United States
Environmental Protection
Agency

National Enforcement
Training Institute
Washington, DC 20460

EPA

LITIGATING CIVIL PENALTIES

- ☐ Strategies
- ☐ Techniques
- ☐ Tools

Selected Resource Materials

THIRD EDITION

LITIGATING CIVIL PENALTIES

THIRD EDITION
February, 2000

Regulations, guidance, policy and other important desk references for all EPA administrative practitioners.

This desk reference is intended to serve EPA administrative practitioners as a tool in developing, litigating and/or settling cases. This desk reference identifies and in some instances, provides a full text copy, of regulations, key EPA guidance documents, EPA policies and other materials that are essential to the administrative practice of environmental law at EPA. There are numerous policies, guidances, rules and statutes that have not been included on the list which may be pertinent to an individual case. These documents can be obtained in regional libraries or via the EPA or OECA Internet homepage. The purpose of this desk reference is to provide the general essentials for administrative practice at EPA.

INDEX OF SELECTED RESOURCE MATERIALS

(1) **The Administrative Litigation Practice Network** - EPA newsletter which reports on ALJ and EAB decisions on a monthly basis. A sample copy is included 1

(2) **Procedural Rules of Practice**

(A) Preamble..... 14
(B) 40 CFR Part 22 (July 23,1999)..... 53
(C) Note: Unique Supplemental Rules of Practice - by statute..... 64
(D) Subpart I - for non-APA matters..... 67

(3) **EPA Enforcement Response Penalty Policies**

(A) **General** - The general penalty policies are not media-specific but provide agency-wide guidance for media programs to use in developing ERPs. They discuss the EPA goal in proposing and assessing penalties and provides a framework for the development of media-specific penalty policies.

(I) Statutory Penalty Section Regarding Penalty Assessment..... 69

(II) GM 21 "Policy on Civil Penalties"..... 72

(III) GM 22 "A Framework for Statute-Specific Approaches to Penalty Assessments..... 82

(IV) Guidance on the Use of Penalty Policies in Administrative Litigation. 12/15/95. Gives language to insert into Complaints to reflect ***Wausau*** decision.....114

(V) "Impact on ***Wausau*** on Use of Penalty Policies" 3/19/97..... . 119

(VI) "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule(Pursuant to the Debt Collection Improvement Act of 1996)" 5/9/97..... 122

(B) **Statute Specific** - The statute specific penalty policies (also called "Enforcement Response Policies" or "ERPs") generally serve two distinct purposes. The policies explain how to calculate a penalty for the purpose of proposing a penalty in the complaint. Most of the policies also explain the factors that may be considered in settling a case and explain how to calculate a settlement figure.

(I) Clean Air Act - Mobile Sources

1. Volatility Civil Penalty Policy. 12/1/89
2. Interim Diesel Civil Penalty Policy. 2/8/94
3. Regulation of Fuels and Fuel Additives. 8/29/75
4. Manufacturers Program Branch Interim Penalty Policy. 3/31/93
5. Tampering and Defeat Device Civil Penalty Policy for Notices of Violations. 2/28/94
6. Lead Banking Penalty Policy and Revisions of Lead Usage and Reporting Penalty Policy. 12/18/87

(II) Clean Air Act - Stationary Sources

1. Clarifications to the 10/25/95 CAA Stationary Source Civil Penalty Policy. 1/17/92
2. Stationary Source Civil Penalty Policy. 10/25/91

(III) Resource Conservation & Recovery Act

1. Civil Enforcement Response Policy. 3/15/96
2. RCRA Civil Penalty Policy. 10/90
3. Final U.S. EPA Penalty Guidance for Violations of UST Regulations. 11/14/90

(IV) Toxic Substances Control Act - Title I

1. Enforcement Response Policy for TSCA Section 4 Test Rules. 5/28/86
2. TSCA Good Laboratory Practices Regulations. 4/9/85
3. Amended TSCA Section 5 Enforcement Response Policy. 6/8/89
4. Recordkeeping and Reporting Rules TSCA Sections 8, 12 and 13. 5/15/87
5. PCB Penalty Policy. 4/9/90

(V) Toxic Substances Control Act - Title II

1. Interim Final ERP for AHERA. 1/31/89
2. ERP for Asbestos Abatement Projects: Worker Protection Rules. 11/14/89

(VI) Toxic Substances Control Act - Title X

1. Residential Lead-Based Paint Hazard Reduction Act of 1992; Interim Enforcement Policy. ½/98

(VII) Federal Insecticide, Fungicide & Rodenticide Act

1. FIFRA Response Policy. 7/2/90
2. FIFRA Section 7(c) ERP. 2/10/86
3. FIFRA ERP Good Laboratory Practices. 9/30/91
4. FIFRA Worker Protection Standards - Interim Final. 12/97

(VIII) Emergency Planning & Community Right-To-Know Act

1. ERP for Section 313 of EPCRA and Section 6607 of the Pollution Prevention Act. 8/10/92
2. Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of EPCRA and Section 103 of CERCLA.. 9/30/99

(IX) Comprehensive Environmental Response, Compensation & Liability Act

1. Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of EPCRA and Section 103 of CERCLA. 6/13/90

(X) Safe Drinking Water Act

1. Interim Final UIC Program Judicial and Administrative Order Settlement Penalty Policy -- Underground Injection Control Guidance No. 79.9/27/93
2. New Public Water System Supervision Program Settlement Penalty Policy. 5/25/94

(XI) Clean Water Act

1. Revised Interim Clean Water Act Settlement Penalty Policy. 2/28/95
2. Guidance on the Distinctions Among Pleading, Negotiating, and Litigating Civil Penalties for Enforcement Cases Under CWA.1/89

(4) **Audit Policy** - This series of guidance documents embody EPA's position on the granting of enforcement discretion to entities that voluntarily discover, disclose and correct violations of environmental requirements. The Audit Policy is intended for use solely in cases of settlement and are not intended for cases which are litigated.

(A) "Restatement of Policies Related to Environmental Auditing" Federal Register 7/28/94. Provided as background.....146

(B) "Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement" Federal Register 4/3/95. Provided as background..... 153

(C) "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" Final Policy Statement, Federal Register 12/22/95. For use by EPA during settlement only. Note that on 5/17/99 EPA published an Evaluation of Proposed Revisions and Request For Comments..... 158

(D) "Audit Policy Interpretive Guidance" 1/15/97
* Qs&As.....166

(5) **Supplemental Environmental Projects (SEP) Policy** - In an effort to encourage pollution prevention and environmental justice, the EPA developed a policy whereby a respondents willingness to conduct a "supplemental environmental project" would be considered as a penalty reduction factor in the context of settlement. What constitutes an acceptable project and how to calculate the penalty reduction is set forth in the policy.

(A) "EPA SEP Policy" 5/1/98.....192

(6) **Guidance on Enforcement for Small Businesses** - The purpose of this policy is to promote environmental compliance among small businesses by providing incentives for participation in compliance assistance programs and encouraging prompt correction of violations. Specifically, EPA announced that it would exercise its enforcement discretion, under applicable media-specific policies, to refrain from initiating an enforcement action or to mitigate penalties whenever a small business

makes a good faith effort to comply and there is no criminal behavior and no significant health, safety or environmental threat.

(A) "EPA OECA Policy on Compliance Incentives for Small Businesses" Issued on 5/20/96. 214

(7) **Guidance on Analyzing "Ability to Pay"** - A common statutory factor that must be considered before the assessment of a penalty is the Respondents "ability to pay" a penalty. There are several guidance documents intended to help the administrative practitioner analyze this statutory factor for use in determining Respondent's ability to pay a penalty and for use in arguing the EPA's position in litigation. Practitioners can also access the EPA/OECA website (http://es.epa.gov/oeca/datasys) which has actual programs that can evaluate ability to pay.

(A) "Guidance on Determining a Violator's Ability to Pay a Civil Penalty" 12/16/86.....224

(B) "Change in Methodology for Determining the BEN Model's Discount Rate" 10/19/92.....230

(C) Kimberly Zanier memos, "Financial Analysis/General Synopsis" and "Financial Analysis Memorandum #2", August 2, 1995.....236

(8) **Settlement Guidance** - In addition to the Audit Policy and the SEP Policy, which are for use only during settlement, there are several other documents pertaining to settlement which EPA practitioners should be familiar with as they consider negotiating settlements.

(A) "Use of Stipulated Penalties in EPA Settlement Agreements" 1/24/90.....266

(B) See the Statute Specific ERPs.

(C) "Guidance on Certification of Compliance with Enforcement Agreements" 7/25/88.....275

(9) **Guidance on Prosecutorial Discretion** - The Audit Policy, the SEP Policy and the Small Business Policy are all policies which embody an EPA position on prosecutorial discretion in certain circumstances. However, there are two more guidance documents which the practitioner should be familiar with that have general applicability in all media.

(A) "Processing Requests for Use of Enforcement Discretion" 3/3/95.....283

(B) "Policy Against 'No Action' Assurances" 11/16/84.....287

(10) **Guidance on Intra-Agency Process and Procedure** - These guidance documents explain who does what and how within EPA when it comes to administrative practice.

(A) "Procedures to Improve Coordination before the Environmental Appeals Board" 1/25/93.....290

(B) "Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases" 7/11/94.....299

(C) "OECA/Regional Procedures for Civil Judicial and Administrative Enforcement Case Redelegation" 11/8/94.....315

(D) "Documenting Penalty Calculations and Justifications in EPA Enforcement Actions" 8/9/90..... 331

(E) "Credentials Certification Policy".....335

(11) **Delegations of authority.** Available at EPA's website, www.epa.gov.

(12) **Selected Model Pleadings.** complaints, settlements, documents, justification memos, etc. Models are a handy tool that should be used with caution. Guard against over-reliance on models. Always double check your models to ensure applicability in a particular case and that the model is current with respect to EPA policy, procedure, regulation and, of course, current case law.

(A) Complainant's Pre-Hearing Exchange in Celltech Media, Inc. aka Health Care Products, Docket Nos. FIFRA 95-H-04; FIFRA 93-H-02F and I.F.&R. VIII-90-279C; February 26, 1996.....340

(B) Complaint in GEC Precision, EPCRA Docket No. 94-T-381-E.....367

(C) Memo in Support of Penalty in GEC Precision.....376

(D) Transcript of hearing in GEC Precision.....382

(E) Transcript of hearing in *Wausau*..... 395

(13) **Statutes worth studying:**

(A) The Revisions to the Equal Access to Justice Act made by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), P.L. 104-121, 110 Stat. 857-74. This statute authorizes certain Respondents to file an application seeking reimbursement from the EPA for attorneys fees and other expenses incurred in defending itself during the litigation. See "Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act", 5/28/96.....416

(B) Paperwork Reduction Act, 44 U.S.C. Sections 3501 et seq., amended in 1995 at Publ.L. No. 104-13, 109 Stat. 163. Implementing regulations are found at 5 CFR Part 1320. The statute requires the EPA to get OMB approval for any regulation, permit, etc. which requires the collection of information. Where EPA has failed to get OMB approval or has failed to otherwise comply with the PRA requirements, EPA may not collect a penalty for the violation of an information collection request.

(C) Five-Year Federal Statute of Limitations, 28 U.S.C. 2462. All of our administrative cases are subject to a five-year statute of limitations. Case law should be consulted to determine whether a particular violation is "continuing" in nature.

(D) Anti-deficiency Act, 31 U.S.C. 665 which prohibits government officials from spending funds in excess of Congressionally appropriated amounts or without a Congressional appropriation, unless authorized by law.

(E) Miscellaneous Receipts Act, 31 U.S.C. 3302 mandates that any penalties collected by an agency to be returned to the treasury as miscellaneous receipts, rather than be retained by the agency. MRA is not applicable where there is a specific statutory authority to retain collected funds or to handle such funds differently.

(14) **Access to Information:**

(A) Guidance documents, memos and policies can be accessed through the EPA/OECA website (http://es.epa.gov/oeca) or the Enforcement and Compliance Docket and Information Center located in Room 4033 of EPA's Ariel Rios Building. E-mail address is OECA/Docket@EPAMail.Gov. Center contacts are Lee Carothers (202) 564-2614 and Donna Williams (202) 564-2119.

(B) Penalty Policies can be accessed through OECA's website or through LEXIS via a special sub-library in the environmental library called "PENLTY".

(C) EPA Shadowlaw has an Administrative Law library containing all ALJ and EAB decisions as well as a Policy and Guidance library.

Prepared by Helene Ambrosino, Senior Attorney
Office of Enforcement and Compliance Assurance
U.S. EPA - Washington, D.C.

ADMINISTRATIVE LITIGATION PRACTICE
NETWORK

Helene Ambrosino - 202-564-2627- Michael J. Walker 202-564-2624
Telefax: 202-564-0633

Prepared & distributed for use by EPA administrative law practitioners.

Welcome to the first Administrative Litigation Practice Network for January 2000.....our first newsletter of this great new Century. This month we highlight summaries of several decisions issued by the Administrative Law Judges and one from the Environmental Appeals Board. Though several FIFRA cases dominate, the CERCLA/EPCRA ***Lily*** accelerated decision of Chief Judge Biro, which builds upon her earlier ***PRASA*** ruling, is significant and expansively first impression. Look carefully at the following decisions and orders . . . see how you can apply these holdings and general legal concept's m to your cases and practice:

- ❑ Sealed drums "released" from a facility constitute a "reportable release" under CERCLA/EPCRA, see ***Lily Del Caribe***.
- ❑ Respondent's request for discovery is denied; lacking "materiality" showing ***Davis-Monthan Air Force Base***, also a Harmon-*res judicata* defense soundly rejected.
- ❑ Multiple penalties for multiple sales rejected, see ***Microban***, now "on appeal"
- ❑ Liability established for landlord in lead-poisoning case; see ***Billy Yee.***
- ❑ Cooperative "sprit & intent" defense fails in NPDES action, ***Pleasant Hills.***
- ❑ Full penalties imposed in CAA asbestos abatement, ***Choice Insulation.***

Of the 12 cases discussed in this *NETWORK*, only ***Microban***, ***Choice***, ***Bullen*** and ***Plesant Hills*** are Initial Decisions. The rest of the orders and decisions are the direct result of aggressive motion practice by EPA counsel, as well as aggressive opposition to Respondent's motions. Motion practice is very critical and here we can clearly see how a such motion practice addresses matters of great impact to our entire practice. The motions for accelerated decision in ***Lily Del Caribe*** and ***Billy Yee*** are textbook perfect examples of how to win cases by narrowing the issues for trial.

In other developments, we were disappointed to see the narrowing of our authority to seek *per sale* penalties in ***Microban*** (on appeal) and the rejection of the false claims charges in ***Bullen*** (under consideration for appeal). The ***Zoo Med*** denial of

000001

interlocutory review ruling of the Environmental Appeals Board is also troublesome in that it fails to recognize the practical impossibility for the trial team to preserve issues for appeal, when one is precluded from introducing evidence at trial. The victory in ***Lily*** is particularly noteworthy as it expands our view about the enforceability of situations involving the "release" of toxic or hazardous materials, which are not reported to the National Response Center as required by CERCLA & EPCRA. ***Lily*** and the ***Puerto Rico Aquaduct & Sewer Authority*** (reported in the November 1999 *NETWORK*) reject the "lost closed container" defense. An Interlocutory Appeal of ***PRASA*** was denied. It is significant to note that under these rulings, it is not necessary to prove that the chemicals have actually escaped from the containers to constitute a "release." Finding full drums of toxic chemical in trees miles from the storage area appears to be "release" enough in the minds of some judges for now. This is really first impression litigation and we are watching these developments very closely.

PRACTICE ADVISORY: *Is a penalty witness necessary?*

We encourage all practitioners to carefully read the ***Pleasant Hills*** decision, as we did with veteran OECA penalty expert witness Jonathan Libber. This decision underscores a concern we have been raising that it may not be sufficient to address economic benefit or ability to pay issues at hearing by merely having a case development officer present a BEN or ABEL run, unless they have the ability to fully explain and defend the models. Since the calculation of economic benefit or the determination of ability to pay requires substantial expertise, litigation teams should not try to present this evidence through general fact witnesses. (It needs an expert witness) Even if defense counsel fails to object to EPA's proffer of "expert" testimony through a fact witness, the ALJ in assessing the totality of the administrative record, may conclude that the economic benefit portion of the case lacks adequate development or foundation and may reject the testimony, as happened in ***Pleasant Hills*** where Judge McGuire zeroed out the benefit part of the penalty.

Judge McGuire's rejection of the economic benefit evidence made very little difference in the final penalty assessment, since the "benefit" component was calculated to be $2,000. In all fairness, it may not have been cost effective to bring in an expert for a $2,000 benefit component. By attempting to introduce expert testimony through a fact witness EPA may risk its credibility before the Judge on the economic benefit issue as well as overall penalty credibility. Should anyone need expert witness help regarding a financial issue that impacts an enforcement action, be sure to contact: Jonathan Libber, BEN/ABEL Coordinator, Office of Enforcement and Compliance

Assurance, EPA Headquarters.(202) 564-6102. He is available to provide advice, to serve as an expert witness or help to identify or prepare penalty witnesses.

PRACTICE ADVISORY: ***Your NETWORK is now 100% electronic.***

In an effort to conserve paper and disseminate this information faster, we now distribute the Administrative Litigation Practice *NETWORK* **electronically**. October, 1999 was the last Network that we sent out with full text hard copies of the ALJ and EAB decisions. All future *NETWORKs* will be issued via the National email lan system and full text decisions will no longer be distributed, since these documents are now readily available through the OALJ and EAB websites; Shadowlaw, LEXIS and Westlaw. (Note: we understand that the new national contract with Westlaw has created some concerns that the full arsenal of ALJ/EAB decisions are not available on Westlaw at this time. We are taking measures to ensure that Westlaw gets up to speed with Lexis and ShadowLaw. Remember, **ShadowLaw** still remains the most comprehensive data base available to you.

PRACTICE ADVISORY: ***It's time to inventory your practice "must haves"***

The new year, the new century, the new millennium: are you ready to practice? efficiently and effectively?? Take 30 minutes to run through this checklist to be sure you have the minimum "practice must haves" at your fingertips. Make this the first resolution you ***keep*** for the new year.

CHECKLIST 2000 FOR EPA ADMINISTRATIVE PRACTITIONERS

- ☐ The *revised* **Consolidated Rules of Practice**; 40 CFR Part 22. Note also the new non-APA procedural rule, Subpart I.
- ☐ **Statute Specific Penalty Policies** (ERPs) - As of 5/20/97 all of EPA's penalty policies were available on SHADOWLAW or LEXIS via a special sub-library in the environmental library called "PENLTY" WESTLAW is expected to carry a similar library. Penalty policies are also available on the OECA web page in hard copy format from ORE practice offices.
- ☐ **Key General Penalty Policies** - GM 21 "*Policy on Civil Penalties*" and GM-22 "*A Framework for Statute-Specific Approaches to Penalty Assessments*" 2/16/84. "*Guidance on the Use of Penalty Policies in Administrative Litigation*" 12/15/95; ORE Directive."Impact of *Wausau* on Use of Penalty Policies" 3/19/97; ORE Directive. [Cite these policies in briefs, pre-hearing exchanges and related pleadings]
- ☐ ***"Modifications to EPA Penalty Policies to Implement the Civil Monetary***

000003

Penalty Inflation Rule (Pursuant to the Debt Collection Improvement Act of 1996)" 5/9/97. ORE Directive

- ☐ **Audit and Self Disclosure Policy Guidance and Directives:**
  "*Restatement of Policies Related to Environmental Auditing*" Federal Register, 7/28/94.
  "*Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement*", Federal Register, 4/3/95.
  "*Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,*" Final Policy Statement, Federal Register, 12/22/95.
  "*Audit Policy Interpretive Guidance,*" 1/15/97.
- ☐ **Supplemental Environmental Projects (SEP) Policy:**
  "*Issuance of Interim Revised Supplemental Environmental Projects Policy,*" 5/3/95.
  "*Drafting Guidance for Revised Interim Supplemental Environmental Projects Policy,*" 5/24/95.
- ☐ **Small Businesses:**
  "*Interim Policy on Compliance Incentives for Small Businesses,*" Federal Register, 6/23/95.
  "*Qs and As on Interim Policy on Compliance Incentives for Small Businesses,*" 9/19/95.
- ☐ **Ability to Pay:**
  "*Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment,*" 11/5/84.
  "*Guidance on Determining a Violator's Ability to Pay a Civil Penalty,*" 12/16/86.
  "*Change in Methodology for Determining the BEN Model's Discount Rate,*" 10/19/92.
  "BEN, ABEL and CASHOUT Models on National LAN Platform," 12/13/94.
  Kimberly Zanier memos, "Financial Analysis/General Synopsis" and "Financial Analysis Memorandum #2", August 2, 1995.
- ☐ **Settlements:**
  "*Use of Stipulated Penalties in EPA Settlement Agreements,*" 1/24/90.
- ☐ **Prosecutorial Discretion:**
  "*Processing Requests for Use of Enforcement Discretion,*" 3/3/95.
  "*Policy Against "No Action" Assurances*", 11/16/84.
- ☐ **Intra-Agency Process and Procedure:**
  "*Procedures to Improve Coordination before the Environmental Appeals Board,*" 1/25/93.
  "*Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases,*" 7/11/94.

"*OECA/Regional Procedures for Civil Judicial and Administrative Enforcement Case Redelegation,*" 11/8/94.

☐ **Regional delegations.**

☐ **Statutes worth studying:**

The revisions to the Equal Access to Justice Act made by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), P.L. 104-121, 110 Stat. 857-74.

Paperwork Reduction Act, 44 U.S.C. Sections 3501 et seq., amended in 1995 at Publ.L. No. 104-13, 109 Stat. 163. Implementing regulations are found at 5 CFR Part 1320.

General Federal Five-Year Federal Statute of Limitations, 28 U.S.C. 2462.

