from the Policy itself. (The Policy contains *no* discussion of the "credit" issue involved in this appeal although it does reference the *BEN User's Manual* as establishing the methodology for calculating economic

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[4] "BEN" is the name of the computer model EPA's enforcement officials use for calculating the economic benefit in enforcement actions.

[5] Under 40 C.F.R. § 22.27(b), a presiding officer "must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease."

benefit.) Therefore, we conclude that Judge Harwood was intending to apply the Policy when he calculated economic benefit.

OE contends that Judge Harwood misapplied the Policy and associated guidance. BNRR does not discuss the proper interpretation of the Policy except by noting that the EPA guidelines should not be given the force of law and have been widely criticized. BNRR Brief at 4.

We do not believe that this appeal presents a particularly good vehicle for resolving the issue of whether credit should be given for illegal expenditures in calculating the economic benefit component of a penalty. The posture of this case does not lend itself to having the issue fully briefed on both sides. Although BNRR filed a brief in opposition, it had no monetary stake in the outcome of the appeal and thus only a limited incentive to research and address the issue. We believe it would be more appropriate to decide this issue when it is presented in a truly adversarial context.

That said, we are still sensitive to the OE's underlying concern about the potentially precedential nature of Judge Harwood's Initial Decision. Therefore, we are modifying the Initial Decision to eliminate the language providing for a credit for the costs of open burning, as follows.

The paragraph beginning at the bottom of page 23 and carrying over to the top of page 24 is revised to read:

> The EPA computed $2,212 as the economic benefit realized by BNR from the violation. This is based on an estimated cost of $11.08 a tie to haul the ties to an industrial furnace for incineration. [27] The study from which this cost was derived also estimated a cost of $2.60 per tie for open-burning, or a total of $520 for the 200 logs. [28] It is not necessary to decide whether EPA should have credited the $520 against the $2,212 or properly declined to do so since, as will be seen, the size of the penalty will ultimately be determined by the statutory maximum and the penalty will thus be the same in any event.

In addition, the last full sentence in the text on page 25 and the sentence following it are revised to read:

> If the same procedure is followed here, the penalty for the size of the violator would be reduced to reflect the adjustments previously discussed. However, this adjusted figure, when added to the amount calculated for economic benefit, importance to the regulatory scheme, and length of time would result in a penalty in excess of the $25,000 maximum, and thus the preliminary deterrence amount is assessed at $25,000.

Since the changes to the Initial Decision do not affect the amount of the penalty assessed, a $25,000 penalty is still appropriate.

III. *CONCLUSION*

Pursuant to the Section 113(d) of the Clean Air Act, 42 U.S.C. 7413(d), a civil penalty of $25,000 is assessed against Burlington Northern Railroad Co. The full amount of the penalty shall be paid within sixty (60) days of the date of service of this decision. Payment shall be made in full by forwarding a cashier's check or a certified check in the full amount payable to the Treasurer, United States of America, at the following address:

EPA - Region VIII
Regional Hearing Clerk
P.O. Box 360859M
Pittsburgh, PA 15251

So ordered.

GENERIC WITNESS TIPS

1. What's Done Is Done (you can't change the past)

2. A Witness Is Forever (you can run but you can't hide)

3. Don't Take It Personally (even if it is)

4. Tell The Truth ("and you don't have to remember anything")

5. Listen, Pause, and Answer (if possible)

6. Do Not Volunteer, Do Not Volunteer (do not volunteer)

7. Be Simple (the attorney/upper management test)

8. You Are The Boss (for once)

9. Do Not Argue The Theory Of The Case (lawyer will)

10. The Record Is Cold (uh, and like, sometimes, uh, cruel)

11. Experts: Build A Pyramid (strong foundation)

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Attitude Can Make A Difference

Dealing with the EPA's Enforcement Office: Some Practical Considerations

BY MICHAEL J. WALKER

U.S. EPA, with the combined assistance of the Department of Justice, U.S. Attorney's Offices, State lead agencies and the Federal Bureau of Investigation, will initiate more than 5,000 separate enforcement actions this year. These actions can range from indictments by grand juries for environmental data fraud to $10,000 administrative civil complaints seeking penalties for one-time instances of non-compliance.

While the agency stands ready to litigate and invests a great deal of time and effort into serious preparation for litigation, the vast majority of cases — well over 97 percent — will settle through the negotiation of a judicial consent decree or administrative consent order. EPA actively encourages settlement of enforcement actions, since they can effectively resolve disputes over non-compliance and lower transaction costs for both EPA and the regulated community.

Settling an enforcement action can offer you the opportunity — perhaps initially an unplanned and unwelcome opportunity — to develop an improved relationship with regulatory officials.

While paying a negotiated civil penalty to the U.S. Treasury might not seem like a good business decision at first, settling an enforcement action can offer you the opportunity — perhaps initially an unplanned and unwelcome opportunity — to develop an improved relationship with regulatory officials. These are likely to be the same individuals you will need to work with in the future. Demonstrating a willingness to be open with the regulators and to actively resolve non-compliance issues in a manner that is rational, professional and solution-oriented, will engender the good will and respect of these same regulatory officials, making settlement a sensible investment that can help your company. Rather than viewing each enforcement action as an unwarranted intrusion into your daily operations, an environmental enforcement action should be viewed as a critical *opportunity* for you to put your best foot forward with EPA. It can be an invaluable opportunity for you to come in, uninterrupted, to sell the positive elements of your environmental compliance program. Good will with EPA is good for business.

In approaching settlement discussions with EPA, here are practical points to consider:

- *Figure out in advance what the issues are.*

Most EPA enforcement actions are about two things: compliance and money. EPA, through its ten regional offices, initiates cases when compliance with federal statutes or regulations is alleged to be nonexistent or severely wanting. In the majority of cases, the evidence clearly reveals facts that go beyond mere allegations. EPA will rarely bring a weak or marginal case. Frequently, EPA has evidence that it is "beyond a reasonable doubt."

If EPA has strong evidence of a violation, think twice about exaggerated defenses that will cause the regulators to question your motives, sanity or business sense. If you have accepted the fact that you had a compliance problem and have corrected it, bring the pictures, video or purchase orders to the settlement table. EPA will appreciate your acknowledgement of the problem and commitment to environmental remedies. Your actions will show good faith and satisfy a major point on EPA's checklist: compliance.

- *Take the violation seriously, even though the forum is administrative and the penalty may be light.*

The typical EPA administrative action may involve a relatively modest penalty demand (in terms of the gross daily revenue of the facility), and selection of an administrative rather than district court proceeding may suggest "informality." But it is critical that the regulated community approach the proceeding with the same care and degree of concern that it would present at formal proceedings initiated by the United States Attorney in U.S. District Court. EPA's administrative enforcement programs are the backbone of the agency's enforcement presence nationwide, and refusal to cooperate in the less formal administrative proceeding may be grounds to escalate the matter to the Department of Justice.

Refusal to cooperate or to remedy obvious environmental problems may trigger more detailed examinations of the facility. More important, it can create an image: that the com-

About the Author

Michael J. Walker serves as the senior enforcement counsel for administrative litigation, and regional liaison in the Office of Enforcement, U.S. EPA. Previously he served for four years as enforcement counsel for toxics and pesticides, where he supervised attorneys in the toxics litigation division and ten regional offices in the enforcement of TSCA, FIFRA, EPCRA, and other federal statutes. The views in this article are the author's and not necessarily those of the EPA.

pany is recalcitrant and deliberately and willfully disregards regulatory requirements. Once a facility, a corporation or key employees in a company develop a poor reputation, it is difficult to erase that image from the Agency's collective mental notebook.

Enlisting the help of an elected official to write a letter in your favor is a bad idea almost certain to backfire. It signals a weak case and can limit whatever discretion the agency might have been willing to utilize.

- *Leave politics out of it.*

One of the strongest signals to EPA law enforcement staff that they have an excellent case is that the respondent or defendant has enlisted the help of an elected official, such as a congressman or senator, to send a letter to the EPA administrator, asking if the matter "could be evaluated." EPA, with rare exception, files cases only when there is evidence that is clear, convincing, obvious and nearly irrefutable.

When a congressional inquiry is received, the matter is marked and highlighted for a two-week special investigation and response. The inquiry will be routed to the case attorney and technical staff most familiar with the underlying facts for preparation of the response letter. Rarely is there new information that might suggest a drastically different outcome. But because of the additional congressional scrutiny, coupled with historic incidents of questionable congressional interference, EPA is careful to handle such cases strictly by the book. Raising congressional concerns simply sends a signal that the case is strong and the respondent is seeking an unlevel playing field.