Don't have it? Can't find it? Computer too Slow? Check **LITIGATING CIVIL PENALTIES; Selected Resource Materials,** 1999 Edition. (Note: this is the text for the NETI course **Pleading & Litigating Civil Penalties. Watch for this course to be offered this year in 5 of the regional offices.**

PRACTICE ADVISORY: *10th Advanced Administrative Practice Institute: a must for every administrative practitioner.*

It is not too soon to start planning for the **10th Annual Advanced Administrative Litigation Practice Institute,** to be held in mid-**March** in Region 8, Denver, Colorado. Regional attorneys David Janik and Dana Stotsky, who are helping to host this event, promise good weather. Space will be limited. Do you have suggestions for the agenda or topics for discussion? Please send suggestions to Mike Walker or Helene Ambrosino. If you have questions, call Mike Walker or David Janik at 303-312-6917.

* SIGNIFICANT ORDERS & INITIAL DECISIONS *

*** Allegheny Power Service Corporation and Choice Insulation, Inc., Docket No. CAA-III-0676. Full penalty assessed in asbestos NESHAP case!**

On December 14, 1999 Judge Bullock assessed the full penalty in his Initial Decision in this asbestos NESHAP case. Respondent was found liable for its failure to adequately wet RACM during a removal operation and for its failure to keep the RACM until proper disposal in violation of the CAA. The Judge rejected Respondent's attack on the credibility of the EPA inspector who served as a basis for

the liability determination. The Judge ruled that Respondent failed to provide any substantive basis for their assertions that he was negligent or biased. Further, the inspector's choice not to use the EPA guidance document on how to sample asbestos does not mean that evidence he gathered should be disregarded. EPA guidance documents have been held in several prior decisions to be advisory only and not mandatory. Without a substantive basis for Respondent's attack, the Judge held the inspector's testimony to be credible. The ALJ also found that it was not necessary for the inspector to observe the removal activities in order to testify. There was adequate evidence to support the inspectors conclusions that the RACM was not adequately wet. For example, the Judge agreed with the inspector that when dry material is found in bags which are sealed and airtight it is reasonable to conclude that the RACM had not been adequately wet when bagged. The full proposed $32,000 penalty was assessed after the ALJ concluded that EPA's penalty proposal was consistent with the violations, the CAA and the Penalty Policy. **Donna Mastro** represents EPA Region 3 in this proceeding. Former EPA administrative practitioner, **Charlie McPhedran**, also helped to litigate this case.

*** Lily Del Caribe, Inc., Docket No. EPCRA-02-99-4001. Drums still must be reported whether they leak or not.**

On December 14, 1999 Chief Judge Biro issued an Order on Cross Motions for Accelerated Decision in this EPCRA Section 325/CERCLA Section 109 case. Specifically, Respondent was charged with failing to notify the National Response Center, Local Emergency Response Center and State Response Center when 18 drums of propionic anhydride was "released" from its facility during a hurricane. At issue in the cross motions was whether drums that were swept off Respondent's property during a hurricane, but recovered sealed and intact, constitute a "release" pursuant to Section 101(22) of CERCLA and Section 329(8) of EPCRA. The Judge ruled that when the closed drums were swept away from the facility by the hurricane it constituted an "escaping" within the definition of "release." "[E]scaping . . . into the environment" may be construed as encompassing unbroken containers coming to rest in a location on land surface or in water which is unsupervised by or unknown to the persons in charge of the hazardous substance. The Judge rejected Respondent's argument that the definition of "release" limits releases of closed containers to those that have been "abandoned" or "discarded" finding no support of Respondent's position in the statutory text or its legislative history. Rather, the Judge held that her position is consistent with the overall purpose of the statute. A closed container which has escaped by force of nature presents just as much danger as a closed container which has escaped by act of man. Respondent's Motion for Accelerated Decision was

denied. EPA's Motion for Accelerated Decision was granted on the issue of "release" but denied with respect to whether Respondent provided notice of the release to the proper authorities. **Hector Velez Cruz** of EPA's Caribbean Field Office is representing EPA in this highly contested litigation. This case is set to go to hearing in February.

*** Department of Defense, Davis-Monthan Air Force Base, Docket No. CAA-09-98-17. DOD's "Kitchen Sink" Motion War Defenses Fail; Paving Way for Trial on the Merits**

On November 3, 1999 Judge Moran issued an Order on Respondent's Motion to Amend Its Answer and Motion to Dismiss Complaint in this CAA asbestos case. Respondent's Motion to Amend its Answer was granted which sought to retract certain admissions it made in the Answer and its Pre-hearing Exchange. Specifically, in its Answer Respondent admits the facts establishing the asbestos violations. However, after EPA's pre-hearing exchange was filed, Respondent now believes that EPA cannot establish the presence of asbestos. The ALJ held that, after trial, if it appears that Respondent lacked a good faith basis to retract its admissions, the Court may take that into consideration when recommending a penalty.

On November 17, 199 Judge Moran issued an Order Denying Respondent's Motion to Compel Discovery. Generally, the Judge ruled that Respondent's Motion fails to satisfy the "materiality" requirement for ordering additional discovery as contained in 40 CFR 22.29. Specifically, Respondent sought information to support its affirmative defenses. Respondent sought to delve into EPA's waiver decision that was made pursuant to CAA 113(d)(1). In denying the request for discovery, Judge Moran ruled that the statute unequivocally provides that [the waiver decision] made by the EPA Administrator and the Attorney General shall not be subject to judicial review. No inquiry may be made into the decisional process itself. The only permissible inquiry is whether or not such a waiver was in fact issued. Discovery based on the statute of limitations issue was denied since the EAB decided in ***Lyon County Landfill*** that "the exceptions clause of section 113(d)(1) does not contain a durational component" but rather authorizes waivers "where violations of any duration occurred more than twelve months prior to the initiation of the administrative action." Respondent sought information which would have gone to a perceived "durational component" that the Judge rule does not exist in the statute. Lastly, Respondent would not be allowed discovery that would have gone to its overfiling argument based on ***Harmon*** since it was Respondent who stymied the state proceeding and cannot now claim EPA is precluded from seeking a penalty.

On November 19, 1999 Judge Moran issued an Order Denying Respondent's Motion to Dismiss in this CAA asbestos case. The ALJ rejected Respondent's argument that EPA failed to comply with the filing limitations contained in CAA Section 7413(d)(1) and held that the EAB interpretation of this section in ***Lyon County Landfill*** CAA Appeal No. 98-6 (August 26, 1999) is dispositive that EPA had the requisite jurisdiction to file its complaint. The ALJ rejected Respondent's argument that EPA improperly "overfiled" when it filed a complaint after the local state agency closed its case. The Judge held that this case was distinguishable from Harmon Industries v. Browner, 19 F.Supp. 2d 988 (W.D. Mo. 1998) since the state action in this case never negotiated a settlement with Respondent. The state case was closed because Respondent refused to pay a penalty, arguing sovereign immunity. The record indicated to the ALJ that Respondent was on notice that EPA always thought the state remedial action to be inadequate and, further Respondent knew the matter was referred to EPA for enforcement. Finally, the ALJ rejected Respondent's affirmative defense of laches and held that it generally does not apply to the federal government when it is acting in its sovereign capacity to protect the public welfare. Further, there was nothing in the record to establish that Respondent suffered any prejudice from any delay in bringing the proceeding. **Carol Bussey** represents EPA Region 9 in this proceeding.

*** Microban Products Company, Docket No. FIFRA 98-H-01. Micro-fine in Macro FIFRA claims differ case. On appeal to the EAB.**

On November 4, 1999 Judge Moran issued an Initial Decision Regarding Penalty in this FIFRA case. In a previous ruling the ALJ had found Respondent liable for making claims that were substantially different from claims permitted within the terms of a registration approval. In this penalty ruling, the ALJ clarified an earlier holding that the number of violations would not be based upon the number of sales of the pesticide product, as argued by EPA. Rather, the number of violations would be based upon the number of documents (five in this case) that contain an unlawful claim. The complaint had proposed a $160,000 penalty based upon 54 shipments of the product. The Judge assessed a $5,000 penalty for each violation for a total of $25,000. In assessing the statutory maximum for each violation, the Judge cited the egregiousness of Respondent's unlawful claims and the damage Respondent did to the regulatory program. This case is being handled by ORE-Toxics attorney **James Handley**. An appeal was filed with the Environmental Appeals Board .

*** Billy Yee, Docket No. TSCA-7-99-0009. Accelerated Decision Finds Landlord Liable in Lead Poisoned Kids Case, only the penalty remains to be decided.**

On November 8, 1999 Chief Judge Biro issued an Order Granting EPA's Motion for Partial Accelerated Decision as to Liability. The complaint charged Respondent with failing to provide a lessee with lead-based paint disclosures as required by TSCA Section 409 and 40 CFR Part 745. A penalty of $29,700 was proposed for six violations. Through its Amended Answer, Respondent had admitted all material allegations of fact, laying the foundation for the Accelerated Decision motion. Two affirmative defenses were raised. The first was that the Respondent was excluded from the rule because its property was found to be lead-based paint free by a certified inspector. The ALJ rejected the affirmative defense because Respondent failed to provide supporting documentation for this affirmative defense. The ALJ also rejected Respondent's second affirmative defense that an "Effective Date Note" left unintentionally in the CFR rendered the regulation at issue unenforceable. Specifically, Respondent tried to argue that a note in the CFR which read "will not become effective until approval has been given [by OMB]" made the rule unenforceable since it was never deleted after OMB approval and, therefore, made it confusing to the reader. The ALJ held that the failure of the publishers of the CFR to delete the Effective Date Notes may cause some confusion but does not render the Lead-Based Paint Disclosure Rule requirements unenforceable. **Mike Gregeric,** Region 7 and **Claude Walker,** ORE-Toxics took this case to trial on December 20 in St. Louis, MO. Testimony from the physician who treated the children for lead poisoning was presented, along with testimony by their mother. A decision on penalty is expected to be issued this spring.

*** Pleasant Hills Authority, Docket No. CWA-III-210. Unpleasant result for Pleasant Hills.**

On November 19, 1999 Judge McGuire issued an Initial Decision in this CWA NPDES permit compliance case. Specifically, Respondent was charged with violating effluent limitations for free cyanide, phenolics and mercury, with the failure to use analytical testing methods sufficiently sensitive to demonstrate compliance with the effluent limitations in the permit and with failure to submit an approvable pretreatment program as required. The ALJ found Respondent liable for exceeding the effluent limitations and for failing to have sufficiently sensitive test methods. The Judge rejected Respondent's argument that they complied with the "spirit and intent"

of the requirements concerning the development of a pretreatment program and held that they needed to actually submit such a program for approval within the applicable time limitations and, having failed to do that, Respondent must be held in violation. With respect to the penalty, the Judge points out that there is no specific penalty formula in the CWA, the implementing regulations or in any applicable penalty policy for calculating penalties under Section 309. Therefore, he looked at prior EAB and federal court decisions as guidance in recommending a penalty assessment. Noting that he prefers a "bottom-up" methodology is calculating penalties, he found that this case did not easily permit such an approach since the economic benefit component was not well supported by the record. Therefore, in assessing the penalty, the Judge considered each statutory factor as a percentage reduction from the statutory maximum of $10,000 per day per violation. EPA had proposed a penalty of $70,000. The ALJ assessed a $45,600 penalty. The Judge lowered the penalty from that proposed based, in large part, on EPA's failure to present evidence on the potential for harm. The Judge felt that some evidence, other than conclusory testimony, was required to satisfy EPA's burden of persuasion that the penalty is appropriate. **Deanne H. Bartlett and Joyce A. Howell** represent EPA Region 3 in this proceeding.

*** Ultramar Diamond Shamrock Corp., Docket No. UST-99-001-AO-1. Include the Amended Complaint when Filing a Motion to Amend.**

On November 23, 1999 Judge Gunning denied EPA's motion to amend the complaint because there was no amended complaint attached to the motion. A mere description of what the amended complaint will contain upon amendment is not sufficient. Also, the ALJ found it problematic that the Motion for Leave to File an Amended Complaint was sent to Respondent by regular mail. The Judge holds that had the motion been accompanied (as she rules it should have been) by the Amended Complaint, it needs to be served as a complaint.

*** Burlington Northern and Santa Fe Railway Company, Docket No. TSCA-10-99-0051. Is Owning Property Enough for Liability in PCB Disposal Case?**

On November 23, 1999 Judge Nissen issued an Order on Motions in this TSCA PCB case. The complaint alleged that Respondent was the owner of property on which PCB fluid was spilled by a sub-lessee from a transformer being stored on the site and, therefore, was liable for improper disposal under the PCB rule. A penalty of $25,000 was proposed. Respondent filed a Motion to Dismiss arguing, in pertinent part, that it should not be held liable as a mere owner of the property since they had

no knowledge of the sub-lease, the storage of transformers or the spill until after the spill occurred, nor did they take an active role in cleaning up. EPA filed a Motion for Accelerated Decision on Liability. The ALJ denied both motions for lack of supporting evidence, and ordered a hearing to be held, however, he made some important rulings. He points out that while an owner of property is a "person" under the PCB rule however, to impose liability for illegal disposal there must be a nexus between the owner and the violation. Further, he holds that "disposal" by its definition requires a showing of some type of action. Therefore, an owner's failure to act cannot -- alone -- be evidence of a disposal violation. The disposal rule applies to those who dispose of PCBs. The Judge ruled that his decision is consistent with the EAB decision in Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6 (February 11, 1997). Respondent's liability will turn on its duty to prevent the spill and to assume responsibility for the cleanup and these issues are clearly in dispute necessitating a denial of both motions.

*** The Bullen Companies, Inc., IF&R Docket Nos. III-470-C, III-471-C, III-472-C & III-473-C.**

On November 29, 1999 Judge Charneski issued an Initial Decision in this FIFRA involving the illegal sale or distribution of pesticides. The complaint sought a penalty of $38,900. Six of the twelve counts in the complaint had been decided earlier when the ALJ granted an EPA Motion for Accelerated Decision on Liability. At issue here was liability for the remaining counts and the penalty. The Judge dismissed the remaining counts which alleged Respondent's failure to register certain pesticides. The Judge held that EPA failed to sustain its burden of proof that the products were pesticides and, therefore, required registration. The ALJ faulted EPA with relying on stipulated exhibits which consisted of product labels and literature, instead of putting on a witness who could testify that these products were pesticides. The ALJ ruled that the labels and literature never identify the pesticide product name at issue in the complaint and, therefore, cannot be said to make pesticidal claims with respect to those products. EPA's argument that the exhibits pertain to all of Respondent's products was found to be too strained and was rejected. The Judge assessed a $17,900 penalty which represents the full penalty for the six counts remaining in the complaint. **Benjamin D. Fields and Janet Sharke** represent EPA Region 3 in this proceeding. An appeal is underway.

* EAB DECISIONS *

*** Zoo Med Laboratories, FIFRA Appeal No. 99-10. Interlocutory review denied; can issues be preserved for appeal?**

On November 23, 1999 the EAB issued an Order Denying EPA's Motion for Interlocutory Review in this FIFRA unregistered product case. The ALJ in the case dismissed certain counts and denied EPA's Motion to Certify the Matter for Interlocutory Appeal. Using 40 CFR 22.29(c) EPA filed this motion seeking review of the decision based upon " exceptional circumstances" and where the EAB determines "to delay review would be contrary to the public interest." The judge had dismissed certain counts on the basis of *res judicata;* that a New York state settlement with the same Respondent had resolved these issues. The Judge determined that a cooperative agreement between EPA and the New York Department of Environmental Conservation gave New York the ability to enforce federal violations as well as state violations.

In rejecting the motion seeking review, the Board held that "exceptional circumstances" do not exist and denied EPA's motion. It is important to note that Respondent has not denied the allegations underlying the dismissed counts and, therefore, if the EAB later set aside the ALJ's dismissal ruling, no hearing would be necessary to determine liability. **David M. Jones** represents EPA Region 9 in this proceeding.

###

federal register

Friday
July 23, 1999

Part V

Environmental Protection Agency

40 CFR Part 22

Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits; Final Rule

000014

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 22

[FRL-6373-3]

RIN 2020-AA13

Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This Rule revises the Consolidated Rules of Practice ("CROP"), including expansion of these procedural rules to include certain permit revocation, termination and suspension actions, and new rules for administrative proceedings not governed by section 554 of the Administrative Procedure Act. The CROP has not been substantially revised since 1980. This Rule will remove inconsistencies, fill in gaps in the CROP by codifying accepted procedures, and make the CROP more clear and easily understood. Most of these changes will not produce any procedural or substantive difference in the Agency's administrative enforcement actions. Other changes make the CROP more efficient and more effective, or to conform to new statutory requirements and new judicial decisions.

DATES: *Effective Date:* This rule shall become effective August 23, 1999.

Applicability Date: This rule shall be applicable to all proceedings commenced on or after August 23, 1999. Proceedings commenced before August 23, 1999 shall become subject to this rule on August 23, 1999, unless to do so would result in substantial injustice.

FOR FURTHER INFORMATION CONTACT: Scott Garrison (202-564-4047), Office Enforcement and Compliance Assurance, Office of Regulatory Enforcement (2248A), U.S. Environmental Protection Agency, Washington, D.C. 20460.

SUPPLEMENTARY INFORMATION:

The following outline is provided to assist the reader in locating topics of interest in the preamble.

I. Background

II. Response to Public Comments

A. Significant Comments Supporting Proposed Revisions

B. Significant Comments Critical of Proposed Revisions

1. Scope (40 CFR 22.1)
2. Powers and Duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal and reassignment (40 CFR 22.4)
3. Filing, Service, and Form of Documents (40 CFR 22.5(a)-(c))
4. Confidentiality of Business Information (40 CFR 22.5(d))
5. Computation and Extension of Time (40 CFR 22.7)
6. Ex Parte Discussion of Proceeding (40 CFR 22.8)
7. Intervention and Non-Party Briefs (40 CFR 22.11)
8. Commencement of a Proceeding (40 CFR 22.13)
9. Complaint (40 CFR 22.14)
10. Answer to the Complaint (40 CFR 22.15)
11. Default (40 CFR 22.17)
12. Quick Resolution (40 CFR 22.18(a))
13. Settlement and Scope of Resolution or Settlement (40 CFR 22.18(b)&(c))
14. Alternative Dispute Resolution (40 CFR 22.18(d))
15. Prehearing Exchange; Prehearing Conference (40 CFR 22.19(a)&(b))
16. Other Discovery (40 CFR 22.19(e))
17. Supplementing Prior Exchanges, and Failure To Exchange Information (40 CFR 22.19(f)&(g))
18. Evidence (40 CFR 22.22)
19. *Filing the Transcript* (40 CFR 22.25)
20. Initial Decision (40 CFR 22.27)
21. Appeal From or Review of Initial Decision (40 CFR 22.30)
22. Final Order (40 CFR 22.31)
23. Motion To Reconsider a Final Order (40 CFR 22.32)
24. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Clean Air Act (40 CFR 22.34)
25. Scope of Subpart I (40 CFR 22.50)
26. Presiding Officer (40 CFR 22.51)
27. Information Exchange and Discovery (40 CFR 22.52)
28. Interlocutory Orders or Rulings (40 CFR 22.53)
29. Clean Air Act Field Citations
30. Other Comments Not Related to a Particular Section of the Proposed Rule

III. Miscellaneous Revisions

A. Section Numbering

B. Definitions (40 CFR 22.3)

C. Filing and Service of Rulings, Orders and Decisions (40 CFR 22.6)

D. Examination of Documents Filed (40 CFR 22.9)

E. Consolidation and Severance (40 CFR 22.12)

F. Motions (40 CFR 22.16)

G. Record of the Prehearing Conference (40 CFR 22.19(c))

H. Accelerated Decision; Decision to Dismiss (40 CFR 22.20)

I. Assignment of Presiding Officer; Scheduling a Hearing (40 CFR 22.21)

J. Offers of Proof (40 CFR 22.23(b))

K. Proposed Findings, Conclusions, and Order (40 CFR 22.26)

L. Motion to Reopen a Hearing (40 CFR 22.28)

M. Interlocutory Appeals (40 CFR 22.29)

N. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act (40 CFR 22.35)

O. Supplemental Rules of Practice Governing the Administrative Assessment of Civil Penalties Under the Clean Water Act (40 CFR 22.38)

P. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under CERCLA Section 109 (40 CFR 22.39)

Q. Supplemental Rules Governing the Administrative Assessment of Civil Penalties for Violations of Compliance Orders Issued to Owners or Operators of Public Water Systems Under Part B of the Safe Drinking Water Act (40 CFR 22.42)

R. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Against a Federal Agency Under the Safe Drinking Water Act. (40 CFR 22.43)

S. Supplemental Rules Governing the Termination of Permits Under Section 402(a) of the Clean Water Act or Under Section 3005(d) of the Resource Conservation and Recovery Act (40 CFR 22.44)

T. Supplemental Rules Governing Public Notice and Comment in Proceedings Under Section 309(g) of the Clean Water Act and Section 300h-2(c) of the Safe Drinking Water Act (40 CFR 22.45)

U. Appendices

IV. Administrative Requirements

A. The Regulatory Flexibility Act

B. Executive Order 12866

C. Paperwork Reduction Act

D. Unfunded Mandates Reform Act

E. Executive Order 12875

F. Executive Order 13045

G. Executive Order 13084

H. National Technology Transfer and Advancement Act

I. Submission to Congress and the Comptroller General

I. Background

The Consolidated Rules of Practice ("CROP"), 40 CFR part 22, are procedural rules for the administrative assessment of civil penalties, issuance of compliance or corrective action orders, and the revocation, termination or suspension of permits, under most environmental statutes. The CROP were first promulgated on April 9, 1980 (45 FR 24360). On February 25, 1998, (63 FR 9464) EPA issued a notice of proposed rule making giving public notice and soliciting comments on proposed revisions to the CROP.

During the public comment period, EPA received substantive comments from Dow Chemical Company ("Dow"), the U.S. Air Force ("USAF"), the Utility Air Regulatory Group ("UARG"), the Utility Water Act Group ("UWAG"), the Corporate Environmental Enforcement Council ("CEEC"), and joint comments

from the Chemical Manufacturers Association and the American Petroleum Institute ("CMA/API"). The original public comment period closed on April 27, 1998. On May 6, 1998 (63 FR 25006), EPA published a second notice reopening the public comment period for an additional 60 days. During this reopened public comment period, EPA received one set of supplementary comments from CEEC.

All of the public comments submitted in response may be reviewed at the Enforcement and Compliance Docket and Information Center, room 4033 of the Ariel Rios Federal Building, 1200 Pennsylvania Avenue, N.W., Washington, DC. Persons interested in reviewing the comments must make advance arrangements to do so by calling 202-564-2614. A reasonable fee may be charged by EPA for copying docket materials. The public comments may also be viewed on the internet at http://www.epa.gov/oeca/forepart22.html.

Today's final rule includes most of the revisions identified in the proposed rule, with certain additional changes (both to the proposed revisions and to other provisions of the existing rule) responding to public comments. EPA's response to the public comments appears below.

II. Response to Public Comments

A. Significant Comments Supporting Proposed Revisions

Dow stated that "[m]ost of the CROP provisions appear to reflect an appropriate balancing of interests" and that it has a "favorable impression of part 22 as a whole." CMA/API support EPA's efforts to simplify and clarify the CROP. CEEC states that it supports "many of the types of changes EPA has proposed, as they will increase efficiency and reduce complexity in the administrative process." The following are specific comments supporting particular provisions of the proposed rule.

Commenters generally support the consolidation of the various rules into a single set of CROP procedures for APA and non-APA proceedings. CMA/API supports the Agency's decision to use the CROP instead of the proposed part 28 procedures for Class I proceedings under the Clean Water Act and the Safe Drinking Water Act (56 FR 29996 (July 1, 1991)). Dow and UARG support the use of CROP procedures in lieu of the procedures originally proposed for use under the Clean Air Act Field Citation Program.

Dow states that it supports the "change" in § 22.4(d)(1) [1] that would make appeals from a denial of a motion to disqualify a Presiding Officer go to the Environmental Appeals Board ("EAB") "rather than the Administrator." EPA notes that this revision of § 22.4(d)(1) is not intended to change the substance of the existing rule but merely to eliminate any implication that the Administrator must personally rule on appeals from the denial of disqualification requests made to Presiding Officers. *See In re Woodcrest Manufacturing, Inc.*, EPCRA Appeal No. 97-2, slip op. at 11-12 (EAB, July 23, 1998)(stating that the term "Administrator" is defined at 40 CFR 22.4(d)(1) to include the Administrator's delegate, and therefore "the Administrator is not required to act personally on disqualification issues, but may instead delegate this authority to other individuals within the EPA").

Dow supports the proposed change to § 22.5(c)(5), giving the Presiding Officer and the EAB, rather than the hearing clerks, authority to rule on the adequacy of documents filed. Dow strongly supports the inclusion of language in § 22.5(d) stating that the Agency's rules governing treatment of Confidential Business Information (40 CFR part 2) apply in CROP proceedings.

Dow supports proposed changes to §§ 22.5 and 22.6 allowing service of documents by reliable commercial delivery services other than the U.S. Mail, and supports the decision to expand the "mail box rule" of § 22.7(c) to provide that service is complete when the document is placed in the custody of a reliable commercial delivery service.

CMA/API support the provision in the proposed § 22.14(a)(6) requiring that the complaint give notice whether subpart I, non-APA procedures apply to the proceeding.

CMA/API and Dow support the proposed revision to § 22.15(a) expanding to 30 days the time allowed to file an answer.

CMA/API and Dow support the provisions in the proposed rule extending the time period for filing a response to a motion from 10 days to 15 days. Additionally, CMA/API supports not placing page limits on motion papers.

Dow supports the revisions to § 22.17(a) & (c) that give the Presiding Officers greater discretion in determining the appropriate relief in the default orders, because this "flexibility will let the Presiding Officer ensure that any relief ordered is supported by the administrative record." CMA/API "support the provision requiring the Presiding Officer, when issuing a default order, to determine that the relief sought in the complaint is consistent with the applicable statute."

CEEC supports the Agency's explicit recognition of Alternative Dispute Resolution in the proposed § 22.18(d). Dow supports the provisions of the proposed § 22.18(d)(2) that permit the Presiding Officer to grant extensions of time for the parties to engage in alternative dispute resolution procedures.

CMA/API support the proposed § 22.19 allowing amendment of prehearing exchanges without restriction, and support the § 22.19(f) requirement that parties promptly supplement or correct information known to be incomplete, inaccurate or outdated, without requiring the parties to constantly check the accuracy of their information exchanges. CEEC supports the proposed revisions to §§ 22.19 and 22.22 that would allow use of information that has not been timely provided to the opposing party, upon a showing of "good cause" for the failure to timely provide that information. CEEC also supports the proposed limitation that "other discovery" pursuant to § 22.19(e) should be available only after the prehearing exchange required under § 22.19(a).

The CMA/API comments support the proposed change in § 22.27(b) "requiring the Presiding Officer in all cases to explain how the civil penalty imposed corresponds to the statutory penalty criteria, rather than just the Agency's penalty policies." Dow notes its support for the provision in § 22.27(b) requiring that the Presiding Officer articulate how the amount of penalty conforms to the criteria set forth in the law under which the proceeding has been commenced. Dow supports the proposed revision of § 22.27(c) that would make an initial decision inoperative pending review by the EAB, because it "will avoid premature recourse to the Federal courts" and avoid harm to respondents whose appeals might be successful. Dow also supports the provision in the proposed § 22.28(b) under which a motion to reopen a hearing would expressly stay the deadlines for appeal or EAB review of the initial decision.

Both CMA/API and Dow support the new provision in § 22.30(a) allowing a party who has initially declined to

[1] To conform the CROP to the preferred style of the U.S. Government Printing Office, EPA has converted § 22.01 to § 22.1, § 22.02 to § 22.2, etc., in this final rule. For simplicity, this preamble will use the new numbering system throughout, even when referring to sections of the proposed rule or the 1980 CROP.

appeal an additional 20 days to raise additional issues in a cross appeal.

EPA received no significant public comment on many of the proposed revisions to the CROP. Proposed revisions to §§ 22.2, 22.6, 22.12, 22.21, 22.23, 22.24, 22.29, 22.33, and 22.35–22.45 elicited no specific comments at all. Today's final rule incorporates all of the changes identified in the February 25, 1998, Notice of Proposed Rule Making, except as noted below.

B. Significant Comments Critical of Proposed Revisions

1. Scope (40 CFR 22.1)

a. Summary of Proposed Rule. Section 22.1(a) identifies, statute by statute, the types of proceedings that are subject to the CROP. The proposed rule would bring within the scope of the CROP a number of proceedings that had previously used other procedures or that had no formal procedures: field citation proceedings under the Clean Air Act (42 U.S.C. 7413(d)(3)), proceedings to suspend or revoke a permit issued under section 402(a) of the Clean Water Act (33 U.S.C. 1342(a)) or to suspend or revoke a permit under sections 3005(d) and 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and 6928(h)) (originally proposed in 60 FR 65280, December 11, 1996), proceedings for the assessment of administrative civil penalties under section 6001 of the Solid Waste Disposal Act (42 U.S.C. 6961), section 311(b)(6) of the Clean Water Act (33 U.S.C. 1321(b)(6)), and sections 1423(c) and 1447(b) of the Safe Drinking Water Act, 42 U.S.C. 300h–2(c) and 300j–6, including orders requiring both compliance and the assessment of a civil penalty under 1423(c), and proceedings for the assessment of civil penalties or the issuance of compliance orders under the Mercury-Containing and Rechargeable Battery Management Act (42 U.S.C. 14304). Other amendments would clarify the applicability of the CROP to proceedings already within its scope, and delete outdated references.

Section 22.1(b) explains the interrelation between the subpart H, the new subpart I, and the provisions of subparts A–G. Section 22.1(c) empowers the Administrator, the Regional Administrator, and the Presiding Officer to resolve procedural matters not covered in the CROP. The proposed revision to § 22.1(c) would make explicit the authority of the EAB to resolve such procedural matters.

b. Significant Comments and EPA Response. CEEC objects to expanding the scope of the CROP to include non-APA proceedings, arguing that EPA has failed to explain why the proposed CROP is more suitable than other procedures. Dow and CMA/API strongly support revised CROP procedures replacing the procedures proposed for the part 59 field citation program. CMA/API also supports the decision to include non-APA proceedings within the CROP, rather than as a distinct set of procedures under part 28.

The preamble to the proposed rule explained generally why EPA considers the proposed CROP suitable for non-APA enforcement cases, but it did not expressly contrast the suitability of alternative sets of procedures. In drafting the proposed CROP, EPA had the benefit of the public comments received in response to the 1991 proposed part 28 procedures and the 1994 proposed field citations procedures, and the benefit of practical case experience with both the proposed part 28 procedures and the existing CROP procedures. The proposed CROP revisions drew from the best provisions of each set of procedures, and is as a result more clear, more simple and more efficient than its predecessors.

CEEC questions EPA's decision to use the CROP procedures for non-APA cases, asserting that it is inappropriate for EPA "to assume that one size fits all." CEEC does not identify any class of cases for which the proposed CROP might be unsuitable, nor does it identify other procedures that might be more suitable. EPA has taken into account the limits to a "one size fits all" approach through the inclusion of statute-specific supplemental rules (subpart H) and the special rules for non-APA proceedings (subpart I).

In apparent contradiction to its criticism of the "one size fits all" approach of the CROP, CEEC also faults EPA for failing to explain why the scope of the CROP fails to encompass corrective action orders pursuant to Solid Waste Disposal Act ("SWDA") sections 3008(h) and 9003(h)(4), and pesticide cancellation proceedings pursuant to section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Although the proposed rule would expand the scope of the CROP, EPA did not propose that it should replace all administrative adjudicatory procedures.

EPA determined in 1988 that less formal procedures are appropriate for corrective action orders because of the need for quick response to hazardous waste spills, because such cases present fewer factual issues than cases where a regulatee may be forced to pay a civil penalty for violating the law, and because the cost of the formal CROP procedures is twice as high as the cost of the informal procedures. 53 FR 12256, 12257 (April 13, 1988). EPA's procedures for corrective action orders, codified at 40 CFR part 24, were challenged upon issuance and upheld by the Court of Appeals for the District of Columbia Circuit. The D.C. Circuit agreed with EPA that "to the modest extent that EPA's Part 24 regulations do implicate the private interest in avoiding the expense of unnecessary corrective actions, formal procedures [i.e., the CROP] do not promise a sufficient lowering of the risk of error to justify their significant expense to the Government." *Chemical Waste Management, Inc. and Waste Management of North America, Inc., v. U.S. Environmental Protection Agency*, 873 F.2d 1477, 1485 (D.C. Cir. 1989). EPA continues to believe that the informal procedures of part 24, rather than the CROP, are appropriate for SWDA sections 3008(h) and 9003(h)(4) corrective action orders.

Pesticide cancellation proceedings are subject to rules codified at 40 CFR part 164, as are other proceedings related to the registration status of a pesticide. Although some sections of part 164 are very similar, or identical, to provisions of the CROP, there are also fundamental differences, that reflect differences between FIFRA section 6 and the statutory authorities for various CROP proceedings. Although it would be possible to draft a single set of procedures that could apply to all corrective action orders and pesticide cancellation proceedings, as well as the proceedings within the scope of the CROP, it would call for extensive revisions and elaborate supplemental rules. At this time, it does not appear that combining either part 24 or part 164 with the CROP would produce significant efficiencies or improvements.

c. Final Rule. EPA has adopted § 22.1 as proposed, with minor changes. In the December 11, 1996, "Round Two" permit streamlining proposed rule, EPA proposed to remove the procedures existing in 40 CFR part 124, subpart E, for proceedings to revoke or suspend a permit issued under section 402(a) of the Clean Water Act (33 U.S.C. 1342(a)) or to revoke or suspend a permit under sections 3005(d) and 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and 6928(h)). See 61 FR 65268 (December 11, 1996). EPA proposed that such proceedings would be conducted pursuant to the CROP procedures, and proposed CROP revisions to accomplish this. These changes were incorporated into the February 25, 1998, proposed CROP revisions. As EPA has not yet finalized the Round Two permit

streamlining rule and 40 CFR part 124, subpart E remains in effect. EPA has removed from § 22.1 (a)(4) and (a)(6) the proposed references to permit revocation, suspension and termination. EPA anticipates that these references will be restored when the Round Two permit streamlining rule is finalized.

EPA has deleted the word "conducted" from paragraphs (a)(1), (a)(3) and (a)(5). This word is unnecessary, and the deletions make these paragraphs more consistent with the rest of § 22.1(a). In § 22.1(a)(4)(i), EPA has replaced the word "and" in the first parenthetical list of citations to the U.S. Code, with the word "or" for consistency.

In the proposed § 22.1(b), the word "establish" appeared twice in the first sentence. EPA has deleted the redundant word. EPA has also revised the last sentence of 22.1(b) for clarity.

2. Powers and Duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; Disqualification, Withdrawal and Reassignment. (40 CFR 22.4)

a. Summary of Proposed Rule. Proposed revisions to § 22.4(a) clarify the role of the Environmental Appeals Board, to which the Administrator has delegated the authority to rule on appeals. The proposed rule clarifies that the Environmental Appeals Board rules on appeals from decisions, rulings and orders of a Presiding Officer in proceedings under the CROP, acts as Presiding Officer until an answer is filed in cases initiated at EPA Headquarters, and approves settlement of such cases. The proposed rule provides that appeals and motions must be directed to the Environmental Appeals Board except those in matters referred by the Environmental Appeals Board to the Administrator, and motions for disqualification under paragraph (d).

Proposed revisions to § 22.4(b) describe the function of the Regional Judicial Officer, requiring each Regional Administrator to designate one or more Regional Judicial Officers to act as Presiding Officers in proceedings under subpart I, and to act as Presiding Officers in APA CROP proceedings until an answer is filed. The proposed rule provides that the Regional Administrator may delegate to a Regional Judicial Officer the authority to approve settlement of proceedings, ratify consent agreements and issue consent orders.

EPA proposed deleting from § 22.4(b) certain limitations on the Regional Judicial Officers. One proposed deletion is the current prohibition on employment of a Regional Judicial Officer by the Region's Enforcement Division or the Regional Division directly associated with the type of violation at issue in the proceeding. The other is the prohibition, derived from section 554(d) of the Administrative Procedure Act, against a Regional Judicial Officer having "performed prosecutorial or investigative functions in connection . . . with any factually related hearing." The proposed rule would add new language precluding an individual from serving as Regional Judicial Officer in any case in which he or she has any "interest in the outcome." The proposed rule retains the provisions that prohibit an individual from serving as Regional Judicial Officer in the same case in which he or she performed prosecutorial or investigative functions, and that require that Regional Judicial Officers be attorneys employed by a Federal agency.

EPA proposed editorial revisions to § 22.4(c), describing the role of the Presiding Officer, that do not introduce any substantive change.

The proposed § 22.4(d) establishes new procedures for seeking disqualification of the Administrator, a Regional Administrator, a member of the EAB, a Regional Judicial Officer ("RJO"), or an Administrative Law Judge ("ALJ"), from performing functions they are authorized to perform under the CROP. Under the existing rules, any party may seek the disqualification of a Regional Judicial Officer by motion to the Regional Administrator; or may seek the disqualification of any of the other individuals by motion to the Administrator. Under the proposed rules, any party must first file a motion with the particular individual requesting that he or she disqualify himself or herself from the proceeding. If the party has moved to disqualify a Regional Administrator, a Regional Judicial Officer, an ALJ, or a member of the EAB, and the motion is denied, the party may appeal the denial of the motion administratively. The proposed rule does not provide for administrative appeal from the Administrator's denial of a motion to disqualify herself.

The proposed § 22.4(d) provides that an interlocutory appeal may be taken when an ALJ denies a motion that he disqualify himself or herself from a proceeding. However, EPA asked for comments on whether to prohibit such interlocutory appeals.

b. Significant Comments and EPA Responses

22.4(a). Dow suggests clarifying the rule by adding the word "initial" before the word "decisions" in the description of the Environmental Appeals Board's role in ruling on decisions, rulings and orders of a Presiding Officer. EPA accepts the suggested change.

22.4(b). CEEC states that it opposes expansion of the role of RJOs through the CROP. The preamble to the proposed rule stated that EPA had no current plans to use the subpart I procedures for any cases other than those arising under Clean Water Act ("CWA") sections 309(g)(2)(A) and 311(b)(6)(B)(i) (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)), and Safe Drinking Water Act ("SDWA") sections 1414(g)(3)(B) and 1423(c) (42 U.S.C. 300g-3(g)(3)(B) and 300h-2(c)). *See* 63 FR at 9479. To codify that point, EPA has revised the proposed § 22.50 so that it applies only to these cases. With this revision, today's rule clearly does not represent any practical expansion of the RJOs' role. Since the 1980's, RJOs have presided over cases under CWA sections 309(g)(2)(A) and 311(b)(6)(B)(i), and SDWA sections 1414(g)(3)(B) and 1423(c), under the procedures proposed (but not finalized) as part 28 and under other Agency guidance (*e.g. Guidance on UIC Administrative Order Procedures,* November 28, 1986). Now they preside over the same kinds of cases using the CROP.

Of the six commenters on the proposed rule, five (UWAG, UARG, CEEC, CMA/API, and Dow) expressed concern that the proposed rule fails to protect constitutional due process rights and assure the independence and impartiality of Regional Judicial Officers. UARG and UWAG oppose use of any EPA attorneys as Presiding Officers, arguing that Agency loyalty will create bias or the appearance of bias. CEEC, CMA/API, Dow and (by implication) UARG and UWAG oppose the use of EPA enforcement attorneys as Presiding Officers. These commenters argue that allowing enforcement personnel to be Presiding Officers creates actual or apparent bias by commingling the investigative, prosecutorial and adjudicative functions. Particular concerns include EPA enforcement attorneys presiding over cases brought by their colleagues, and over cases with issues or defendants in common with cases the Presiding Officer has litigated. Dow, UARG and UWAG urge the Agency to use Administrative Law Judges for adjudication of all administrative enforcement proceedings, arguing that ALJs are more qualified and are insulated against institutional bias.

In response to these concerns, EPA has made several changes to § 22.4(b). First, EPA has added a requirement that a "Regional Judicial Officer shall not prosecute enforcement cases and shall

not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel." This change will assure that the persons presiding over subpart I proceedings will be able to freely exercise independent judgment, without fear of adverse action by EPA enforcement managers.

Commenters suggested various independence criteria: Dow suggested that the CROP should mandate either that the employment and advancement of each EPA attorney serving as RJO expressly be made independent of his or her rulings as Presiding Officer, or the attorney has no direct or indirect supervision (for a total of at least two levels of supervision) by persons or offices responsible for enforcement. UARG and UWAG believe that hearings should be run only by ALJs, but if the Agency refuses to implement that suggestion, they support the idea presented in the preamble to the proposed rule that the Presiding Officer not be directly supervised by any person who directly supervises the prosecution of the case. CMA/API suggested a requirement that the Regional Judicial Officer "should not be employed by or supervised by any enforcement component, whether that component is in the Office of Regional Counsel or the Regional Office of Enforcement."

EPA has considered the various independence criteria suggested by the commenters, and has concluded that prohibiting RJOs from prosecuting enforcement cases, and prohibiting RJOs from being supervised by persons who supervise the prosecution of enforcement cases, will sufficiently separate RJOs from enforcement. Although Regional Administrators and Regional Counsels necessarily have significant responsibility for their Regions' enforcement program, they have other responsibilities which give them a broader perspective. Accordingly, there is little risk that they would exert improper influence over the decisions of an RJO. In order to avoid any confusion, the rule explicitly allows supervision by the Regional Counsel. The Regional Administrators' authority to personally supervise the RJOs is implicit, but may not be delegated to a person who supervises the prosecution of enforcement cases (except the Regional Counsel).

EPA's experience with non-APA adjudications to date indicates that RJOs maintain their independence and impartiality, and their decisions reveal no bias toward the complainant. Only four decisions by EPA attorneys serving as Presiding Officer have been reversed on appeal out of over 180 decisions rendered over a period of approximately 10 years. Moreover, there has not been a single penalty or corrective action case where a respondent has appealed a denial of a motion to disqualify a Regional Judicial Officer, nor where a respondent has alleged a Regional Judicial Officer's actual bias among its grounds for appeal. These results demonstrate that the RJOs' present levels of competence and independence are reasonable. Today's rule assures that this independence will not be compromised.

The more restrictive requirements suggested in some of the comments would not be feasible to implement. Prohibiting supervision by Agency officials who have any enforcement responsibilities would prohibit virtually all upper management in the Regional Offices, including the Regional Administrators, from such supervision. The RJOs' record to date indicates that such restrictive standards are not necessary. Other suggested standards would invite time consuming litigation over side issues, such as whether a supervisor or office is responsible for "enforcement" or whether someone is "indirectly" supervising the RJO, when the proper questions are whether an RJO is in fact biased and whether such bias affected the outcome of a particular case.

Second, EPA has included in the final rule a provision precluding a Regional Judicial Officer from knowingly presiding over a case involving any party concerning which the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the initiation of the case. CMA/API recommended that Regional Judicial Officers should not currently be involved in any other proceedings involving the same defendants and should not have been involved in the investigation or prosecution of the defendant within the previous 5 years. EPA agrees that it could create at least an appearance of bias if an EPA attorney were to serve as prosecutor of one complaint and shortly thereafter function as adjudicator of another complaint against the same party. It is neither necessary nor practical for EPA to adopt CMA/API's recommendation that the CROP prohibit prosecutorial or investigative activity against the respondent for 5 years. EPA has included in the final rule a provision precluding a Regional Judicial Officer from knowingly presiding over a case involving any party concerning which the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the initiation of the case. EPA has made this requirement contingent upon the RJO's knowledge because name changes are sufficiently common in modern industry that a RJO might preside over a case without being aware that he or she had previous dealings with the same company. Upon becoming aware of such prior relationship, the RJO must promptly disqualify himself or herself from the proceeding. If, in a particular case, a party were to believe that participation in a similar case more than 2 years earlier would bias the RJO, that party could move for disqualification under § 22.4(d). Note also that, owing to the new prohibition against RJOs prosecuting enforcement cases, the potential for these conflicts will decrease over time.