Furthermore, congressional inquiries can limit whatever discretion the agency might have been willing to utilize in the settlement of the case. The best approach is to pursue settlement discussions on the merits of the individual case.

- *Avoid excessive informality.*

EPA personnel are public servants and to some extent bureaucrats, isolated from the world of business. However, derogatory remarks about the stereotypical mindless bureaucrat are incorrect, improper and definitely counterproductive. Most EPA staff at settlement meetings will be lawyers, engineers, or scientists. These college-educated technical professionals are committed to the mission of protecting public heath and the environment. Many EPA employees are anxious to work with

Avoid These Company Disasters

Company A was charged with manufacturing a pesticide that failed to work as the label promised. Testing evidence was solid and done by another agency under contract to EPA. When presented with the test data, the company insisted the product worked, and it contested each and every aspect of the test protocol, including the motives and academic qualifications of the individuals who analyzed, verified and even collected the samples. Eventually the company conceded that the product was a failure and it had to come off the market.

Like the motorist who gets stopped by the sheriff with radar, you may not wish to challenge the calibration of the instrument if in fact your speed is far in excess of the posted limit. When you bring unsupported and unsubstantiated confrontational arguments into the debate, you make it difficult for law enforcement officials to trust your word on related issues. If you are speeding outside your home state, the chance of meeting that same sheriff again may be remote. However, in the "small town" of environmental regulation, with a limited number of EPA or state regulators, why run the risk of bad feelings in the future, especially where the evidence of violation is overwhelming?

Company B was charged with violating PCB disposal and recordkeeping regulations. A civil penalty was proposed and a settlement was discussed, though it was highly contested and rejected. Later, at trial, all the violations were proved and accepted by the judge, who awarded a large penalty to EPA. The company repeatedly exercised its right to appeal and lost at every level. The violations here were clear cut. What point was this company trying to make? Should EPA trust this company in the future?

Company C was charged with improperly disposing of hazardous wastes. The matter was widely reported in several national newspapers. Prior to issuing the civil complaint, EPA offered the company an opportunity to pre-settle the case for a negotiated sum. Starting low, the company only meagerly raised its settlement offer over a two week period. It refused to raise its settlement amount by an additional 10 percent, which EPA said would be sufficient to settle the case in accordance with the established penalty policy. When pre-filing settlement negotiations broke down, EPA filed suit and later negotiated a settlement for nearly three times the original proposed settlement sum.

In settlement negotiations with company D, EPA agreed to reductions in emissions of more than 12 chemicals identified as priority pollutants by the administrator, in exchange for a reduced penalty. An EPA-originated check with the applicable state regulatory agency revealed that state law already required the reductions for the same chemicals. This episode suggested an unfortunate departure from veracity and full disclosure at the settlement table. EPA had to wonder if this was typical of the company's dealings with EPA.

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the regulated community to get their facilities into compliance. Staff may be willing to "bend the rules" if the modification to EPA policy may actually result in accelerated compliance or technical improvements that bring about environmental benefits. The company that comes to an enforcement session hostile to the agency's mission is likely to find an immutable bureaucrat, and as a result will lose the opportunity for a more creative and personalized settlement process.

- *To assess the penalty demand, review the complaint carefully.*

Most cases involve paying money as well as getting into compliance, and the money collected for environmental violations is on the increase. Money penalties accomplish a number of important goals. They remove the economic benefit from acts of non-compliance. They help to level the playing field in the business community by canceling the economic benefit previously enjoyed by the violating company. And monetary penalties, which are not tax deductible, must be dealt with by the entity's corporate structure and may require disclosure to the SEC. Finally, publicity surrounding the imposition of monetary penalties may help deter violations at similarly-situated facilities.

When evaluating any civil complaint, be alert to the key issues: Do the facts in the complaint accurately support the penalty demand in the complaint? Check the mathematics. Do the proposed penalty figures add up correctly?

If you have evidence of factors that demonstrate the penalty was incorrectly calculated, raise it at the first settlement conference. But keep in mind that in the majority of administrative actions, EPA doesn't seek the maximum penalty provided for by statutes.