In the response to the public comments, EPA has revised the proposed § 22.4(b) to increase the independence of RJOs (prohibiting RJOs from prosecuting enforcement cases, prohibiting their supervision by persons who supervises prosecution of enforcement cases, and prohibiting the RJO from knowingly presiding over a case involving any party concerning which he or she performed any functions of prosecution or investigation within the 2 years). Other changes sought by the commenters are impractical and unnecessary.

In proceedings subject to section 554 of the APA, Congress has determined that Presiding Officers may not be "engaged in the performance of investigative or prosecuting functions for [EPA] in * * * a factually related case * * *", and may not "be responsible to or subject to the supervision or direction of [persons] engaged in the performance or investigative or prosecuting functions for [EPA]." 5 U.S.C. 554(d). However, subpart I is designed for use in proceedings that are not subject to section 554 of the APA. Congress has expressly authorized EPA to assess civil penalties through procedures that do not meet the standards of section 554. Despite the broad range of options this allows, EPA has chosen as a matter of policy to make subpart I procedures adhere closely to the APA requirements. The subpart I procedures depart from the requirements of section 554 only in regard to the independence of the Presiding Officer. The commenters who object to subpart I for failing to provide this same level of independence are objecting, in effect, to the statutes that authorize non-APA proceedings. The Agency does not agree that such a broad limitation on its authority is appropriate.

Whether adjudication by EPA attorneys under subpart I provides adequate protection for respondents' due process rights must be evaluated according to the three part standard established in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976):

"[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 334–35.

The private interests in a proceeding under subpart I of the CROP are the impact on respondent of a civil penalty and on respondent's reputation from a finding of liability, and perhaps in the expense and burden of the hearing itself. Although these interests are important, they are less important than the private interest at stake in *Mathews* v. *Eldridge*, where the governmental agency summarily discontinued an individual's social security disability benefits while the benefit termination hearing was pending. The private interests at stake in CROP proceedings do not rise to this level. Moreover, the interests at stake certainly are not so significant as individual interests in liberty or bodily integrity.

The risk of an erroneous deprivation of respondents' private interests through adjudications by EPA attorneys is low, and certainly lower than in *Mathews* v. *Eldridge*, where the disability benefits were terminated before any hearing was afforded. In a CROP subpart I proceeding, the respondent first has an opportunity for a hearing before an RJO (including the opportunity to present evidence and to cross examine the Agency's witnesses), and has opportunities for administrative review before the penalty is assessed (i.e., appeal of the initial decision to the EAB). The risk of an erroneous deprivation of a respondent's interests should correspond closely to the frequency with which decisions by EPA attorneys serving as Presiding Officer are reversed on appeal by either the EAB or a federal court, and as described above, this rate has been extremely low.

Balanced against the private interests at stake and the risk of their impairment is the government's interest. The government's primary interest in having EPA attorneys preside over certain enforcement cases is in making efficient use of Agency resources. The costs for an ALJ to travel from Washington, D.C., to the hearing location is greater than the cost for an EPA attorney to travel from the Regional office to the hearing location. In addition, ALJs are paid more than the EPA attorneys who serve as Presiding Officers. The other government interest is in having the flexibility to increase the number of Presiding Officers to meet the administrative case load. In the recent past, the number of ALJs was clearly inadequate to handle the number of cases. Although the number of ALJs is today more commensurate with the number of cases, future imbalances might be alleviated by temporarily expanding or contracting the number of EPA attorneys who may serve as Presiding Officer.

To summarize the results of this *Mathews* v. *Eldridge* three-step balancing test, there appears to be a relatively small risk of impairment of private interests that are of a moderate level of importance. This small risk of impairing moderately important interests must be balanced against the government's interests in making best use of its resources. Although it is not possible to weigh these factors with mathematical precision, it is clear that the use of EPA attorneys as Presiding Officers, subject to the provisions adopted in this rule and with the right to appeal to the EAB, is not a violation of respondents' rights to due process of law.

CMA/API recommend that, if EPA allows Agency personnel to serve as Regional Judicial Officers, they should be members in good standing with a bar. EPA notes that under the Federal personnel rules all attorney positions require bar membership, so this need not be addressed in § 22.4(b). CMA/API also argues that Regional Judicial Officers should have substantial litigation experience including adjudication. The position descriptions for Regional Judicial Officers require that they be senior attorneys with substantial litigation experience, and EPA believes that its internal procedures and controls are adequate to assure that Regional Judicial Officers have substantial litigation experience. EPA intends to continue its practice of sending each of its Regional Judicial Officers to the National Judicial College for training in presiding over administrative hearings. This level of experience and training is sufficient to prepare Agency attorneys to preside over the relatively straight-forward cases expected under subpart I.

Some commenters (CMA/API, UWAG, UARG) were concerned that the physical proximity, friendships or colleague relationships of the Regional Judicial Officers with Agency prosecuting attorneys would create an appearance of partiality, where they may share work and social activities, training and secretarial support, and where Regional Judicial Officers may overhear statements made by prosecutors. EPA and its RJOs make efforts to avoid such contacts where feasible, and the contacts that remain are unlikely to result in an actual bias. It does not appear that any solution short of complete physical isolation of Regional Judicial Officers from the enforcement offices could completely eliminate this concern. Such separation would also pose significant logistical difficulties for EPA's Regional offices. Accordingly, this comment is not adopted in the final rule. EPA Regional Offices will continue to take prudent measures to physically separate Regional Judicial Officers from personnel responsible for enforcement case development and prosecution to the extent feasible.

CMA/API suggested that a Regional Judicial Officer should not adjudicate any case involving the same counsel as another case in which he or she performed prosecutorial or investigative functions. EPA disagrees. Counsel serve merely as representatives of their clients, and bias cannot be presumed to attach merely to a representative.

CEEC and Dow suggested that the final sentence of the proposed § 22.4(b), which stated that RJOs may not have "any interest in the outcome of any case", is unclear and should incorporate explanatory language from the preamble to the proposed rule indicating that it includes "a financial interest, personal interest, or career interest in the outcome of the action". 63 FR at 9467. EPA notes that any interpretation of this clause would have to conform to the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR part 2635, which are intended to supersede all agency ethics standards (except those approved by the Office of Governmental Ethics and promulgated as supplemental ethics regulations pursuant to 5 CFR 2635.105). In order to avoid creating a standard which might be interpreted differently than these government-wide ethics standards, EPA has removed this clause from the final rule.

A general principle of the government-wide ethics regulations, particularly 5 CFR 2635.101, is that all federal employees must perform their duties impartially. If an RJO held any interest or bias which would compromise his or her ability to preside

impartially in a particular proceeding, this would be grounds for disqualification under § 22.4(d).

Dow suggests that the CROP prohibit enforcement attorneys from serving as Presiding Officers unless the attorney has not issued potentially relevant interpretations of the statute or regulations allegedly violated. Dow suggests possible bias where the Regional Judicial Officer had previously issued interpretations of the regulations at issue in a case before him, that may create a reluctance to overrule his own prior interpretation. However, all adjudicators face the possibility of having to overrule their own prior interpretation of a rule, as contained in their own prior decisions. EPA is unaware of any court where adjudicators are barred from deciding cases where their earlier positions are precedent. In every case, the adjudicator's decision must be supported by the evidence and applicable law, and parties may appeal any adverse decision to the EAB. Accordingly, EPA has not made the suggested change in the final rule.

UARG and UWAG argue that anyone who has participated in a rule making proceeding that leads to the promulgation of a substantive rule would have an interest and bias in the interpretation of that rule, and should not serve as Presiding Officer in a case where that rule is at issue. Although Regional Judicial Officers have presided at public rule making hearings during the public comment period, their role is limited to conducting an orderly hearing—they are not responsible for weighing the evidence and do not participate substantively in the regulatory decision making. EPA believes that participation in substantive rule making is unlikely to result in bias in the interpretation of the rule. The Presiding Officer's decisions must include findings of fact and conclusions of law based upon the record in the case, and their interpretations of regulations are subject to appellate review. EPA declines to add the suggested prohibition with regard to rule making.

The proposed rule would delete from § 22.4(b) language precluding a Presiding Officer from hearing a case that is "factually related" to one in which he or she performed investigative or prosecutorial functions. The 1980 CROP was intended to provide procedures for hearings conforming to section 554 of the APA, and the "factually related" clause was derived from section 554(d), that provides that "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision [or] recommended decision * * *." As the revised CROP is intended for use in proceedings that are not subject to section 554, as well as APA proceedings, provisions of the 1980 CROP such as the "factually related hearing" clause are no longer appropriate for RJOs.

It is very probable that any EPA attorney sufficiently experienced to be selected as RJO would have prosecuted a substantial number of the type of routine cases which are expected to form the bulk of subpart I practice, and these cases may contain similar factual issues. Moreover, the geographical limits on each Region's enforcement efforts make it likely that highly experienced EPA attorneys will have prosecuted cases that have parties, locations, or other facts in common with cases they might hear as an RJO. The prohibition on hearing "factually related" cases is too broad for subpart I proceedings, where the cases will mainly involve well settled law and simple factual issues. The mere fact that two cases have some facts in common need not present any significant risk of bias or "will to win," but it may result in unnecessary litigation over whether the cases are "factually related." Although EPA acknowledges that experience with cases that are factually related in a substantial way could potentially be a cause for concern, there are many more cases where the factual relation is too trivial to result in bias.

Today's final rule will provide respondents in subpart I proceedings a fair and impartial decision maker. Any party may move to have a decision maker disqualified, or a decision overturned, on the basis of partiality where "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career and Finishing School* v. *FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970). In the event that an RJO who performed prosecutorial or investigative functions in a factually related case denies a motion for disqualification, respondent can appeal that decision, and, if the appellate body finds that the RJO was not impartial, then the RJO's decision will undoubtedly be reversed.

22.4(c). A comment as to paragraph (c) urges EPA to provide further sanctions, in addition to the existing sanction authorizing the Presiding Officer to draw adverse inferences against a party. For example, the rule should authorize, when a party willfully disregards discovery orders, sanctions up to the level of dismissal with prejudice or default, such as striking a count from a complaint or striking a specific defense. The commenter suggests adding to the rule that a Presiding Officer may impose any other appropriate sanction that could be imposed by a Federal court in a civil proceeding.

EPA believes that it is not necessary to add any additional language with regard to sanctions that may be imposed by a Presiding Officer. The broad language of § 22.4(c)(10) to "[d]o all other acts and take all measures necessary" authorizes the Presiding Officer to impose a broad array of sanctions appropriate for management of cases, to ensure the "maintenance of order and for the efficient, fair and impartial adjudication of issues." Pursuant to that authority, Presiding Officers impose sanctions such as limiting the evidence a party may present. See, Paul Durham, d/b/a Windmill Hill Estates Water System, EPA Docket No. [SDWA]–C930036, 1997 SDWA LEXIS 1, nn. 5, 6 (ALJ, April 14, 1997). In addition, § 22.17(a) and 22.19(g) specifically provide for sanctions of default or dismissal with prejudice, and for exclusion of the information from evidence for failure to comply with information exchange required by § 22.19 or with an order of the Presiding Officer.

22.4(d). Commenters generally favor the proposed disqualification procedures, but have proposed several revisions to the proposed regulation:

CEEC recommends that EPA add a provision that "requires the individual for whom disqualification is sought to specify reasons for his decision" on the disqualification motion. EPA does not agree with the recommendation because it is unnecessary. When a decision maker rules on any motion under the CROP, the decision maker provides reasons for the ruling unless the reasons therefor are patently evident. The precise level of detail provided will depend upon the decision maker's informed discretion and the circumstances of the case. There is no reason to single out disqualification rulings for purposes of imposing an explicit requirement to articulate the basis for the ruling and no reason for limiting a decision maker's discretion in this regard.

Dow proposes that "EPA should provide a procedure for appeal, in cases where the Administrator denies a motion to disqualify himself." EPA rejects the commenter's suggestion. Since all Agency officials are supervised by the Administrator, there is no

Agency official who could appropriately resolve such an appeal. Moreover, any need for such a requirement is remote, for the occasions when the Administrator acts or serves as the deciding official under the CROP are extremely rare. In practice, the EAB performs the role of final decision maker pursuant to its delegation from the Administrator under the regulations. For the most part, the Administrator's role is residual and limited to cases specifically referred to her by the EAB. The EAB has not made such a referral since its creation in 1992. A slightly different role is reserved for the Administrator under proposed § 22.31(f) (§ 22.31(e) of this final rule), which provides that, if the EAB were to issue a final order to a Federal agency, the agency may request a conference with the Administrator. This opportunity is not available to other recipients of EAB orders. If a conference occurs as provided in the provision, a decision by the Administrator may become the final decision. Nonetheless, EPA does not expect that many such requests will be made pursuant to this provision. If the Administrator were to deny a motion to disqualify herself from participating in a proceeding, the appropriate recourse would be to federal court, upon issuance of the final agency action at the end of the administrative proceeding.

Under both the existing rule and the proposed rule (except for subpart I cases), an interlocutory appeal under § 22.29 is available where a Presiding Officer denies a motion for disqualification. EPA requested comment on whether to prohibit interlocutory appeals to the EAB following the denial of a disqualification motion, consistent with federal court practice.

In response to EPA's request for comment, Dow and CEEC recommend that interlocutory appeals of motions for disqualification be allowed because "there is a far greater likelihood of bias under CROP proceedings than in Federal courts," especially where the presiding officer is not an ALJ. Dow adds, therefore, that although it might be acceptable to prohibit an interlocutory appeal from the denial of a motion to disqualify an ALJ, because "ALJs are insulated against actual bias," it is not appropriate to prohibit an interlocutory appeal from the denial of a motion for disqualification where the presiding officer is not an ALJ. CEEC argues that prohibiting interlocutory appeals would contribute to delay because the unavailability of an interlocutory appeals process would increase the number of proceedings that would have to be overturned on appeal.

EPA has considered these comments, but has decided to add a provision to the rules prohibiting interlocutory appeals from the denial of disqualification motions. EPA believes a prohibition against interlocutory appeals will not significantly affect the impartiality of the administrative adjudicative process and at the same time will prevent unnecessary delays. Based on the Agency's experience to date, motions to disqualify decision makers have been very infrequent. Therefore, the Agency expects that the circumstances will be extremely rare in which either the Agency or private litigants will have the burden of a retrial.

CEEC proposes that the regulatory bases for disqualifying a decision maker be expanded to include "the appearance of impropriety." Courts have held that appearance of impropriety, without more, does not warrant disqualification under due process standards. *Del Vecchio* v. *Illinois Department of Corrections*, 31 F.3d 1363, 1371–72 (7th Cir. 1994). Courts have also declined to extend the judicial system's strict separation of functions standard to multi-function agencies. See e.g., *Simpson* v. *OTS*, 29 F.3d 1418, 1424 (9th Cir. 1994); EDF v. EPA, 510 F.2d at 1305. Likewise, the more stringent "appearance" standard in 28 U.S.C. 455(a), that requires a Federal judge to disqualify himself whenever his impartiality "might reasonably be questioned", does not apply to agency adjudicators. See, e.g., *Marine Shale Processors, Inc.* v. *EPA*, 81 F.3d 1371, 1386 (5th Cir. 1996). Although EPA intends that RJOs should avoid the appearance of impropriety, EPA does not believe that the CROP should create a disqualification standard based on appearance of impropriety.

The criteria for disqualification in a CROP proceeding are whether decision makers have "a financial interest or [a] relationship with a party or with the subject matter which would make it inappropriate for them to act". Whether a financial interest or a relationship is inappropriate is determined by reference to the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR part 2635. Decision makers who fail to conform to these government-wide ethics standards are subject to disqualification.

c. Final Rule. EPA has reconsidered the proposed change to the title of § 22.4, and has decided to retain the original title "Powers and duties of the Environmental Appeals Board * * *"

EPA has adopted the language proposed under § 22.4(a), with the addition of the word "initial" before the word "decisions" in the first sentence, as recommended by a commenter. This paragraph appears as § 22.4(a)(1) in today's final rule. As noted above in the response to comments on § 22.4(c), a commenter recommended that Presiding Officers be given additional authority to impose sanctions. Although § 22.4(c) and other sections of the CROP provide adequate authority to impose procedural sanctions, EPA notes that § 22.4(c) applies only to the Presiding Officer, and not the EAB. In order that the CROP should expressly authorize the EAB to employ equivalent procedural sanctions, EPA has added a new paragraph to § 22.4(a). This new paragraph (a)(2) makes explicit the EAB's authority to impose procedural sanctions for failures to conform to CROP requirements and to orders of the EAB, an authority that the Agency has always considered implicit:

> (2) In exercising its duties and responsibilities under these Consolidated Rules of Practice, the Environmental Appeals Board may do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding, including imposing procedural sanctions against a party who without adequate justification fails or refuses to comply with these Consolidated Rules of Practice or with an order of the Environmental Appeals Board. Such sanctions may include drawing adverse inferences against a party, striking a party's pleadings or other submissions from the record, and denying any or all relief sought by the party in the proceeding.

EPA has also made a minor editorial revision to the last sentence of what is now § 22.4(a)(1), for reasons of grammar and clarity. EPA has changed the last clause from "motions * * * where the Environmental Appeals Board has referred a matter to the Administrator" to "motions filed in matters that the Environmental Appeals Board has referred to the Administrator."

As discussed in the response to comments above, EPA has made several changes to § 22.4(b) in response to public comments. EPA has added a new sentence to § 22.4(b): "A Regional Judicial Officer shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel." EPA has also included in the final rule a provision precluding a Regional Judicial Officer from knowingly presiding over a case involving any party concerning which the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the initiation of the case. EPA has deleted from the final

sentence of the proposed § 22.4(b) language prohibiting RJOs having "any interest in the outcome" of any proceeding. EPA has also revised § 22.50(a) to limit the applicability of subpart I to cases under CWA sections 309(g)(2)(A) and 311(b)(6)(B)(i) (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)), and SDWA sections 1414(g)(3)(B) and 1423(c) (42 U.S.C. 300g-3(g)(3)(B) and 300h-2(c)).

EPA has also made a minor, editorial change to § 22.4(b), unrelated to the public comments. The first sentence of the proposed § 22.4(b) stated that the "Regional Administrator shall designate one or more Regional Judicial Officers to act as Presiding Officer...." EPA has revised this sentence to say that the Regional Administrator shall "delegate" that authority.

EPA has adopted the proposed § 22.4(c) without change.

As discussed above, EPA has revised § 22.4(d) by adding a provision prohibiting interlocutory appeals from the denial of disqualification motions.

EPA has made three minor changes to correct errors in the proposed § 22.4(d). Contrary to the Agency's express intent that all motions for disqualification be made first to the official whose disqualification is sought (see 63 FR at 9467), the proposed § 22.4(d) erroneously includes a statement that motions for disqualification of a Regional Judicial Officer should be made to the Regional Administrator. The final rule requires that all motions for disqualification must first be made to the official whose disqualification is sought.

In the final rule, EPA has corrected another error in the proposed rule by substituting "Administrative Law Judge" for "Presiding Officer" in § 22.4(d). In § 22.3 of the 1980 CROP, "Presiding Officer" was defined as an Administrative Law Judge who has been designated by the Chief Administrative Law Judge to serve as Presiding Officer. However, under the proposed rules, the definition of "Presiding Officer" has been revised to mean either an Administrative Law Judge or a Regional Judicial Officer. The proposed § 22.4(d) failed to reflect this change. Because the proposed § 22.4(d) used the term "Presiding Officer" solely to refer to Administrative Law Judges, EPA has revised this paragraph to use the term "Administrative Law Judge" instead.

Finally, the phrase "they deem themselves" should be singular, rather than plural. EPA has substituted the phrase "he deems himself".

3. Filing, Service, and Form of Documents (40 CFR 22.5(a)-(c))

a. Summary of Proposed Rule. EPA proposed revisions of § 22.5(a) clarifying the requirements for filing documents with the hearing clerk or the clerk of the EAB. Proposed revisions of § 22.5(b) clarify the requirements for serving documents on other parties and on the Presiding Officer. The proposed paragraph (b)(1) would allow service of the complaint by any reliable commercial delivery service that provides written verification of delivery, and paragraph (b)(2) would allow service of all documents other than the complaint by any reliable commercial delivery service.

The proposed § 22.5(c) added provisions which would require more information on the first page of every pleading and to require tables of contents and tables of authorities for all legal briefs and memoranda greater than 20 pages in length (excluding attachments) to simplify review. The provision that allowed Hearing Clerks to determine the adequacy of documents was deleted, leaving that authority solely with Presiding Officers or the Environmental Appeals Board.

b. Significant Comments and EPA Response. Dow says that it is unclear whether the language in § 22.5(b)(1) allowing service of the complaint "by certified mail, return receipt requested" refers to one method of service or two alternative methods. EPA has amended this phrase to read "by certified mail *with* return receipt requested".

Dow suggests that § 22.5(b)(1) should allow respondent to waive the requirement that EPA send a copy of the CROP with the complaint. EPA acknowledges that this is superfluous in many cases, but nevertheless believes that this requirement is the most certain way of assuring that respondents are aware of their procedural rights.

USAF requests that the phrase "officer or" be deleted from § 22.5(b)(1)(ii)(B), questioning EPA's authority to file administrative cases against officers of the United States for actions within the scope of their employment. EPA agrees that the words "officer or" should be deleted from the proposed section for the reasons stated. EPA agrees that under normal circumstances, officers of the United States acting outside the scope of their employment would be treated in the same manner as other individuals. Where the real party in interest is a Federal agency, that agency should be named as respondent.

USAF also notes that the proposed § 22.5(b)(1)(ii)(B) provides less guidance as to the manner of service on Federal agencies than the language presently codified at § 22.5(b)(1)(iii). USAF urges the adoption of language clearly providing for service as provided by regulation, and absent regulation, service upon the chief attorney and on the senior executive officer responsible for the overall operations of the geographical unit of the agency being served. The language describing this latter official is adapted from 40 CFR § 270.11(a)(3)(ii), that designates who must sign waste permit applications. EPA agrees with the Air Force that the proposed rule does not succeed in clarifying who must be served. EPA has revised this paragraph to require service as provided by the respondent agency's regulations, or in the absence of controlling regulation, as otherwise provided by law. This will clearly allow Federal agencies to specify how they are to be served, and where they do not do so, it will allow EPA to serve the agency in any manner permitted by the Federal courts.

EPA recognizes the benefits of assuring that those directly in charge of a federal facility get prompt notice of a complaint, and so, has added to the final rule a direction that the complainant should send an additional copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose. This language, proposed by USAF, is derived from EPA's regulation designating who must sign applications for hazardous waste permits, 40 CFR 270.11(a)(3)(ii). EPA recognizes that the term "geographical unit" may be subject to varying interpretations, but has concluded that the imprecision is both necessary given the wide variety of federal facilities, and acceptable given that this copy of the complaint merely supplements the official service of the complaint. In recognition of this imprecision, this new provision uses the word "should" rather than "shall." EPA will make a good faith effort to provide a copy of the complaint to the base commander, or equivalent, however, so long as complainant properly serves the federal agency according to its regulations or as otherwise provided by law, the requirements of § 22.5(b)(1)(iii) are satisfied.

USAF finds the phrase "all pleadings and documents other than the complaint", used in § 22.5(b)(2) and elsewhere, to be confusing. USAF recommends using "answer" and/or "complaint" in place of "pleading" and "all filed documents" or "all filings" in place of "pleadings and documents". EPA agrees with this recommendation.

Dow recommends that § 22.5(c)(2) should specify how respondent is to

determine the docket number. EPA agrees that the proposed rule leaves this unclear. EPA has stricken the parenthetical clause "(after the filing of the complaint)" in order to assure that the docket number shall appear on the complaint.

Dow and CEEC observe that under § 22.5(c)(4) a party who fails to furnish or update its name, address, and telephone number, and those of its attorney or representative, if any, completely waives its right to notice and service. The commenters argue that this sanction is too severe for harmless errors. EPA has amended this provision so that where a party fails to update information concerning its representative and/or service address, service to the outdated representative or address shall satisfy the requirements of § 22.5(b)(2) and § 22.6. In this manner, the consequences of any failure to update this information will be commensurate with the severity of the error.

In its comments on §§ 22.17(a) and 22.34(c), Dow notes that default is too harsh a sanction for minor errors in service or filing. The proposed § 22.5(c)(5) would allow the EAB or the Presiding Officer to exclude from the record any document that does not comply with § 22.5(c). This would apparently preclude exclusion for service errors as significant as those in § 22.5(c) (e.g., failure to serve the opposing party, failure to include a certificate of service per § 22.5(a)(3), failure to file the original document per § 22.5(a)(1)). Therefore, the final rule expands this sanction to include failures to conform to paragraphs (a), (b) and (d), as well as (c).

The Agency solicited comments on whether electronic filing and service should be allowed, and if so, under what conditions, but received no comments. After further consideration, EPA has decided that the CROP should permit the Presiding Officer and the EAB, in consultation with the parties and the affected hearing clerk, to authorize facsimile or electronic service and/or filing on a case-by-case basis. Accordingly, language is added to §§ 22.5(a)(1) and 22.5(b)(2) allowing the Presiding Officer or the EAB to authorize facsimile or electronic service and/or filing, subject to any appropriate conditions and limitations.

c. Final Rule In response to public comments, EPA has adopted a modified version of the proposed § 22.5(a), (b), and (c). EPA has revised this and other sections to use the more general term "document" in place of "pleadings and documents", and to use "complaint" or "answer" where reference to one or the other is specifically intended. EPA has edited § 22.5(b)(1) to read "by certified mail with return receipt requested". EPA deletes the phrase "officer or" from § 22.5(b)(1)(ii)(B), and revises the proposed § 22.5(b)(1)(ii)(B) as follows:

> "Where respondent is an agency of the United States, complainant shall serve that agency as provided by that agency's regulations, or in the absence of controlling regulation, as otherwise permitted by law. Complainant should also provide a copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose."

EPA has stricken from § 22.5(c)(2) the parenthetical clause "(after the filing of the complaint)". EPA has revised § 22.5(c)(4) as follows:

> "(4) The first document filed by any person shall contain the name, address, and telephone number of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Regional Hearing Clerk, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information or any changes thereto, service to the party's last known address shall satisfy the requirements of § 22.5(b)(2) and § 22.6."

EPA has revised the proposed § 22.5(c)(5) to allow the EAB or the Presiding Officer to exclude from the record any document that does not comply with any requirement of § 22.5.

In addition to the changes suggested by the commenters, EPA has made several other minor changes to § 22.5. EPA has amended § 22.5(a)(1) to allow the Presiding Officer and the EAB the discretion to allow facsimile or electronic filing under such circumstances and limitations as they deem appropriate. EPA also has added to § 22.5(b)(2) language allowing the Presiding Officer or the EAB to authorize facsimile or electronic service, subject to such conditions and limitations as they deem appropriate. EPA has added a reference to the EAB to § 22.5(b): "A copy of each document filed in the proceeding shall be served on the Presiding Officer or the Environmental Appeals Board, and on each party."

EPA has determined that additional clarifications are appropriate for § 22.5(b)(2). EPA notes that the U.S. Postal Service considers overnight express and priority mail to be forms of first class mail. EPA has revised § 22.5(b)(2) to allow service "by first class mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), or by any reliable commercial delivery service. This change necessitates a corresponding change in § 22.7(c), because 5 day grace period for responding to motions sent by first class mail is unnecessary for documents served by overnight or same-day delivery.

Finally, EPA has revised the CROP to present numbers consistently, adopting the preferred style of the U.S. Government Printing Office. Numbers of 10 or more are expressed in figures and not spelled out. Accordingly, EPA has revised § 22.5(c) to require a table of contents and a table of authorities for all briefs and legal memoranda "greater than 20 pages in length".

4. Confidentiality of Business Information (40 CFR 22.5(d))

a. Summary of Proposed Rule. The proposed § 22.5(d) addresses treatment of information claimed as Confidential Business Information ("CBI") in documents filed in CROP proceedings. The proposed paragraph (d)(1) would provide that any business confidentiality claim shall be made in the manner prescribed by 40 CFR part 2 at the time that the document is filed. It warns that a document filed without a claim of business confidentiality will be available to the public for inspection and copying pursuant to § 22.9.

Paragraph (d)(2) would require the submission of a redacted, non-confidential version in addition to the full document containing the information claimed confidential, and describes the process for preparing these documents. Paragraph (d)(3) describes the procedures for serving documents containing claimed-confidential information and makes clear that only a redacted version of any document may be served on a party, amici, or other representative thereof not authorized to receive the confidential information. Paragraph (d)(4) provides that only the redacted version of a document with claimed-confidential information will become part of the public record of the proceeding, and further provides that an EPA officer or employee may disclose information claimed confidential only as provided by 40 CFR part 2.

b. Significant Comments and EPA Response. Dow and CEEC express concern that under the proposed rule a failure to include a CBI claim at the time a document is submitted forecloses any future protection of the document. They argue that even where a company has inadvertently placed information in the public record, there is still value to in preventing further disclosure. They also point out that the Agency's CBI regulations at 40 CFR 2.203(c) provide that the Agency "will make such efforts as are administratively practicable to

associate [a] late [confidentiality] claim with copies of . . . previously-submitted information in EPA files.

Section 2.203(c) expresses an Agency intent to give effect to late claims of business confidentiality, to the extent administratively practicable. While it is often administratively practicable to provide meaningful protection for a document that has been submitted in a non-confidential manner to an EPA office for EPA's own regulatory use, it is not administratively practicable to protect information that has become a matter of public record. There are significant costs associated with maintaining the confidentiality of documents EPA uses, and EPA must balance them against the potential benefits of protecting information that is already likely to be circulating among the public. The criteria for determining whether business information is entitled to confidential treatment, at § 2.208, include whether the business has taken reasonable measures to protect the confidentiality of the information. Placing a document in the public record falls short of those reasonable measures. Some of EPA's enforcement dockets receive daily visitors, while others are less frequently examined. Accordingly, once a person has filed a document with a hearing clerk, a subsequent effort by that person to assert a business confidentiality claim for information contained in that document will generally be ineffective. EPA will consider untimely confidentiality claims on a case-by-case basis, but claims asserted more than a few days after the original filing are unlikely to be granted.

CEEC also faults EPA for failing to draw sufficient attention in the notice of proposed rule making to the provisions addressing CBI. CEEC asserts that EPA missed an opportunity to work with the regulated community to achieve important regulatory reforms. EPA disagrees. It is the purpose of a notice of proposed rule making to elicit comment from the public to better inform the Agency's rule making process. EPA has made many changes in this final rule in response to the helpful comments submitted by CEEC and other commenters. Although EPA has not agreed with CEEC's one substantive comment on the CBI provisions, EPA appreciates the comment and carefully considered CEEC's point.

c. *Final Rule.* EPA adopts § 22.5(d) as proposed, except for replacing the phrase "pleading or document" with "document" as discussed in the response to public comments on § 22.5(a), (b) and (c), and replacing "amici" with "non-party participant" for consistency with changes to § 22.11(b).

5. Computation and Extension of Time (40 CFR 22.7)

a. Summary of Proposed Rule. Section 22.7(a) defines time periods for determining the date upon which a document is due. The proposed rule would revise the term "legal holiday" to "Federal holiday" for clarity.

Section 22.7(b) sets forth conditions under which the due date may be extended. The proposed revision to that paragraph would require that a motion for extension of time be filed sufficiently in advance of the due date so as to allow other parties an opportunity to respond and to allow time for the Presiding Officer or EAB to issue a ruling upon the motion.

Section 22.7(c) of the proposed rule would expand the "mailbox rule" to provide that service of documents other than the complaint is complete either upon mailing or when placed in custody of a reliable commercial delivery service, and to allow 5 additional days to respond not only to documents served by mail but also to documents served by reliable commercial delivery service.

b. Significant Comments and EPA Response. Dow requested an exception from including Saturdays, Sundays and holidays where the time period is 10 days or less. The commenter is concerned that there are not enough work days and mail delivery days to respond to a document.

In effect, this would extend the time period for a party's reply to a response, which is 10 days, under § 22.16(b). EPA believes that two different ways of calculating time periods would cause confusion and inconsistency. When a party needs more than 10 days to file a document, an adequate solution would be to request an extension of time.

Dow suggested a "good cause" exception to the time limit for filing a motion for extension of time. EPA believes that including such an exception in the rule is unnecessary and may encourage untimeliness, and thereby adversely affect the Agency's efforts to make administrative proceedings more efficient. A motion for leave to file a document beyond the time limit ("out of time"), stating reasons for not having filed within the time limit, may be submitted in accordance with § 22.16(a), along with the document sought to be filed. The time limit provided in the proposed revision does not require a motion for extension to be filed so far in advance of the due date so as to allow other parties the 15 days provided by § 22.16(b) to respond to the motion. A "reasonable opportunity to respond" and "reasonable opportunity to issue an order" will be construed based on the circumstances of the case.

c. Final Rule. Today's additional clarifications to § 22.5(b)(2), which define first class mail as including Overnight Express and Priority Mail, expressly allow for service by EPA's internal mail system, and provide the Presiding Officer and the EAB discretion to authorize facsimile or electronic filing, require a corresponding change to § 22.7(c). To assume 5 days for delivery by mail of a document, and thus to allow 5 additional days for a response, is appropriate where a document is served by first class mail and some forms of commercial delivery. However, it is not appropriate to make such assumption and allowance where there is a date of receipt, logged or stamped by the postal or commercial delivery service, showing that the document was sent by same day or overnight delivery. Accordingly, EPA is revising the third sentence of § 22.7(c) to exempt documents served by overnight or same-day delivery. According to the preferred style of the U.S. Government Printing Office, measurements of time are to be expressed in figures and not spelled out. EPA has revised § 22.7(c) to say that "5 days shall be added".

6. Ex Parte Discussion of Proceeding (40 CFR 22.8)

a. Summary of Proposed Rule. The existing § 22.8 prohibits the decision making officials in a proceeding from discussing 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 the proceeding or a factually related proceeding. This prohibition is also imposed on representatives and to persons likely to advise the decision making officials on the proceeding. The proposed rule would add a sentence that would exempt officials who have formally recused themselves from all adjudicatory functions, including the approval of consent agreements and issuance of final orders.

b. Significant Comments and EPA Response. Dow argues that the CROP should also restrict ex parte contacts before a complaint is issued, in order to avoid the potential for an adjudicator developing a bias in favor of the complainant. Dow suggests that the CROP should prohibit any communication regarding contemplated or reasonably foreseeable enforcement

proceedings between potential adjudicators and Agency enforcement personnel. Dow also suggests that where Agency enforcement attorneys may potentially serve as Presiding Officers, any communications regarding contemplated or reasonably foreseeable enforcement proceedings should be recorded, kept on file, and served on respondent as soon as that attorney is designated Presiding Officer.

EPA agrees that EPA attorneys who may serve as Presiding Officers should avoid communications regarding contemplated or reasonably foreseeable enforcement proceedings over which they might preside. However, a complete prohibition is neither feasible nor necessary.

In some instances, it is appropriate for Agency enforcement personnel to have prefiling discussions concerning specific enforcement cases with Agency attorneys who may be called upon act as Presiding Officers. When considering whether to assign a new case to a particular Agency enforcement attorney, it may be necessary to inquire of that attorney whether a prospective case may present a conflict with any cases in which the attorney is acting as Presiding Officer. So long as those discussions are carefully limited to transmitting the identity of the prospective respondent and a bare statement of the statutory or regulatory provisions allegedly violated, and to exploring whether there is any potential conflict of interest, but do not address the merits of the potential action, such discussions could not influence the decisions of the prospective adjudicator, and should not be considered prohibited ex parte communications.

Sound management of the Agency's enforcement program also periodically requires some discussion between complainants and adjudicators concerning anticipated work loads. For example, EPA periodically offers compliance audit programs (see, e.g., Registration and Agreement for TSCA Section 8(e) Compliance Audit Program, 56 FR 4128 (Feb. 1, 1991)) where large numbers potential cases are simultaneously settled on essentially identical terms, and it is appropriate in such cases for the complainant to discuss process issues with the persons who would be responsible for approving the consent agreements and issuing final orders. Discussions of how many consent agreements might be submitted for approval, when they might be submitted, whether or to what extent the consent agreements vary, are all permissible procedural matters that are not prohibited ex parte communications.

Compliance audit programs encourage violators to identify their violations and disclose them to EPA in exchange for a settlement and release of liability on favorable terms. Obtaining advance approval of the generic consent agreements could reassure those members of the regulated community who are wary of disclosing violations that the Agency will in fact conclude the cases according to the terms offered. Although this would result in substantive discussion of the terms of settlement between prospective complainants and adjudicators, this is permissible under the peculiar circumstances of a compliance audit program. It is permissible because compliance audit programs are entirely voluntary. Each compliance audit program is an offer by the Agency to the regulated community at large, and EPA typically engages in these efforts precisely because it does not know who is in violation and it wants to bring a large and ill-defined sector of the industry into compliance. No regulatee is obligated to identify itself as a violator or to participate in the program; each chooses to do so only if it considers the terms offered by the Agency to be in its best interest. Accordingly, where complainants wish to confer with Agency officials responsible for approving consent agreements and issuing final orders concerning potential compliance audit programs, they may do so without violating § 22.8.

Dow's suggested limitations also pose significant implementation problems. Parties may disagree about when an investigation becomes a "contemplated or reasonably foreseeable enforcement proceeding" and about what communications concern such a proceeding. For the foregoing reasons, EPA has not added any prohibition against communications concerning cases before the filing of the complaint. Similarly, EPA does not believe that it is necessary to require by rule that potential adjudicators retain a written record of all communications regarding potential cases. The prohibition in § 22.4(d)(1) against individuals serving as Presiding Officer in regard to "any matter in which they have any relationship with a party or with the subject matter which would make it inappropriate for them to act" provides adequate protection against any bias that might arise through communications prior to the filing of a complaint.

Dow also comments that where an adjudicator obtains advice from other EPA personnel, any such advice should be served on the respondent. The focus of Dow's concern is that EPA personnel such as technical experts, rule writers, and attorneys might be advising adjudicators on the merits of a proceeding. EPA shares Dow's opinion that such ex parte advice is generally unnecessary and inappropriate, and believes that it is in fact extremely uncommon. EPA agrees with the commenter that adjudicators should not be receiving such advice without all parties having the opportunity to review and respond to it. The CROP provides suitable procedures for adjudicators to solicit such advice (e.g., by calling for an expert to testify pursuant to § 22.19(e)(4)) and for EPA personnel to volunteer such advice (through amicus briefs subject to § 22.11(b)) without risk of ex parte communication.

There are, however, circumstances where it is appropriate for adjudicators to obtain from other EPA personnel advice that is not served on the parties. Administrative Law Judges periodically consult with each other, as do the Agency's RJOs. Adjudicators routinely receive advice from the attorneys and law clerks on the staff of the Environmental Appeals Board and the Office of Administrative Law Judges, and on occasion from hearing clerks and from Agency ethics officials. Accordingly, EPA declines to require that all advice to adjudicators from EPA personnel be served on the parties.

c. Final Rule. EPA is adopting § 22.8 as proposed, with minor changes. EPA notes that § 22.8 refers in three places to both Regional Judicial Officers and Presiding Officers. In order to avoid redundancy and potential confusion, EPA has stricken the words "the Regional Judicial Officer." Other minor editorial changes in the first sentence are the substitution of the word "proceeding" for "case", so as to consistently use the word "proceeding" when referring to a particular administrative adjudication, and substitution of "any decision" for "the decision" to clarify ex parte communication is prohibited in regard to small matters as well as large ones. These editorial changes do not alter the substance of the CROP.

The preamble to the proposed rule indicated that the prohibitions on ex parte communications would apply to persons who approve consent agreements and issue final orders. 63 FR at 9468 ("For purposes of this provision [§ 22.8], the Agency would consider the approval of consent agreements and issuance of consent orders to be adjudicatory functions."). In some instances, Regional Administrators have delegated the authority to review settlements and issue final orders to

persons associated with the Regions' enforcement programs. The Agency has reconsidered the position expressed in the preamble to the proposed rule, and has determined that the person who ultimately approves settlements on the Agency's behalf and issues these final orders need not be as independent as those who adjudicate contested issues. To make this change clear, EPA has amended the last sentence of § 22.8 to state that the ex parte restrictions shall not apply to a person who issues final orders only pursuant to § 22.18(b)(3).

7. Intervention and Non-party Briefs (40 CFR 22.11)

a. Summary of Proposed Rule. Section 22.11(a) describes the process for intervening in a CROP proceeding. The proposed rule provides more specific procedures and would make the standard for intervention equivalent to the standard used in the Federal courts. Paragraph (b) describes the procedures for motion for leave to file an amicus brief; the major change proposed was to provide a uniform 15 day period for responses to an amicus brief, rather than leaving this to the discretion of the Presiding Officer or the EAB.

b. Significant Comments and EPA Response. Dow suggests that § 22.11(b) should expressly allow 15 days for parties to respond to a motion for leave to file an amicus brief, as well as 15 days to respond to the brief itself. This change is not necessary, because "motions" are subject to § 22.16, which provides for responses within 15 days. Nevertheless, EPA accepts Dow's suggestion and has revised § 22.11(a) and (b) so that all CROP requirements apply to any motion for leave to file an amicus brief or motion to intervene in the same manner as if the movant were a party.

c. Final Rule. EPA is adopting the proposed § 22.11 with modifications. EPA has amended the language of § 22.11(a) and (b) so that all requirements of the CROP shall apply to any motion for leave to intervene or motion for leave to file an amicus brief as if the movant were a party.

EPA has also made two other changes to § 22.11(b) on its own initiative. First, it has replaced the terms "amicus curiae" and "amicus brief" with "non-party brief." Second, EPA has replaced the requirement that motions for leave to file a non-party brief "state the reasons why the proposed amicus brief is desirable" with the requirement that it "explain the relevance of the brief to the proceeding." Both changes are intended to improve the clarity and specificity of the CROP, and neither is intended to make a substantive change.

To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.7(c) to state the time allowed for responding to a non-party brief with the numeral "15".

8. Commencement of a Proceeding (40 CFR 22.13)

a. Summary of Proposed Rule. EPA proposed amending § 22.13 to define the commencement of an administrative enforcement proceeding, and to allow the simultaneous commencement and conclusion of a case through the filing of a consent agreement and a final order where pre-commencement negotiations result in settlement.

b. Significant Comments and EPA Response. CEEC recommends that the CROP should require discussions with a prospective respondent before the filing of a complaint. CEEC argues that pre-filing discussions would expedite the proceeding by allowing the parties to resolve the matter cooperatively, and by allowing early elimination of inappropriate allegations or penalties. CEEC proposes that the CROP should require that complainant determine whether a potential respondent had fair notice of the regulatory requirement(s) that it is alleged to have violated, and require EPA to disclose both the information in EPA's possession suggesting the violation and the information EPA will utilize to set the proposed penalty. CEEC argues that such a pre-filing process would maximize the opportunity to resolve compliance matters cooperatively and expeditiously.

EPA has often found it advantageous to engage in pre-filing discussions with prospective respondents under the existing CROP, and the proposed revisions will increase EPA's incentives to do so. Nothing in the proposed rule prevents EPA from engaging in the sort of pre-filing process CEEC proposes. However, EPA declines to go as far as CEEC proposes and create a mandatory pre-filing process. EPA's experience with pre-filing negotiations has been mixed: While in many cases pre-filing negotiations have produced expedited settlements, in other cases they have resulted in delay. Sometimes a respondent is not interested in settlement, but uses settlement discussions as a tactic in efforts to forestall enforcement. In contrast, active management of the case by a neutral presiding officer is generally effective in keeping both parties actively engaged in settlement efforts, and provides an alternative process when settlement efforts fail.