At the first settlement meeting, EPA will be prepared to discuss the penalty demand in detail. If you have evidence or factors that demonstrate the penalty was incorrectly calculated, raise it then. But keep in mind that in the majority of administrative penalty enforcement programs, EPA does not seek the maximum penalty provided for by statutes. Instead, EPA uses civil penalty policies that propose penalties based upon the degree of harm to the environment or degree of deviation from the regulatory scheme. Unsubstantiated attacks on the penalty or low ball settlement counteroffers should be avoided.

- *Actively participate in settlement conferences.*

EPA policy and the consolidated rules of practice encourage informal settlement discussions. These conferences are useful, off-the record opportunities to present settlement options for the government's consideration and so that the parties can evaluate the relative strengths and weaknesses of their respective cases.

At the settlement meeting, EPA will be particularly interested in (1) a demonstration that the facility or corporation has no history of prior violations of the applicable statutes, and (2) a candid discussion of the nature and circumstances of the violation.

It is important to show that violations have been corrected. The failure to demonstrate that problems have been addressed may serve as the basis to *increase* a proposed penalty. Documented efforts to address compliance problems go a long way toward reassuring the EPA that management is serious about correcting deficiencies and that the problems do not reflect hostility to the regulatory requirements or, worse, a knowing disregard for the law.

Evidence that the company cannot pay the penalty, or that paying it will severely impair its ability to continue its business, may persuade EPA to decrease a penalty. Companies must provide copies of signed federal tax returns and supporting schedules in order to bring this issue before EPA staff.

Frequently, companies seek to schedule settlement meetings prior to the submission of their answer and request for hearing. This may gain them insight into the government's case, so the respondent's answer will more accurately address any perceived weakness or defenses. Those seeking to employ this course of action should be aware that under EPA's consolidated rules of practice governing administrative cases, the government as a matter of right may amend the complaint, once, at any time before the answer is filed. The EPA inevitably will amend the complaint in response to continued violations or recalcitrance. The amended complaint may seek additional penalties for continuing violations, or it may reduce or eliminate altogether the possibility of any downward adjustment in the penalty for "cooperation shown the government" or "other factors as justice may require."

One of the most frequent impediments to effective representation of a client is simple failure to read and understand the applicable statutory or regulatory provisions.

- *Know both the applicable law and the rules of practice.*

One of the most frequent impediments to effective representation of a client in an EPA proceeding is failure to read and understand the applicable statutory or regulatory provisions, as well as the specific rules of practice that govern the proceeding.

As has been referenced earlier, although EPA has made significant efforts to consolidate the rules of practice into one specific section of the Code of Federal Regulations (40 CFR Part 22 et seq.), many administrative enforcement programs have unique procedural requirements. Agency practitioners are at an advantage because they work with the statutes and rules every day. Thus the infrequent administrative practitioner needs to be careful about reviewing EPA filing deadlines, service requirements or other procedural rules relevant to

these proceedings.

Arguments based upon unique state law precedents or that a given statute or regulation is clearly "unconstitutional" rarely, if ever, have merit.

- *Prepare your answer thoroughly and in the same detail that you would for state or district court.*

The consolidated rules of practice require that the answer state all arguments which are alleged to constitute the grounds of defense, including facts which the respondent plans to place at issue. A careless or inadequately drafted response to what might be perceived as an "informal" proceeding might provide the basis for an accelerated decision, including the imposition of the full penalty where "no genuine issue of fact exists and the Complainant is entitled to judgment as a matter of law."

- *Offer a settlement at the initial meeting — but don't insult the agency.*

Given the volume of actions EPA is handling these days, EPA will be anxious to pursue settlement discussions seriously and in detail at the first settlement meeting. This is good public policy for EPA and helps to reduce the potential transaction costs incurred by both the government and the regulated community.

In addition to a tangible and verifiable demonstration of compliance, the amount of the civil penalty will probably be the major outstanding issue on the table. The most unproductive approach to settlement discussions is to offer an unreasonably low counter offer to the EPA penalty. With few exceptions, where the statutory maximums may be sought for strategic reasons, civil penalties sought by EPA will have been calculated from a published or publicly available civil penalty policy and may already reflect substantial mitigation from statutory per-violation per-day maximums. Unless you have evidence that the penalty is grossly miscalculated or you have facts that may not be known to EPA, offering an unrealistically low settlement figure might be perceived as bad faith negotiating. Approach EPA settlement negotiations with a recognition that the Agency is serious about the penalty amounts.

- *Have the right people available to make decisions.*

In order for there to be effective negotiation, the right parties must meet at the negotiation table. At EPA, while staff attorneys and technical professionals have some latitude and authority to bind the agency, their authority is limited to representing what the division or office director will agree to do. Except for unusually large or unique cases, it is not realistic to expect that the agency hierarchy will be able or willing to participate in detailed settlement negotiations. EPA staff are limited by the parameter of individual penalty policies and accordingly must negotiate within those parameters.

Don't insult the agency with an unrealistic counter offer. With few exceptions, civil penalties sought by EPA will have been calculated from a published or publicly available civil penalty policy and may already reflect substantial mitigation from statutory per-violation per-day maximums.

Defendants or respondents to EPA enforcement proceedings are advised to bring appropriate-level personnel to the settlement table in an effort to ascertain early what it will take to settle the case.

Defendants or respondents to EPA enforcement proceedings are advised to bring appropriate-level personnel to the settlement table in an effort to ascertain early what it will take to settle the case. Where compliance and money are frequently the conditions at issue, establishing that the company is in compliance or on a schedule to achieve and maintain compliance will leave only the issue of money for discussion. To ensure that compliance or technical issues are adequately dispensed with, it will be necessary to have reliable, credible technical professionals and evidence, photographs, videos or affidavits on hand to verify compliance.

In writing about EPA's administrative adjudication authorities, Gerald Harwood, EPA's former chief administrative law judge, has noted: "The Agency can only be effective if the public has confidence in the process, a confidence created by the conviction that they have been treated fairly and that the outcome is reasonable, even though they may be unhappy about the ultimate judgment."

Fairness and an open mind is something we all expect from our judicial system. Treating companies and individuals fairly and with respect is an important goal for the administrator and for managers of EPA's law enforcement program. EPA staff, in rare occurrences, must be reminded to respect the concerns and interests of the regulated community. At the same time, however, it is critically important that the regulated community approach EPA personnel with a level of respect for the tough job and frequently competing demands and priorities that face agency personnel.

Corporate officers or managers who signal subordinates to fight and challenge every aspect of even the most straightforward case are advised to rethink this philosophy. Approaching EPA enforcement officials with a problem-solving and cooperative attitude can build a strong relationship with the Agency. Respect garners respect, just as trust can build trust.

An enforcement proceeding, though potentially an unexpected and unpleasant interruption of your normal course of business, can serve to give you the opportunity to present your best case and your best eco-image to EPA.

ECCR

ENVIRONMENTAL JUSTICE

Challenges & Opportunities

- WHAT IS ENVIRONMENTAL JUSTICE?
- WHAT IS ENVIRONMENTAL INJUSTICE?
- ENVIRONMENTAL JUSTICE IS A NATIONAL & AGENCY PRIORITY
- ACHIEVING ENVIRONMENTAL JUSTICE THROUGH LAW ENFORCEMENT IS ***BOTH*** A GOAL and RESPONSIBILITY

A. Introduction

All people, regardless of economic status, race or ethnic origin are exposed to a variety of environmental contaminants and pollution as the result of life in a complex, technological society. Statistically, minority groups, particularly those living in economically depressed areas tend to get a disproportionately larger share of negative environmental impacts. This is a well documented problem. EPA is committed to providing special attention to identifying and resolving these environmental problems in areas of significant concern. All EPA employees can play an important part in identifying and resolving environmental justice issues.

B. The Problems Are Real

Several national studies[1] have documented that people of color and low income

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[1] See for example: United Church of Christ Commission for Racial Justice and Public Data Access, Inc. ***"Toxic Wastes and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites"*** (New York, NY: United Church of Christ Commission for Racial Justice, 1987); Goldman, Benjamin and Fitton, Laura, ***"Toxic Wastes and Race Revisited;"*** Center for Policy Alternatives; National Association for the Advancement of Colored People and the United Church of Christ Commission for Racial Justice, 1994.