Although EPA does not at this time believe that a mandatory pre-filing process should be part of the CROP, EPA will consider ways to expand use of pre-filing negotiations. Although statutory public commenter provisions somewhat limit the Agency's authority to pursue pre-filing negotiations, the final rule does not add any further limits to EPA's discretion in this regard.

c. Final Rule. EPA is adopting § 22.13 of the CROP as proposed, with two minor changes. The first resolves conflicting language in the proposed rule concerning whether a case subject to public comment requirements of § 22.45 could be commenced through the filing of a consent agreement and final order pursuant to § 22.13(b). Although the proposed § 22.13(b) states that it is limited to cases not subject to § 22.45, the proposed § 22.45(b)(1) and (2) describe a process for public notice in cases commenced pursuant to § 22.13(b). EPA has revised the public comment procedures of § 22.45 to better accommodate cases commenced pursuant to § 22.13(b). Accordingly, EPA has deleted from § 22.13(b) the clause which would have made it inapplicable in cases subject to the public comment provisions of § 22.45. Second, as noted in the discussion of public comments on § 22.18(b) and (c), EPA has eliminated the term "consent order," and is using the term "final order" instead.

9. Complaint (40 CFR 22.14)

a. Summary of Proposed Rule. The primary substantive change proposed in § 22.14 was the addition of explicit authority for complainants to use, at their discretion, a notice pleading approach comparable to that used in administrative enforcement proceedings under the proposed part 28 procedures and in the Federal courts. The proposed § 22.14(a)(4) would expressly permit EPA to file a complaint without specifying the precise penalty sought, as an alternative to pleading a specific penalty. Where complainant elects not to demand a specific penalty in the complaint, complainant is nonetheless obligated to provide a brief explanation of the severity of each violation alleged and a citation to the statutory penalty authority applicable for each violation alleged in the complaint. The text originally in paragraph (c) would be deleted to avoid the possibility of conflict with the notice pleading option proposed under § 22.14(a)(4)(ii).

The proposed § 22.14(a)(6) would require the complainant to specify in the complaint whether the non-APA procedures in subpart I shall apply to the proceeding. If a complaint does not contain an explicit statement that subpart I applies, the ensuing

proceeding shall be conducted in conformance with section 554 of the APA.

EPA also proposed editorial revisions, primarily to consolidate the provisions applicable to complaints for assessment of civil penalties with the essentially parallel provisions for revocation, termination or suspension of permits, and to explicitly provide for the issuance of compliance and corrective action orders.

b. Significant Comments and EPA Response

Four of the commenters, CMA/API, CEEC, UWAG and USAF, opposed the proposed notice pleading option.

Implicit in these comments is a concern that respondents will not be able to fairly gauge the amount of their potential penalty liability based on the information in the complaint. EPA agrees that complaints should provide more information than is required under the proposed rule. The proposed § 22.14(a)(4)(ii) arguably would allow issuance of complaints which do not clearly identify the number of violations charged, for example, where a statute authorizes EPA to assess a separate penalty for each day a violation continues. In order to ensure that respondents understand from the complaint how many violations are charged, EPA has revised § 22.14(a)(4)(ii) to require that the complaint specify "the number of violations (where applicable, days of violation) for which a penalty is sought".

CMA/API objected to the notice pleading option and recommended that it be rejected, noting that allowing complaints to issue without stating a sum certain would make it "too easy" for EPA to proceed with an administrative penalty action without gathering sufficient information to make an informed decision, and that the Agency might file meritless complaints that would nonetheless have a "stigmatizing impact" on respondents. EPA notes that the proposed § 22.14 would still require complainant to state the factual basis for alleging the violation, and to specify each provision of a statute, regulation, permit or order that respondent is alleged to have violated. The proposed change would only allow EPA, at its discretion, to postpone stating the extent of the relief sought. Owing to the retention of provisions that require complainant to specifically allege respondent's violation, the risk that EPA might file meritless complaints is not increased by the proposed change.

CMA/API objects that notice pleading will allow EPA to use the administrative complaint as a form of discovery to obtain information from the respondent, and argues that EPA's existing information gathering tools are adequate for that purpose. EPA does not view the administrative complaint as an investigation or discovery tool, but rather, the product of an investigation through which EPA has collected evidence reasonably supporting the conclusion that the respondent has violated the law. However, in some cases the litigation process is the only mechanism by which EPA can obtain the financial information necessary to determine what penalty is appropriate for those violations (see, e.g., FIFRA section 8(b), 7 U.S.C. 136f(b), and Toxic Substances Control Act ("TSCA") section 11(b), 15 U.S.C. 2610(b), which expressly prohibit inspections seeking financial information).

The USAF argues that the proposed change potentially shifts to respondents the burden of demonstrating that something less than the maximum penalty is appropriate. EPA disagrees, as the proposed § 22.24(a) states that complainant bears both "the burdens of presentation and persuasion * * * that the relief sought is appropriate", while respondents only bear "the burden of presenting * * * any response or evidence with respect to the appropriate relief." Notice pleading is common practice in the state and federal courts, and in those courts notice pleading does not put the burden of persuasion on the respondent, is not inherently unfair, and does not violate a defendant's due process rights.

USAF objects that notice pleading is unnecessary to achieve the Agency's stated goal of "provid[ing] the Agency with added flexibility in issuing a complaint under circumstances where only the violator possesses information crucial to the proper determination of the penalty * * *." USAF suggests that a better approach would be to require a specific penalty proposal in the complaint, but allow the complainant to amend the proposed penalty based on information it timely obtains after the commencement of a suit.

EPA agrees that the approach USAF identified is appropriate in many cases. However, where EPA does not have adequate information to confidently recommend a specific penalty, EPA would be misleading the respondent were it to propose an arbitrary penalty which does not reflect significant facts of the case. An unreasonable penalty demand may also make EPA liable for respondent's attorneys' fees under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. 504. The Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub.L. 104-121, expanded the EAJA to allow recovery of attorney's fees where an initial penalty demand is later shown to be unreasonable. Notice pleading is an appropriate and responsible choice in circumstances where liability is clear, but where EPA is not able to determine with confidence the reasonableness of a specific penalty amount before filing the case.

If EPA were not to provide the option of notice pleading, the SBREFA amendments would make it possible for polluters to escape high penalties if they can effectively hide from EPA their financial status or the economic benefits derived from their noncompliance with environmental regulation. Some statutes require EPA to consider a respondent's ability to pay the proposed penalty or its economic benefit of noncompliance in assessing a penalty (e.g., FIFRA section 14(a)(4), TSCA section 16(a)(2)(B), CWA section 309(g)(3), Clean Air Act ("CAA") section 113(e)(1)), and EPA generally considers these factors relevant in penalty assessment under other statutes as well. However, authority for EPA to gather such information is not always clear, and under some statutes it has been expressly withheld (see, e.g., FIFRA section 8(b), 7 U.S.C. 136f(b), TSCA section 11(b), 15 U.S.C. 2610(b)). The SBREFA amendments to the EAJA make the Agency wary of seeking large penalties against individuals or privately held corporations (who do not generally make public disclosures of their financial condition) absent reliable financial information. Because EPA does not have the resources to inspect any but the largest facilities more than once every few years, inspections typically reveal violations that are several years old. The 5-year federal statute of limitations may limit the Agency's ability to sanction violators for older violations, so a respondent need only hide its financial status for a short time in order to forestall EPA from seeking penalties commensurate with a serious violation. Notice pleading increases the deterrent effect of EPA's enforcement program, and levels the regulatory playing field for publicly held and privately held corporations.

CEEC noted in its comments that the February 25, 1998, FR Notice of Proposed Rule Making did not analyze the proposed notice pleading option in light of the SBREFA amendments to the EAJA. The proposed rule, as well as today's final rule, is fully consistent with the EAJA as amended by SBREFA. The EAJA does not prohibit notice

000028

pleading, and nothing in the SBREFA legislative history suggests any intent by Congress to limit its use in judicial or administrative enforcement. The EAJA does not require the agencies to include specific penalty demands in their complaints.

When a complainant makes an express demand, the remedies of the EAJA may be invoked. However, the EAJA explicitly excludes from the definition of "demand" any "recitation of the maximum statutory penalty" in the administrative or civil complaint. Consistent with this provision, EPA may postpone making a "demand" by exercising the notice pleading option of § 22.14(a)(4)(ii), and providing "a brief explanation of the severity of each violation alleged and a citation to the statutory penalty authority applicable for each violation alleged in the complaint" instead of a specific penalty demand.

Civil administrative penalty complaints should communicate the significance that the Agency places on the alleged violations. The CROP accomplishes this in both the traditional method embodied in § 22.14(a)(4)(i), and the notice pleading option in § 22.14(a)(4)(ii). Section 22.14(a)(4)(i) requires that the complaint state "[t]he amount of the civil penalty which is proposed to be assessed, and a brief explanation of the proposed penalty," while § 22.14(a)(4)(ii) requires "a brief explanation of the severity of each violation alleged and a citation to the statutory penalty authority applicable for each violation alleged in the complaint". Moreover, EPA intends to maintain the practice developed in the notice pleading cases under the proposed part 28 administrative enforcement rules of concurrently supplementing complaints with early, informal settlement overtures to respondents. EPA has found this process expedites settlement while also providing respondents with more specific guidance on the penalty value the Agency places on its enforcement case.

EPA notes that notice pleading is not mandatory, but is instead an option. EPA expects that administrative complaints containing specific penalty proposals will continue to be a central part of the Agency's administrative enforcement program. However, one clear mandate of SBREFA is that the Agency should not make a penalty demand unless it has evidence to fully support that demand. Notice pleading balances the goals of SBREFA with those of the statutes EPA is charged with enforcing, as it allows the Agency to pursue enforcement in cases where adequate financial information is either unavailable or withheld by the respondent during the case development process.

Today's final rule is fully consistent with the spirit and intent of the Equal Access to Justice Act, in that the CROP produces complaints that are substantially justified by the facts, circumstances and relevant statutory and regulatory requirements alleged to be violated. The limitations on discovery in CROP proceedings practically force complainants to have in hand at the time an administrative complaint is filed virtually all the evidence necessary to prove the alleged violations and the appropriateness of the penalty. This is in marked contrast to the rules governing civil judicial enforcement, that allow complaints to be filed so long as the allegations and factual contentions "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery * * *." See Rule 11(b)(3) of the Federal Rules of Civil Procedure. The notice pleading option does not ease the Agency's pre-filing burdens associated with documenting that a regulatee has violated the law, but merely allows the filing of a complaint with somewhat less information about what penalty might be appropriate for those violations.

UWAG also questioned the efficacy of the notice pleading option, asserting that the Agency will be no better informed at the time of prehearing exchange or default than it is at the time the complaint is issued. EPA has shared this concern, and requested comments on whether complainant might postpone stating a specific proposed penalty for an additional 30 days, or longer, after prehearing exchange. 63 FR at 9472. Dow objected to postponement beyond prehearing exchange (although it did not state any objection to allowing complainant to state a specific proposed penalty for the first time in prehearing exchange). As discussed in the response to comments on § 22.19(a) below, it is appropriate to allow complainant to review respondent's prehearing exchange for 15 days before specifying a proposed penalty. EPA believes that this process properly balances the parties' competing interests.

Most regulatees will engage in settlement discussions with the Agency once a complaint has been filed. Such settlement discussions, often accompanied by voluntary exchanges of certain documents, almost always give EPA additional information about the merits of the Agency's allegations and the appropriateness of a penalty. In addition, § 22.15(b) requires respondent to state in its answer the "circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; [and] the basis for opposing any proposed relief * * *." As a result of the information received through the answer and settlement discussions, complainant generally has a better understanding of whether respondent has financial limitations significant enough to warrant assessing a lower penalty. EPA recognizes that in some cases, a respondent may still resist providing necessary information. In such cases, the Agency's recourse would be to postpone proposing a specific penalty until 15 days after respondent has filed its prehearing exchange, in accordance with § 22.19(a)(4). If respondent's prehearing exchange fails to contain necessary information, complainant could then move for a discovery order, and subsequently amend the penalty demand as necessary.

Several commenters noted that notice pleading might impede quick resolution and settlement. CEEC notes that failure to provide a specific penalty amount early in the process can frustrate quick resolution of the proceedings. UWAG states that the failure to specify a sum-certain penalty in the complaint will undercut the Agency's goal of resolution of administrative complaints with a minimum of cost and delay, since a party will "have no choice" but to engage in settlement discussions in order to ascertain "exactly what penalty" the Agency is seeking. CMA/API notes that requiring a specific penalty demand amount encourages settlement because it makes clear to the respondent the extent of the penalty relief that EPA is seeking. CMA/API states that without a specific penalty amount stated in the complaint, a respondent can neither judge whether settlement is a realistic possibility nor gauge EPA's view of the significance of the matter. USAF states that the proposed change reduces the respondent's ability to negotiate and removes any incentive to negotiate.

The Agency acknowledges that notice pleading may impede use of the quick resolution process, and that it has the potential to delay settlement relative to cases where a sum certain penalty amount is stated in the complaint. However, notice pleading also provides an additional incentive to settle by preserving EPA's full penalty claim in the event settlement is not achieved. In those cases where the Agency perceives critical information gaps relevant to the amount of the penalty, these potential inefficiencies are an acceptable price to

pay in order to avoid making an unreasonable penalty demand.

EPA's introduction of the notice pleading option into CROP proceedings does not signal any intention to alter the Agency's longstanding policies and practices favoring expeditious settlements. Over the past 20 years, more than 98 per cent of all administrative cases have been settled without trials. Today's final rule evidences EPA's continuing commitment to non-adversarial resolution with new provisions such as commencement of pre-negotiated cases with a final order pursuant to § 22.13(b), the quick resolution of § 22.18(a), and procedures supporting alternative dispute resolution at § 22.18(d). Although notice pleading could possibly delay settlement, it is expected that the need to make efficient use of enforcement resources will restrain EPA's use of notice pleading if, in actual practice, it significantly reduces the frequency of settlements or the pace at which settlements are reached.

c. Final Rule. EPA has adopted § 22.14 as proposed, with several changes. As noted above, EPA has revised § 22.14(a)(4)(ii) to require that where complainant chooses not to specify a proposed penalty in the complaint, the complaint must state "the number of violations (where applicable, days of violation) for which a penalty is sought".

EPA also has made several minor changes at its own initiative. The proposed § 22.14(a)(6) required complainant to specify in the complaint whether subpart I "applies to such hearing." EPA has revised this paragraph to clarify that where subpart I applies, it applies to the entire proceeding, and not just the evidentiary hearing phase.

EPA has added two new requirements as to content of the complaint. Section 22.14(a) now requires in paragraph (7) that the complaint include the address of the Regional Hearing Clerk, and in paragraph (8) requires instructions for paying penalties, if applicable. EPA has observed that the names and addresses of the lock box banks change often, and that it would be difficult to keep the proposed Appendix B up to date. EPA also notes that Appendix A is redundant with 40 CFR 1.7, and moreover, notes that these addresses are of less value to respondent than the specific address of the Regional Hearing Clerk. EPA has decided to expand § 22.14(a) to require that the relevant information appear in the complaint, and to delete both appendices.

In recognition of the fact that most complaints allege more than one violation, EPA has amended § 22.14(a)(3) to require that the complaint state the factual basis "for each violation alleged."

For the convenience of respondents receiving complaints which do not specify a proposed penalty, EPA has amended § 22.14(a)(4)(ii) to clarify that the complaint shall include "a recitation of", rather than a mere "citation to", the applicable statutory penalty authority.

EPA has revised § 22.14(a)(4)(iii) and (a)(5), as well as other sections of the CROP, to replace the unwieldy phrase "revocation, termination or suspension of all or part of a permit" with a new term "Permit Action." EPA has moved the "revocation, termination or suspension" language into the definition of "Permit Action" at § 22.3(a), which makes the remainder of the CROP easier to read, and will facilitate any future efforts to bring other permit actions within the scope of the CROP.

EPA has changed the title of this section from "Content and amendment of the complaint" to the more general "Complaint". Finally, to conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.14(c) to state the time allowed for responding to an amended complaint with the numeral "20"

10. Answer to the Complaint (40 CFR 22.15)

a. Summary of Proposed Rule. EPA proposed to amend § 22.15(a) to clarify requirements for filing and serving the answer to a complaint, and to extend the time allowed for the filing of an answer from 20 days to 30 days. EPA proposed to add to paragraph (b) a new requirement that the answer state the basis for opposing any proposed penalty, compliance or corrective action order, or permit revocation, termination or suspension. EPA proposed editorial changes to paragraph (c), and proposed no changes to paragraphs (d) or (e).

b. Significant Comments and EPA Response. USAF notes that where complainant has elected not to specify a penalty in the complaint, respondent cannot comply with the proposed requirement in § 22.15(b) that the answer state respondent's basis for opposing the proposed relief. In response, the final rule now requires that the answer shall state "the basis for opposing any proposed relief * * *"

CEEC urges that EPA amend § 22.15(e) to allow respondent to amend its answer as a matter of right, arguing that respondent is unlikely to have all the necessary information at the time the answer is due. Allowing amendment of the answer as a matter of right would not encourage diligence in answering the complaint, and could disrupt the orderly progress of proceedings. Accordingly, EPA declines to adopt CEEC's suggestion.

The existing CROP allows amendments of the answer at the presiding officer's discretion, and motions to amend pleadings are generally granted. See, e.g., In re Port of Oakland and Great Lakes Dredge and Dock Co., 4 E.A.D. 170, 205 (EAB 1992) ("the Board adheres to the generally accepted legal principle that administrative pleadings are liberally construed and easily amended") (citations omitted). Moreover, in paragraph (a) EPA already has expanded by 50% the time allowed for assembling information and preparing an answer. Although leave to amend pleadings is liberally granted, allowing amendments to the answer as a matter of right would make the CROP significantly less efficient. The purpose of the answer is to clarify what is contested and what is not contested at an early stage of the proceeding. Allowing amendment of the answer as a matter of right would not encourage due diligence in framing the issues, and could unfairly prejudice complainant if, for example, respondent were to substantially alter its defenses shortly before, or even after, the evidentiary hearing. Accordingly, CEEC's recommendation is rejected, except in circumstances where the complaint has been amended.

c. Final Rule. For the foregoing reasons, EPA has adopted § 22.15 of the CROP as proposed, with the exception of certain changes. As discussed above, the language of § 22.15(b) is amended to require that the answer state "the basis for opposing any proposed relief * * *", and the proposed § 22.15(e) is amended to allow amendment as of right whenever the complaint is amended.

Section 22.15(c) of both the proposed rule and the 1980 CROP states that "[a] hearing ... shall be held if requested by respondent in its answer." As used in this context, the word "hearing" refers to an adjudicatory proceeding, and encompasses a determination on motion papers alone. See In re Green Thumb Nursery, Inc., 6 E.A.D. 782, 790 & n.14 (EAB 1997) (holding that there is no right to an oral evidentiary hearing). Elsewhere in both the proposed rule and the 1980 CROP, "hearing" refers specifically to the oral evidentiary hearing phase of a proceeding. In today's final rule, EPA has endeavored to use the term "hearing" to refer specifically to the oral evidentiary hearing. In order to avoid the implication that a request for a hearing

necessarily results in an oral evidentiary hearing, EPA has replaced the word "shall" with "may."

Consistent with the changes noted in § 22.14(a)(4)(iii) and (a)(5) above, EPA has revised § 22.15(a) by replacing the phrase "permit revocation, termination or suspension" with a new term "Permit Action." To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.15(a) to state the time allowed for filing an answer with the numeral "30".

11. Default (40 CFR 22.17)

a. Summary of Proposed Rule. The proposed § 22.17 would reorganize the entire section to indicate the role of each of the parties and the Presiding Officer in a sequential manner.

Paragraph (a) would describe the actions of each party that may result in a finding of default and the consequences of such a finding for each of the parties. Provisions describing the end of the process (i.e., when penalty monies come due, when a permit revocation, termination or suspension becomes effective) would be moved to paragraph (d).

Paragraph (b) would describe content requirements for motions for default and would include a requirement that when the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and must put into the record the legal and factual grounds for the relief requested. This amendment accommodates the change in § 22.14 that allows notice pleading in which the complainant elects not to demand a specific penalty in the complaint.

Paragraph (c) would describe the default order itself, would provide that a default order shall be an initial decision, and would clarify the standards for granting the default order, for granting the relief proposed, and for setting the order aside. In addition, proposed paragraph (c) would remove the apparent restriction on the Presiding Officers' discretion in existing § 22.17(a), in which a default order automatically assesses the penalty proposed in the complaint, or automatically revokes or terminates the permit according to the conditions proposed in the complaint. Although the proposed paragraph (c) would acknowledge that the Presiding Officer has some discretion regarding default orders, it would require that the proposed relief must be granted unless the record clearly demonstrates that the requested relief is inconsistent with the Act.

Paragraph (d) would specify when penalties assessed by default are due, and the effective dates for the default revocation, termination or suspension of permits, and for the default issuance of compliance or corrective action orders.

b. Significant Comments and EPA Response. Dow suggests revising § 22.17(a) to allow other less serious sanctions. Dow argues that minor or technical defaults, such as not including a proof of service in a responsive document when proper service is perfected or failing to appear at a conference due to weather conditions, do not deserve the severe sanctions delineated in the section. Dow's objection seems to be two-fold: that issuance of an order of default is mandated upon the violative conduct and that an issued order of default might be too severe under certain circumstances.

Dow's objection concerns language that has been in § 22.17(a) since 1980. The CROP has not mandated and does not now mandate automatic determination of default liability. The proposed rule retained the language in § 22.17(a) which states that a "party may be found to be in default", and in § 22.17(c) included the old § 22.17(d) language "[f]or good cause shown, the Presiding Officer may set aside a default order" [emphasis added]. Moreover, the proposed rule adds a new provision at § 22.17(c), which states that "[w]hen the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party unless the record shows good cause why a default order should not be issued". Therefore, the new provisions at § 22.17 would allow Presiding Officers to exercise discretion in issuing a default order for "minor or technical default."

Furthermore, Presiding Officers do have authority to impose sanctions less than a complete finding of default when appropriate. Section 22.16(b) provides that any party who fails to respond to a motion within the designated period waives any objection to the granting of the motion. Section 22.19(g) provides that a when a party fails to respond to a discovery or prehearing exchange order as required, the Presiding Officer may draw adverse inferences and exclude information from evidence. As noted above in the response to comments on § 22.5(c), EPA has amended § 22.5(c)(5) so that the Presiding Officer may exclude from the record documents that are improperly served or untimely filed.