are more likely to live in communities with environmental problems that affect their health and welfare. African-American males had a 33% higher death rate from cancer than Caucasian males; African-American females had a 16% higher death rate from cancer than Caucasian females.[2] Among urban children five-years old and younger, the percentage of African-Americans who had excessive levels of lead in their blood far exceeded the percentage of Caucasians at all income levels. For families with incomes of less than $6,000, 68% of African-American children and 36% of Caucasian children had unsafe blood lead levels. In families earning more than $15,000, 38% of African-American children and 12% of Caucasian children had lead poisoning.[3]

The location of industrial facilities and hazardous waste sites appears to have a direct correlation to a variety of health problems found in minority and low-income groups. See Attachment A.[4] The decision to open or operate a facility in areas occupied by low income or minority populations appears to reflect a number of economic considerations that range from lower land values to a perception that there will be lower community resistance and a lack of financial resources of low income communities, which can lessen the potential for litigation or permit challenges. Finally, there is evidence that wealthier or more educated communities may have better access to informal decision making networks in state government.[5]

Additional, complicating factors that have been identified suggest that lower income people appear to be generally less well informed about environmental health issues; may (often) lack adequate health care; may have inadequate or substandard diets or nutrition and may be more likely to have stressful and healthy lifestyles,[6] making these people, particularly children, more vulnerable to the adverse effects of

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[2] Collin, Robert W., ***"Environmental Equity: A Law and Planning Approach to Environmental Racism,"*** 11 Virginia Environmental Law Review, 501 (1992).

[3] *Id.* At 501-502.

[4] "Zip Codes With Commercial Hazardous Waste Facilities and Above Average Percent of People of Color," Figure 2, "***Toxic Wastes and Race Revisited***" Center for Policy Alternatives; NAACP and the United Church of Christ Commission for Racial Justice, 1994. Map and data prepared by Claritas, Inc.

[5] *Id.* At 512.

[6] Sexton, Kenneth, ***"What's Known, What's Not, Cause for Concern,"*** Vol. 18, No. 1 EPA *Journal*, March/April, 1992).

environmental contaminants.

C. The Quest for "Equality" May Cause "Inequality"

While our Declaration of Independence and Constitution clearly support "Equal Protection Under the Law"[7] and "All Men[8] Are Created Equal" we know from history that these principles have not always had full implementation throughout all levels of society. EPA[9], though striving to protect all people[10] (including, but not limited to plants, birds, mammals, insects, scenic vistas[11], endangered species, etc.) equally[12] from the harmful and negative effects of pollution and environmental contamination has engaged in some practices that may have lead - inadvertently - to a failure to adequately address problems in environmental justice communities. One example is the "neutral inspection scheme" employed by some programs to identify candidates for inspection. While we should take pride in out efforts to protest all people equally -we can not allow our desire for "equal protection under the law," to ignore the harsh reality that there are clearly <u>unequal</u> impacts and <u>unequal</u> effects on human populations within our jurisdiction. We must put a special and deliberate emphasis on the adverse impacts on people impacted by pollution.

In February 1994, President Clinton issued an <u>Executive Order</u> on Environmental Justice[13]. This directive, to all federal departments and agencies,

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[7] Carved in stone above the Supreme Court.

[8] Broadly construed over time, through enlightenment and court orders to include women and minority groups.

[9] From time to time it is worth acknowledging that EPA stands for "environmental protection agency".

[10] Without regard to race, age, religion, national origin, gender, sexual orientation, marital status, political persuasion; citizen or non-citizen, etc.

[11] Note, for example, the positions taken by EPA under the Clean Air Act and NEPA to protect the Grand Canyon arced from the harmful effects of air pollution on scenic vistas in the national park.

[12] Recognizing, of course, limitations established by the budget.

[13] See Executive Order 12898; February 11, 1994, "***<u>Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations</u>***"

mandates "to the greatest extent practicable", that EPA and other federal agencies achieve environmental justice as part of our mission. EPA was directed by the President to serve as an example for the rest of the government. At EPA we do this by identifying and addressing the disproportionately high and adverse human health and environmental effects on minority and low income populations and develop programs and strategies to promote environmental justice.