EPA has made no change to § 22.17(a) in response to Dow's comment because the CROP does not mandate default for minor errors and because other provisions of the CROP authorize less severe sanctions that are appropriate for types of nonperformance that fall short of default. Nevertheless, EPA has revised § 22.17(c) to emphasize the Presiding Officer's discretion, as discussed below.

The proposed § 22.17(b) would require complainant to specify the penalty sought and the legal and factual grounds therefor in any motion that "requests the assessment of a penalty or the imposition of other relief against a defaulting party * * *" This provision was added in order to complement the notice pleading option in § 22.14(a)(4)(ii), giving respondents notice of complainant's specific penalty demand assuring that record will support the penalty assessed. CEEC argues that delaying disclosure of the penalty demand until this stage "delays resolution, fails to give respondents *sufficient notice; frustrates small* entities' or small business' rights under SBREFA; and thwarts EPA's goal to increase administrative efficiency." For the reasons stated above in the response to comments on § 22.14(a)(4), EPA disagrees. Because EPA has retained the notice pleading option in § 22.14(a)(4), EPA also retains in § 22.17(b) the requirement that complainant specify a penalty and state the legal and factual grounds therefor.

In its objection to the notice pleading option, CEEC states that the new provision requires disclosure of the penalty demand in "any motion for default" when such demand has not been disclosed in the complaint. This statement does not correspond exactly to the text of the § 22.17(b), which only requires that motions for default specify a penalty sought "[w]here the motion requests the assessment of a penalty * * *" Section 22.17(b), consistent with accepted practice under the existing CROP, allows parties to make motions that merely ask the Presiding Officer to determine whether a default has occurred, without arguing at that time what penalty should be assessed.

As noted in the response to comments on § 22.17(a), not all failures to conform to the CROP will warrant a default judgment. Until such time as a respondent is found to be liable for a default judgment, it is not necessary for the parties to commit their resources to arguing what relief is appropriate. Motions for default may be likened to motions for accelerated decision: It is appropriate in many instances to file a motion for partial accelerated decision, that merely attempts to resolve whether as a matter of law respondent is or is not liable for a violation, leaving the determination of the proper penalty for

a subsequent motion if liability is established. This approach spares the parties from burdensome litigation over an issue that may be moot.

CEEC's statement mirrors a statement in the preamble to the proposed rule (63 FR at 9469). EPA acknowledges that this statement, while generally accurate, is overly broad in that it incorrectly implies that every motion for default must specify a penalty. In order to avoid unnecessary burdens on the litigants, EPA intends that the CROP should continue to allow parties to make motions that merely ask the Presiding Officer to determine whether a default has occurred, without specifying a penalty in that particular motion. Pursuant to the second sentence of paragraph (b), complainant will still be obliged to specify a penalty if it moves for the assessment of a penalty against a defaulting party. However, this may be a second motion that follows a finding that default judgment against respondent is warranted.

In order to eliminate any confusion resulting from the overly broad statement in the preamble or ambiguity in the regulation itself, EPA has added an additional clarifying sentence to § 22.17(b): "The motion may seek resolution of all or part of the proceeding."

Dow supports the revision of § 22.17(c) that gives the Presiding Officers greater discretion in determining the appropriate relief in the default orders because this "flexibility will let the Presiding Officer ensure that any relief ordered is supported by the administrative record." Dow's comment is essentially reiterated by CMA and API: both organizations "support the provision requiring the Presiding Officer, when issuing a default order, to determine that the relief sought in the complaint is consistent with the applicable statute."

Even though there were no adverse comments regarding this provision, the preceding discussion of paragraphs (a) and (b) suggests some useful revisions of paragraph (c). First, corresponding to § 22.17(b)'s statement that a default "motion may seek resolution of any or all parts of the proceeding", § 22.17(c) is revised to no longer require that a default order must be an initial decision, unless it resolves "all issues and claims in the proceeding." This will allow Presiding Officers to find a party liable in default, without necessarily determining the appropriate relief in the same order.

Second, EPA has also relaxed the proposed requirement that "the relief proposed in the complaint or the motion for default shall be ordered unless the record clearly demonstrates that the requested relief is inconsistent with the Act." Under this proposed language, if a proposed penalty were inconsistent with the record (e.g., owing to a mathematical error), though not to such a degree as to be clearly inconsistent with the statutory penalty authority, the Presiding Officer would apparently be required to assess the proposed penalty. In order to prevent injustice, EPA has amended this language to allow the Presiding Officer to impose other relief where "the requested relief is clearly inconsistent with the record or the Act".

c. Final Rule. EPA is adopting § 22.17 as proposed, but with several modifications. As discussed above, EPA has added one sentence to § 22.17(b). EPA has also noted that the rest of the proposed § 22.17(b) repeats parts of § 22.16(a). Section 22.16 applies to all motions, except as otherwise provided, so restatement is not necessary in § 22.17(b). Moreover, the failure to include all of § 22.16(a) in § 22.17(b) introduces potential confusion. Accordingly, EPA has deleted from the final rule those parts of the proposed § 22.17(b) that are redundant with the general requirements for motions at § 22.16.

The proposed § 22.17(a) provided that a default by respondent would constitute a waiver of respondent's "right to a hearing" on the factual allegations in the complaint. Throughout today's final rule, for clarity and consistency, EPA has endeavored to use the term "hearing" only to refer to oral evidentiary hearings. As there is no right to an oral evidentiary hearing (see, e.g., In re Green Thumb Nursery, Inc., 6 E.A.D. 782 (1997)), EPA has revised § 22.17(a) to state that default by respondent constitutes a waiver of respondent's "right to contest" the factual allegations in the complaint. EPA has replaced the undefined word "action" in § 22.17(a) with the word "proceeding," which is defined in today's final rule as discussed below.

EPA has revised § 22.17(c) as follows: (1) EPA has added the clause "as to all or part of the proceeding," to the first sentence, before "unless the record shows"; (2) EPA has revised the second sentence to say "If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice."; (3) EPA has expanded the next to last sentence in order to allow the Presiding Officer to impose relief other than that requested by complainant if it is clearly inconsistent with the record of the proceeding. In addition, EPA has split the second sentence of the proposed § 22.17(c) into two sentences. This editorial revision is not intended to effect a substantive change.

For consistency with changes elsewhere in the CROP, EPA has revised § 22.17(d) to refer to the effective date of a "Permit Action" rather than the effective date of a permit revocation or suspension. To conform to the preferred style of the U.S. Government Printing Office, EPA has also revised § 22.17(d) to state the time allowed for paying default penalties with the numeral "30"

12. Quick Resolution (40 CFR 22.18(a))

a. Summary of Proposed Rule. In cases where the complaint proposes a specific penalty amount (and seeks no other relief), the proposed § 22.18(a)(1) would provide that the respondent can resolve the case at any time by simply paying the proposed penalty in full. The only restriction on when the respondent can take advantage of the quick resolution provision is in cases involving the public comment provisions of § 22.45. In these cases, the respondent must wait until 10 days after the period for public comment has closed before submitting the penalty payment.

Where the complaint includes a specific proposed penalty, the proposed § 22.18(a)(2) would allow respondent to resolve an action without filing an answer by paying the penalty within 30 days of receipt of the complaint. By paying the proposed penalty within that 30 day time frame, the action is resolved before the answer is due and hence there is no need for respondent to file an answer.

If the respondent wishes to resolve the matter by paying the proposed penalty in full but needs additional time in which to do so, § 22.18(a)(2) would allow the respondent to file a written statement with the Regional Hearing Clerk within 30 days of receiving the complaint in which it agrees to pay the penalty within 60 days of receipt of the complaint.

b. Significant Comments and EPA Response. Dow noted that in actions subject to the public comment provisions, the 30 day public comment period may require respondent to file an answer even though it wants to resolve the action, because the last sentence of § 22.18(a)(1) provides that a respondent cannot utilize the quick resolution provision until 10 days after the close of the public comment period. This commenter suggested amending the last sentence of § 22.18(a)(1) to explicitly provide that the respondent does not have to file an answer if it wishes to settle the action by paying the full penalty. Instead, EPA believes that the

better approach is for respondent to file a statement agreeing to pay the full penalty, in accordance with § 22.18(a)(2), and delay payment until the eleventh day after the close of the public comment period. Section 22.18(b)(2) provides ample time for paying the proposed penalty after the close of the public comment period, so long as the public notice is issued contemporaneously with the complaint. If the public notice is delayed, a motion for extension of time may be necessary.

CEEC supports the proposed inclusion of the "quick resolution" process, but noted that the quick resolution option is not available to respondents if the complaint does not propose a specific penalty. The proposed language would have prevented respondents who receive complaints that did not contain specific penalty demands from exercising the quick resolution option even after EPA has made a specific penalty demand. This was unintended, and EPA has revised § 22.18(a)(1) so that once complainant has made a specific penalty demand, respondent may resolve the proceeding by paying the proposed penalty in full. The option of notice-pleading in lieu of pleading a specific penalty amount is intended to provide EPA with flexibility in those situations where only the violator possesses information crucial to the proper determination of the penalty, such as the economic benefit the violator derived from its noncompliance, or its ability to pay the penalty. Under such circumstances, EPA needs to obtain and review the necessary information before proposing a penalty. Section 22.19 of the rule provides that EPA must at the prehearing exchange stage propose a specific penalty. Once EPA proposes a specific penalty, the respondent may, if it wishes, utilize the quick resolution provision and pay the proposed penalty in full at that time. As a result of this revision, notice pleading does not prevent the use of the quick resolution provision by the respondent, it only delays it. While the respondent, under such circumstances, would not be able to take advantage of the quick settlement until after the prehearing exchange, respondents always have the option of early resolution of the proceeding pursuant to § 22.18(b), by informally negotiating settlement with the Agency.

The same commenter noted that the quick resolution option was available to respondents only if they are willing to pay the full amount of the proposed penalty. This commenter also noted that the quick resolution provision should include safeguards to prevent or redress those situations where EPA may have pled an excessive penalty amount. These comments appear to envision a quick resolution that is entirely unlike that proposed in § 22.18(a), but which does not appear to differ significantly from the settlement process in § 22.18(b) and (c). As presently codified, the CROP does not explicitly provide for a "no contest" plea. EPA intended to remedy this by explicitly providing in the proposed § 22.18(a) a formal process for a respondent who—upon receipt of the complaint or at any later time—wishes to simply pay the proposed penalty and disengage from the proceeding. In contrast, the settlement provisions of § 22.18(b) and (c) provide opportunity to negotiate a settlement that could terminate the proceeding upon payment of a lesser penalty. If the respondent believes that EPA has pled an excessive amount, the respondent has the option of informally discussing the matter with EPA during settlement negotiations, or formally contesting the proposed penalty through the hearing process. Consequently, there is no need to amend the proposed § 22.18(a) to safeguard respondents' interests.

The USAF noted that, because of fiscal law requirements, it would be difficult for a federal agency to make a penalty payment within 60 days of complaint issuance, thereby effectively foreclosing federal agencies from taking advantage of the quick resolution provision. The USAF suggests that 18 months would be appropriate. EPA acknowledges that it may be difficult for a federal agency, or a state or local agency, to pay a penalty within 60 days of receipt of the complaint. However, EPA does not believe that the intended purpose of the quick resolution provision would be served by such an extension of the payment period. Where respondent is unable to pay the penalty within 60 days, EPA believes that the § 22.18(b) settlement process would be the appropriate process for terminating the proceeding.

The USAF also noted that this section obligates respondent to admit the jurisdictional allegations of the complaint and waive its right to appeal a final order, and argues that this deprives the federal respondent its right to elevate the matter to the President. The Agency maintains that if a federal agency wishes to contest a proposed penalty, it should exercise its right to hearing and raise the matter through the appeal processes provided. If, on the other hand, the federal agency wishes to conclude the action, it must be willing to agree to waive its rights to further appeals.

c. Final Rule. As noted above, EPA has amended the proposed § 22.18(a)(1) to allow quick resolution at any point in a proceeding once complainant has proposed a specific penalty, including penalties specified in complainant's prehearing exchange, and by moving from the first to the second sentence the language that limited quick resolution to cases where the complaint contained a specific proposed penalty.

As discussed in connection with the revisions to § 22.14, EPA has deleted Appendix B. Accordingly, EPA has revised the first sentence of § 22.18(a)(1) to require that payment be made as specified by complainant, and deleted reference to Appendix B. In order to address interbank funds transfers, EPA has expanded § 22.18(a)(1) to include other instruments of payment. With these changes, the first two sentences of § 22.18(a)(1) now read as follows:

> A respondent may resolve the action at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. If the complaint contains a specific proposed penalty and respondent pays that proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed.

The proposed § 22.18(a)(3) provided that quick resolution would constitute a waiver of respondent's "rights to a hearing". Throughout today's final rule, for clarity and consistency, EPA has endeavored to use the term "hearing" only to refer to oral evidentiary hearings. As there is no right to an oral evidentiary hearing (see, e.g., In re Green Thumb Nursery, Inc., 6 E.A.D. 782 (EAB 1997)), EPA has revised § 22.18(a)(3) to state that quick resolution constitutes a waiver of respondent's "rights to contest the factual allegations in the complaint"

EPA has also corrected a typographical error in the word "section" that appeared in the third sentence of the proposed § 22.18(a)(1). In the third sentence of § 22.18(a)(1), EPA has replaced the phrase "to revoke, terminate or suspend a permit" with the term "Permit Action", as discussed in connection with revisions to § 22.3(a) and § 22.14(a)(4)(iii).

EPA has replaced the undefined word "action" in § 22.18(a)(1) and (2) with the word "proceeding," which is defined in today's final rule as discussed below. Finally, to conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.18(a)(1) and (2) to state all time periods with numerals.

13. Settlement and Scope of Resolution or Settlement (40 CFR 22.18(b)&(c))

a. Summary of Proposed Rule. The proposed § 22.18(b) would clarify the existing settlement process. Paragraph (b)(2) would specify that consent agreements contain an express waiver of the respondent's right to a hearing and appeal of the final order, and establishes additional content requirements for consent agreements in cases where the complainant proposes to simultaneously commence and conclude a case pursuant to § 22.13(b) through filing of a consent agreement and final order negotiated before a complaint is issued.

Paragraph (b)(3) would be revised to expressly provide that an administrative action is settled only when the Regional Judicial Officer or Regional Administrator, or, in cases commenced at EPA Headquarters, the Environmental Appeals Board, approves a consent agreement and issues a final order.

Paragraph (c) would provide that the effect of settlements and full payment of proposed penalties is limited to those facts and violations specifically alleged in the complaint, and reserves the Agency's right to pursue injunctive relief or criminal sanctions.

b. Significant Comments and EPA Response. Dow urges that § 22.18(b)(2) should expressly provide for partial or contingent settlements. Dow's particular concern is that paragraph (b)(2) should not require respondent to waive its right to hearing or to appeal matters that are raised in the complaint but not included in the consent agreement or the final order. Dow's comments do not take issue with the waiver of rights to hearing or appeal in settlements of the entire proceeding.

Paragraphs (a), (b) and (c) of § 22.18 define the process by which the parties may resolve an entire proceeding, and so, consent agreements pursuant to § 22.18(b)(2) and final orders under § 22.18(b)(3) can be neither partial nor contingent. Nevertheless, EPA disagrees with Dow's conclusion that the proposed rule precludes partial or contingent settlements. Where the parties wish to settle some of the counts in a complaint, they may file stipulations as to a respondent's liability, and/or to the appropriate relief, for those counts. Where the parties seek a more final resolution, they may move pursuant to § 22.12(b) to sever the case "with respect to any or all parties or issues." Upon severance, the parties may settle the uncontested portions and litigate the contested portions. Contingent settlements (e.g., where the parties agree that if a contested issue is resolved in a certain manner, then the parties agree to settle on predetermined terms) are possible under the proposed rule, however, the documents committing the parties to the contingency agreement would not themselves constitute "consent agreements" pursuant to § 22.18(b)(2). Such contingent settlements could be accomplished, for example, through formal stipulations as to the appropriateness of certain relief in the event that liability is established, or agreements to sign a specific "consent agreement" when the agreed conditions are met. As the problems Dow describes can easily be avoided, EPA believes that the language in the proposed rule is desirable in that it gives respondents unambiguous notice that consent agreements waive respondents' rights to a hearing and all rights of appeal, including appeal to the federal courts as well as appeal to the EAB under §§ 22.30 and 22.32.

CMA/API object to language proposed for § 22.18(c) that would limit the scope of relief available in settlements to those "violations and facts" alleged in the complaint. CMA/API feel this provision prevents the parties from taking advantage of the economies that result from resolving in a single settlement additional violations that may come to light during the proceeding. EPA agrees that it is, in many cases, desirable to resolve in a single proceeding additional violations that become apparent as a case progresses. However, such expansions of a proceeding should be accomplished through motions to amend the complaint, pursuant to § 22.14(c). Although even a joint or uncontested motion to amend the complaint is somewhat more burdensome that expanding the case through a consent agreement alone, this burden is outweighed by the interest of assuring a clear public record of the Agency's administrative enforcement proceedings.

This is particularly important where statutes require public notice of a proposal to assess penalties for specific violations. Such statutes envision that interested members of the public will have had notice of all violations cited in the complaint and all violations resolved by consent agreement, in order to properly avail themselves of their statutory rights as to those actions.

CEEC also objects to the proposed language limiting settlements to "the facts and violations alleged in the complaint", on the grounds that it is improper for the Agency to assess in a subsequent proceeding additional penalties for other violations arising out of the same circumstances identified in the initial proceeding. As noted above, EPA is well aware that resolving as many violations as possible within a single proceeding generally demands less resources than pursuing multiple cases involving similar facts or issues, and EPA generally can be counted on to take advantage of such cost-saving opportunities. There are, however, circumstances where this may be inadvisable or impossible. For example, where one violation is straightforward and undisputed, neither party would gain from delaying resolution of that case in order to address within the same proceeding another violation sharing certain facts with the first, but concerning a different statute, an unsettled area of the law, and presenting substantial evidentiary disputes. In other circumstances, where new facts establishing other violations come to light after the close of a case, it would be impossible to resolve these newly discovered violations through the closed case. EPA therefore disagrees with CEEC's contention that it is necessarily improper for EPA to seek penalties in a subsequent proceeding for violations related to the initial proceeding.

Section 22.14(a) requires that a complaint specify each statutory provision, regulation, permit or order that respondent is alleged to have violated, and a concise statement of the factual basis for alleging the violation. The complaint thereby describes the violations at issue in the case, in terms of the specific legal requirements and their specific factual circumstances; anything else is outside the scope of the proceeding. This description of the violations that comprise the case must also describe the scope of any settlement. Any violations that are outside the scope of the complaint must necessarily be outside the scope of any possible settlement.

The language of § 22.18(c) to which CEEC objects merely states that payment of a penalty "shall only resolve respondent's liability * * * for the violations and facts alleged in the complaint." This provision defines the scope of settlement in its most obvious and straightforward sense.

c. Final Rule. EPA is adopting § 22.18(b) and (c) as proposed, with minor editorial changes. The proposed § 22.18(b)(2) provided that in a consent agreement, respondent must waive "any right to a hearing". For the reasons noted in the discussion of § 22.18(a)(3) above, EPA has revised this to require that respondent waive "any right to contest the factual allegations in the complaint". EPA has also replaced the term "consent order" with the term "final order" or "proposed final order" in paragraph (b) and elsewhere (§§ 22.3

(definition of final order), 22.13(b), and 22.45(b)(4)). A consent order is in fact a final order, and CROP's suggestion that there is a distinction only adds potential for confusion. EPA has replaced the phrase "permit revocation, termination or suspension" with "Permit Action", as discussed in connection with revisions to § 22.3(a) and § 22.14(a)(4)(iii). Finally, reflecting changes to § 22.14(a) noted above, EPA has added the requirement that in proceedings commenced pursuant to § 22.13(b), the consent agreement shall also contain the information required in § 22.14(a)(8).

14. Alternative Dispute Resolution (40 CFR 22.18(d))

a. Summary of Proposed Rule. The proposed § 22.18(d) would add a new provision that recognizes the use of alternative dispute resolution ("ADR") within the scope of the Alternative Dispute Resolution Act, 5 U.S.C. 581 *et seq.* The proposed rule would provide that, while the parties engage in ADR, the enforcement proceeding is not automatically stayed, jurisdiction remains with the Presiding Officer, and all provisions of the CROP remain in effect. The parties may select any person to act as a neutral, or may file a motion with the Presiding Officer to request a neutral. If the Presiding Officer concurs with the motion, the Presiding Officer forwards the motion to the Chief Administrative Law Judge who designates a qualified neutral.

b. Significant Comments and EPA Response. Those who commented on the proposed § 22.18(d) support the Agency's use of ADR and inclusion in the CROP of a provision that recognizes ADR. CEEC believes that the proposed rule does not go far enough to encourage ADR, that it seems to employ ADR only after a complaint is filed, and that it limits the use of ADR by not staying the enforcement proceeding when the ADR process is commenced. CEEC urges the Agency to make available and encourage the use of a broad array of ADR options, by formalizing the availability of the complete range of ADR. Dow Chemical supports the allowance upon request of temporary stays and extensions for motions, discovery and hearings during ADR proceedings, to encourage voluntary settlement and to avoid imposing undue burdens on the parties and the Presiding Officer.

EPA believes that the absence of an automatic stay provision in the rule does not unreasonably limit the use of ADR. The Presiding Officer always has the discretion to grant a stay in connection with the parties' use of ADR, but such a decision should be made for each case individually depending on the circumstances, and a stay may be inappropriate in cases of excessive delay.

EPA agrees that a broad array of ADR options should be made available to parties, but believes that it is not necessary to list in the rule, and thereby possibly limit, the range of ADR options. Section 22.18(d)(1) provides for "any process within the scope of the Alternative Dispute Resolution Act." The neutral serving in the particular case may discuss ADR options with the parties.

CEEC objected that the CROP does not require the Agency to attempt to resolve a case before filing the complaint. The CROP does not limit ADR to the time after a complaint is filed. The parties may agree to use ADR prior to the filing of a complaint.

c. Final Rule. EPA has adopted § 22.18(d) as proposed, with minor technical revisions to paragraph (d)(3) intended to address two concerns. First, in subpart I cases, it is appropriate for a neutral to be appointed by the Regional Administrator rather than by the Chief Administrative Law Judge. Second, it is more accurate to say the Presiding Officer "grants" a motion, rather than "concurs with" a motion.