The Office of Enforcement and Compliance Assurance has adopted an action plan[14] designed to:

- Promote increased compliance rates in minority and low-income communities;
- Ensure that all federal agencies consider environmental justice in the NEPA process;
- Target efforts to achieve pollution prevention at facilities that have environmental justice concerns;
- Target enforcement actions in communities disproportionately exposed to environmental stresses;
- Increase the use of innovative settlements in minority and low income communities
- Use appropriate enforcement mechanisms to assure timely and effective cleanups that incorporate minority and low-income community concerns;
- Vigorously enforce laws controlling export of wastes and hazardous substances to developing countries;

D. What Role Can You Play? What Can You Do?

The reality must meet the rhetoric. As environmental protection attorneys and technical professionals it is critical that we be responsive to the public; their expectations; and that we look for ways to promote "justice" throughout our activities.

FIRST: LISTEN & LEARN: What are affected populations concerned about?

Affected minority populations have a variety of concerns. Although it is

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[14] See, for example, Section 13 of Environmental Justice Training for Enforcement Personnel; National Enforcement Training Institute; December, 1996.

simplistic and even unfair to try to generalize, [15] past experience demonstrates some geographic, cultural, economic and sociological patterns and EPA staff should look for potential impacts in these areas:

African-Americans, particularly in urban areas, have faced high potential lead exposure and debilitating ill effects from air and water pollutants, particularly in urban areas with antiquated water treatment and distribution systems. Toxic pest control misuse in Cleveland- area apartments resulted in a CERCLA response action to protect the health and welfare of the affected citizens.

Hispanics, especially the large population of 500,000 involved in manual farm labor, have face high levels of pesticide exposure and potential toxic effects from untreated drinking water.

Native Americans have faced a variety of problems from improperly managed radioactive wastes on federal lands and reservations;; contamination of water resources, and degradation of hunting and fishing areas used for subsistence wildlife consumption.

Asian-Pacific Americans have faced a variety of impacts from water and air pollution. Immigrant laborers from the Phillippines were involved in PCB and asbestos cleanup activates without any protective equipment.

All minority and low income groups face potential occupational exposure.

SECOND: ACT RESPONSIBLY, *but* ACT

To ensure that EPA (and you) is doing its part to fulfill the Executive Order and Agency commitment, it is essential that we carefully assess opportunities that address disproportionate impacts on minority and low income populations.

1. When the phone rings - answer it! If it is a citizen calling with a question or concern about a potential problem, listen carefully and actively. Citizen callers may not know the technical "EPA-*speake*," cost-benefit analysis considerations or even have a fax machine or Internet mail box. They may be raising concerns of life and death

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[15] Note: in no way are these meant to be exclusive impacts on any particular minority or low income population; they are offered as examples of potential or typical exposure patterns.

importance. Be patient. Take the time to give them some "compliance assistance."

2. When looking for targets for inspection, be sure to use IDEA, EPCRA TRI[16] and U.S. Census Data base information to identify facilities in low income or minority neighborhoods. Make sure these facilities are incompliance; on a schedule to get into compliance. If they can't or won't get into compliance, get the key to the front door.

3. Look for opportunities to meet with citizen groups and community leaders. A number of Regions have developed excellent programs that do this. Some problems that may be identified in meetings with community leaders like jobs, drugs and homelessness are beyond the statutory mandate of EPA. These discussions, however, can lead to a greater understanding of the problems confronted in low income and minority communities.

4. Actively use the EPA's Policy on Supplemental Environmental Projects; Policy of Incentives for Self-Auditing; Small Business Policy and related guidance to advance and enhance settlement negotiations. Remember, most EPA statues and agency guidance require EPA to consider "*other factors as justice may require*" in assessing civil penalties. Use impacts on affected communities as a factor in settlement negotiations. Work conscientiously to develop settlements that:

(a) achieve compliance; (b) recover economic benefit;
(c) cleanup pollution; (d) address permanent pollution prevention solutions
(e) return something to the community that has endured the non-compliance.

5. Be a patron, but don't patronize. Many citizens have become cynical by a perception that "the government" is not responsive. Your plate may be full, but their plate may be empty and they may be fearing for their health and safety. Listen conscientiously. Tell the truth. Not every complaint or situation will result in an enforcement action - but your ability to listen and explain what is or is not possible will go a long way toward creating a fair dialogue with the public.

6. Take personal and ethical pride in your work.

7. Follow up. If you promise to call or look into a complaint; do it.

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[16] See for example: ***The Federal Toxics Release Inventory: An Important Tool in Identifying Neighborhood Risks From Chemicals***; Walker & Mohtadi, 1997.

Figure 2
ZIP codes with commercial hazardous waste facilities and above average percent people of color