15. Prehearing Exchange; Prehearing Conference (40 CFR 22.19(a)&(b))

a. Summary of Proposed Rule. EPA proposed to amend § 22.19(a) and (b) by reversing paragraphs (a) and (b) in order from the existing CROP, reflecting the fact that the information exchange is more common than, and usually precedes, a prehearing conference. The requirements for the prehearing exchange would now appear in paragraph (a). In addition to the information required to be exchanged under § 22.19(b) of the existing CROP, EPA proposed that the complainant would specify a proposed penalty if it has not done so in the complaint and state the basis for that penalty. The respondent would be required to provide all factual information it considers relevant to the assessment of a penalty, even if the complainant did not identify a specific penalty in the complaint. EPA also proposed under § 22.22 to tighten the standards for admitting into evidence information that was not timely exchanged.

In addition, EPA requested comments on whether it is necessary for the complainant to specify a proposed penalty in the prehearing exchange when it has not specified a specific penalty in the complaint (notice pleading). Comments were also requested on the merits of allowing the complainant to postpone for an additional 30 days, or indefinitely, the making of a specific penalty demand where EPA has not specified a specific penalty in the complaint. EPA also requested comments on the merits of requiring by rule that the parties simultaneously perform their prehearing information exchange 90 or 120 days after the filing of the answer, rather than requiring a prehearing exchange order from the Presiding Officer. 63 FR at 9472.

EPA proposed to revise paragraph (b) to no longer compel the Presiding Officer to require the parties to "appear at a conference before him", but instead would make the nature of the conference more flexible.

b. Significant Comments and EPA Response. CEEC opposes allowing EPA to postpone making a specific proposed penalty until the prehearing information exchange, insisting that the proposed penalty appear in the complaint. Dow does not object to postponing the specific penalty until prehearing exchange, but objects to any further postponement. Dow notes that if information obtained during or after the prehearing exchange warrants a change in the proposed penalty, the CROP already allows for amendment of the pleadings. Dow maintains that requiring a specific proposed penalty is not a hardship for the complainant, however, postponing it beyond prehearing exchange would impose a hardship on the respondent. Respondents need to know the proposed penalty amounts to make informed decisions about settling or contesting violations. Therefore, Dow argues that no further delays or extensions should be allowed, except with the consent of the respondent. UWAG suggested that the proposal would be ineffective because complainant would be no better informed at the time of prehearing exchange than it is at the time the complaint is issued.

As set forth in the discussion concerning § 22.14, EPA has retained § 22.14(a)(4)(ii), which allows EPA to elect not to specify a specific penalty in the complaint. When complainant has incomplete or unreliable information on subjects such as the economic benefit respondent received from its unlawful conduct and its ability to pay a penalty, it would be of little benefit to respondent for complainant to make an uninforme—and possibly unrealistic—penalty demand, which would need to be amended when better information becomes available. Complainant would risk specifying either a too-high figure that could result in EAJA claims, or a too-low figure that fails to achieve

deterrence, and then be forced to defend its guesswork in the penalty litigation. EPA has concluded that complainants should not have to specify a penalty demand until after prehearing exchange.

EPA continues to believe that there is merit to giving respondents a specific penalty demand at the earliest practical stage of a proceeding, and has therefore not adopted the approach used in the federal courts, where specific penalty demands generally are not made until the end of the proceeding. Today's final rule requires complainant to specify a proposed penalty no later than 15 days after respondent has filed its prehearing exchange. The final rule requires each party to include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty, as well as exhibits and documents it intends to use at the hearing, names of witnesses and summaries of their anticipated testimony. Owing to the general nature of these prehearing exchange requirements, further discovery may still be appropriate, and complainants may need to amend their proposed penalties, but the prehearing information exchange nonetheless will provide complainants with a substantial basis for formulating a specific penalty demand.

CEEC and Dow oppose automatic prehearing exchange, stating that during productive settlement discussions such attention could be better spent on settlement. Dow proposes one of the following options: (1) making the prehearing exchange totally dependent on an order from the Presiding Officer, or (2) making the prehearing exchange automatic, but expressly allowing the Presiding Officer to issue a temporary stay or to extend the deadline. CMA/API recommend a default time period of 90 days prehearing exchanges as a starting point, which the parties would be allowed to modify by mutual agreement.

Today's final rule does not require the automatic filing of prehearing exchanges. Although such a requirement may expedite resolution of many cases, EPA believes that it would be a distraction and an unnecessary burden in that greater number of cases that progress readily toward settlement. Furthermore, the Presiding Officer may require additional information from the parties as part of his or her prehearing scheduling order than is provided in § 22.19(a). Therefore, the prehearing exchanges will not be required until ordered by the Presiding Officer.

Regarding the proposed § 22.19(b), Dow notes that EPA failed to delete the phrase "before him", as discussed in the preamble to the proposed rules. EPA agrees that this editorial change would help clarify that § 22.19(b) no longer requires that the parties personally appear before the Presiding Officer, but allows the Presiding Officer to conduct telephonic prehearing conferences.

CEEC proposes that EPA should be required, as part of its prehearing exchange, to provide a respondent with all information relevant to whether the respondent had fair notice of the regulatory requirement(s). Many different offices in EPA conduct compliance assistance, provide speakers, and otherwise publicize regulatory requirements, and documenting all such efforts in every case would present an unreasonable and unnecessary burden on complainant, particularly because fair notice of the law is rarely an issue. Moreover, it is unlikely that EPA would have evidence showing that respondent does not know something. Accordingly, EPA rejects this proposal.

CEEC also proposes that EPA should also be required to disclose all information it uses, or chooses to ignore, in determining the penalty it seeks for each alleged violation. The proposed § 22.19(a) would require complainant to state the basis for the penalty in its prehearing exchange, as well as to provide narrative summaries of witnesses' expected testimony, and copies of all documents and exhibits that it intends to introduce into evidence at the hearing. These requirements would assure that complainant discloses all information it uses in determining the appropriate penalty. It would not, however, require disclosure of all information that EPA "chooses to ignore." EPA believes that little or no reliable, relevant information is ever knowingly ignored in determining proposed penalties. Moreover, such exculpatory evidence and evidence of concerning a respondent's inability to pay the proposed penalty is almost always in respondent's hands, and not in complainant's. Accordingly, it would be exceedingly rare for the requirement proposed by CEEC to provide a respondent with new information. This potential benefit is greatly outweighed by the burden on the complainant to identify, document, and exchange all the information that it has not considered in determining the proposed penalty.

EPA agrees with CEEC's recommendation that § 22.19(a) should be amended to make the complainant's and respondent's burdens more equal. In the proposed § 22.19(a), complainant would be required to state the basis for the proposed penalty, while respondent would have to provide "all factual information it considers relevant to the assessment of a penalty". For cases where complainant has specified a proposed penalty before prehearing exchange, § 22.19(a)(3) of today's final rule now requires that "complainant shall explain in its prehearing information exchange how the proposed penalty was calculated in accordance with any criteria set forth in the Act, and the respondent shall explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated." For those cases where EPA has not specified a proposed penalty, § 22.19(a)(4) imposes on each party the identical burden of providing "all factual information it considers relevant to the assessment of a penalty."

c. Final Rule. For the foregoing reasons, EPA is adopting § 22.19(a) with the two substantive changes noted above. In response to CEEC's comment, EPA has amended the proposed § 22.19(a) to provide a more equitable burden concerning providing information concerning the proposed penalty. EPA has also revised § 22.19(a) to allow complainant to specify a proposed penalty 15 days after prehearing exchange, rather than in its prehearing exchange as proposed.

The parties information exchange burdens necessarily differ depending on whether complainant has specified a proposed penalty before the prehearing exchange, but the proposed rule did not fully address these differences. In order to make the prehearing information exchange process address these differences, EPA has significantly reorganized and revised § 22.19(a). Paragraph (a)(1) contains the provisions describing the nature and effect of the prehearing information exchange. The only significant differences between the provisions of paragraph (a)(1) and their counterparts in the proposed rule are that paragraph (a)(1) expressly requires that prehearing exchange be "filed" (§ 22.5(b) provides for service on the Presiding Officer and opposing parties), and clarifies that an order of the Presiding Officer initiates prehearing exchange.

Paragraph (a)(2) describes the contents of prehearing information exchange, other than those that depend upon whether complainant has specified a proposed penalty. These requirements are unchanged.

As discussed in the response to comments above, paragraph (a)(3) provides that where complainant has already specified a proposed penalty, complainant shall include in its prehearing information exchange an explanation of how the proposed

penalty was calculated in accordance with any criteria set forth in the Act, and the respondent shall include an explanation why the proposed penalty should be reduced or eliminated.

Paragraph (a)(4) applies where complainant has not specified a proposed penalty, and requires each party to include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty. It also requires that complainant file a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in the Act 15 days after respondent has filed its prehearing information exchange.

EPA has adopted § 22.19(b) as proposed, except that in response to comment, EPA has deleted the words "before him".

16. Other Discovery (40 CFR 22.19(e))

a. Summary of Proposed Rule. The proposed § 22.19(e) would provide a mechanism for discovery should any be necessary after the parties have completed their prehearing exchange. Under the CROP, other discovery has always been limited in comparison to the extensive and time-consuming discovery typical in the Federal courts, and designed to discourage dilatory tactics and unnecessary and time-consuming motion practice.

The proposed revisions to § 22.19(e)(1) would require additional detail in motions for discovery, and refine the substantive standards for issuance of a discovery order. The proposed rule would add a prohibition against discovery that would unreasonably burden the other party. The proposal would also elaborate the existing requirement that discovery seeks "information [that] has significant probative value", by the addition of the clause "on a disputed issue of material fact relevant to liability or the relief sought." The proposed rule would clarify the existing prohibition on discovery where "[t]he information to be obtained is not otherwise obtainable", by substituting a requirement that discovery is permissible so long as it "[s]eeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily".

Paragraph (e)(2) of the proposed rule would expressly prohibit discovery of a party's settlement positions and information regarding their development, specifically including penalty calculations that are based on Agency settlement policies. Paragraph (e)(3) would clarify that the Presiding Officer may order depositions upon oral questions only where additional conditions, over and above those in paragraph (e)(1), are satisfied. Paragraph (e)(4) would consolidate in the main body of the CROP the subpoena standards presently scattered through the supplemental rules. This consolidation does not signify any general subpoena authority: Subpoenas are available in CROP proceedings only where authorized by the Act giving rise to the cause of action.

Paragraph (e)(5) states that none of the § 22.19(e) limitations on discovery limit a party's right to request admissions or stipulations, a respondent's right to request Agency records under the Federal Freedom of Information Act ("FOIA"), 5 U.S.C. 552, or EPA's authority under the Act to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information.

b. Significant Comments and EPA Response. Several of the commenters object to proposed changes to § 22.19(e)(1) that would allow discovery only where it "[w]ill neither unreasonably delay the proceeding nor unreasonably burden the non-moving party", and where it "[s]eeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." UWAG and UARG are concerned that these criteria are vague and might prevent respondents from discovering documents relating to the basis for the Agency's determination that a violation has occurred and concerning how the Agency determined the proposed penalty. UWAG and UARG believe that respondents cannot meaningfully respond to a complaint without access to such documents. CEEC states that while efforts to lessen the burden of discovery are admirable, the proposed limitations on discovery are one-sided and disadvantage respondents. CMA/API believe that the proposed criteria of § 22.19(e)(1) are "unfair and fundamentally tip the balance in favor of EPA." CMA/API say the "unreasonably burdensome" standard is vague, subjective, and too easily abused.

EPA believes that the changes to § 22.19(e)(1) will not significantly alter the amount of discovery permitted, although it is hoped that they will reduce the amount of litigation over whether discovery is to be allowed. EPA notes that the provisions to which the commenters object are less vague than the comparable provisions of the existing rule, which have been reasonably effective for 18 years. Although the standard "neither unreasonably delay nor unreasonably burden" does not achieve mathematical exactness, it is the sort of standard that judges are accustomed to apply. EPA is confident that the impartial presiding officers can implement these standards in a fair and efficient manner.

Although commenters express concern that the proposed discovery criteria may prevent respondents from discovering information important to their defense, no commenter has identified any specific information or category of information that could not be discovered under the proposed discovery standards. None of the commenters have articulated any reason why discovery should extend to information that does not have significant probative value on a disputed issue of material fact relevant to liability or the relief sought, or why a presiding officer should allow unreasonable delay or unreasonable burdens. EPA perceives no basis for the contention that these proposed discovery criteria unfairly limit discovery. The proposed changes to the standards for granting a discovery motion are incremental, and are unlikely to produce different results in the majority of cases. The proposed changes are beneficial in that they clarify the types of discovery that are appropriate and help prevent inappropriate discovery.

There is no inherent unfairness in rules that permit less extensive discovery than those of the Federal courts. Restrictions on discovery work as both an burden and an advantage, and as some of the commenters acknowledge, respondents share in the advantages as well as the burdens. For example, the extensive discovery allowed in the Federal courts allows EPA to expand a judicial case through discovery of all manner of violations. The CROP limits the Agency's discovery to "information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." As a result, EPA foregoes in its administrative proceedings the opportunities afforded by extensive discovery in exchange for the benefits of more expeditious case resolution.

EPA finds no merit to the contention that respondents cannot meaningfully respond to a complaint without broader discovery of documents relating to the basis for the Agency's determination that a violation has occurred and concerning how the Agency determined the proposed penalty. EPA is unlikely to have unique information relevant to the case. Respondents are generally in a better position than is EPA to obtain

first hand information about whether or not they have conducted their activities in violation of the law, and about the circumstances surrounding any violations. The evidence upon which EPA bases its enforcement action is generally acquired from the respondent through an inspection or information collection request that is well known to respondent, or through respondent's own reporting. The proposed § 22.14(a) requires EPA to articulate the regulatory and factual basis of its case in the complaint. The proposed § 22.19(a) requires EPA in prehearing exchange to identify all witnesses it intends to call at hearing, provide summaries of their expected testimony, provide copies of all exhibits and documents to be introduced as evidence, and specify the basis of the proposed penalty. In this context, it cannot reasonably be argued that the limitations on other discovery imposed through § 22.19(e) would prevent respondents' full and meaningful participation in the hearing.

Dow asserts that it is not appropriate for § 22.19(e)(2) to preclude discovery of penalty calculations based on settlement policies," because this would leave respondent without information necessary to respond to the proposed penalty. Dow observes that EPA does not have separate written policies for settlement and for pleading penalties, and Dow asserts that EPA uses its "settlement" policies for both purposes. Dow argues that § 22.19(e)(2) should allow discovery of any calculations used to derive a proposed penalty for pleading purposes or otherwise pursued in the proceeding.

EPA had intended that the proposed § 22.19(e)(2) should make clear that a party's settlement positions and information regarding their development are not discoverable. There is merit to Dow's contention that EPA should not be able to shield from discovery the basis for a proposed penalty simply by basing it on a document formally titled a "settlement policy." The preamble to the proposed rule describes this paragraph in a manner that appears to avoid this problem, "the proposed revision would prohibit discovery of a party's settlement positions and information regarding their development specifically including penalty calculations for purposes of settlement based on Agency settlement policies." 63 Fed. Reg. at 9473. Accordingly, EPA has replaced the parenthetical clause from the proposed paragraph (e)(2), "(such as penalty calculations based upon Agency settlement policies)", with more restrictive language taken the preamble, "(such as penalty calculations for purposes of settlement based on Agency settlement policies)".

CMA/API express their understanding and support of limitations on discovery and use of settlement positions, but indicate concern that § 22.19(e)(2) might signal an EPA intention to abandon its practice of sharing penalty and economic benefit calculations in settlement negotiations. This revision of CROP draws on two very different antecedents, as it merges the different approaches of the part 22 and the proposed part 28 procedures. In those programs that have historically relied on the 1980 version of the CROP, the Agency has specified a penalty demand in the complaint and has provided a copy of the applicable penalty policy and penalty calculation worksheets typically at initial settlement conferences, but never later than prehearing exchange. In contrast, in its CWA and SDWA class I administrative enforcement programs under the proposed part 28 rules, EPA did not generally argue the basis of a penalty or specify a penalty demand until post hearing briefs, in the manner of enforcement proceedings in the Federal courts. For those programs where the practice has been to specify a penalty in the complaint, EPA does not intend any dramatic change from current practice regarding disclosure of penalty and economic benefit calculations in settlement negotiations. For those programs that evolved in the Federal courts and under the proposed part 28 procedures, specifying a penalty and the basis for that penalty at prehearing exchange will be a major change, but it is certainly a change that will be to respondents' advantage.

Dow argues that the word "reasonably" should be inserted into § 22.29(e)(3)(i) so as to allow depositions on oral questions in circumstances where the information "cannot reasonably be obtained by alternative methods of discovery." EPA agrees that the suggested change should result in more efficient proceedings, and has therefore adopted this recommendation.

The proposed § 22.19(e)(5) also elicited several comments. Some commenters seem to misinterpret the Agency's proposal as if it were offering FOIA and EPA's other information collection authorities as substitutes for discovery opportunities taken away in § 22.19(e)(1). As noted above, the changes to § 22.19(e)(1) will only produce an incremental restriction of discovery, and would preclude only inappropriate discovery. Accordingly, substitutes for discovery are neither needed nor appropriate, and suggestions that FOIA rights be expanded are rejected. EPA proposed § 22.19(e)(5) simply to make clear that FOIA requests, inspections, statutorily provided information collection requests, and administrative subpoenas issued by an authorized Agency official other than the Presiding Officer do not constitute discovery and are not restricted by the CROP. The proposed revision does not change the CROP, because these activities have never been subject to a Presiding Officer's control.[2]

EPA acknowledges that the statutory information collection tools available to the Agency are substantial, however, EPA does not believe that this undermines the fairness of the CROP proceedings. The central factual issue of a CROP proceeding is whether respondent's conduct has been consistent with the law, and respondent's ability to gather information about its own conduct is always greater than EPA's, statutory information collection authorities notwithstanding. In any event, it is uncommon for EPA to initiate inspections, information collection requests, or administrative subpoenas (other than those issued by the Presiding Officer) to gather information to support cases that have already commenced.

EPA notes that the clause "EPA's authority under the Act" may have contributed to some commenters' view of paragraph (e)(5) as endorsing the use of information collection authorities outside of those in § 22.19 to "otherwise obtain information" support ongoing cases. EPA's primary motivation in proposing § 22.19(e)(5) is that its authority to conduct investigations

[2] See, e.g., In Re: Dominick's Finer Foods, Inc., Docket No. CERCLA/EPCRA-007-95 (February 15, 1996) (holding that a pending action in which the parties are subject to the discovery rules of § 22.19(f) "is by no means a basis for restricting EPA's information gathering rights" under CERCLA § 104(e)). Cases holding that EPA may not be enjoined from exercising its investigative authority under the Solid Waste Disposal Act solely because of the pendency of a related administrative action: Del Val Ink and Color, Inc., RCRA II-91-0104 (January 12, 1993), at 6-7; Florida Dept. Of Transportation, RCRA 92-16-R (October 29, 1993), at 3-6; and Coors Brewing Co., RCRA-VIII-90-09 (January 4, 1991), at 11-15. Comparable federal court decisions: *Linde Thomson Langworthy Kohn & Van Dyke* v. *RTC*, 5 F.3d 1508 1518 (D.C. Cir. 1993) (Statute authorizing RTC investigations does not contemplate the termination of investigative authority upon commencement of civil proceedings.); *National-Standard Company* v. *Adamkus*, 881 F.2d 352, 363 (7th Cir. 1989)("The mere pendency of a related civil action does not automatically preclude EPA's use of other authorized law enforcement techniques. * * *"); and In Re Stanley Plating Co., 637 F.Supp. 71, 72-73 (D.Conn. 1986) (Nothing in RCRA suggesting that civil action restricts EPA to investigative techniques in accordance with discovery rules).

unrelated to the particular proceeding, perhaps under other statutes or at other facilities, should not be restricted by an unrelated enforcement proceeding. EPA has replaced the phrase "authority under the Act" with the more general phrase "under any applicable law" in order to better convey EPA's intention that activities unrelated to an ongoing CROP proceeding are not to be subject to the § 22.19(e) limitations.

EPA cannot agree with commenters' suggestions that EPA's information collection authorities be restricted during the pendency of a case. EPA administers fourteen different regulatory statutes, several of which impose a wide variety of requirements on EPA and on regulatees. Many corporations have dozens, or even hundreds, of facilities that are regulated by EPA. EPA needs to continually conduct inspections and exercise other information collection authorities both to identify noncompliance with existing regulations and to determine the need for new or revised regulations, whether or not a company is presently subject to a CROP proceeding. In effect, the commenters ask EPA to blind itself to anything a respondent might do at any facility during the course of a CROP proceeding. EPA would be derelict in its regulatory and enforcement responsibilities if it were to forego its statutorily authorized information collection tools, even for a relatively short time.

Dow stated that although it agrees generally with the proposed § 22.19(e)(5), it believes that the CROP should allow for protective orders and/or sanctions to prevent a party from abusing or harassing another party. The Presiding Officer has the authority, under §§ 22.4(c)(6), 22.4(c)(10), 22.17, and 22.22, to impose certain sanctions against a party, such as exclusion of evidence, that are not provided in the statute under which a case is commenced. The Presiding Officer in a CROP proceeding does not have the broad powers of a Federal court judge, and can order only such relief (e.g. penalty, compliance order) as is authorized by the statute(s) under which the case is commenced. None of the statutes EPA administers authorize protective orders or contempt sanctions for misuse of the information collection authorities noted in § 22.19(e)(5).

The USAF urges that § 22.19(e)(5) state that where EPA seeks to obtain information from a respondent represented by an attorney in a proceeding under the CROP, it shall seek such information through the respondent's attorney. The USAF observes that § 22.10 requires representatives of parties to conform to the standards of conduct and ethics applicable in the Federal courts, and that one such rule would require that information collection efforts concerning the subject of the litigation are to be made through counsel for the party. EPA notes that these ethical rules are already applicable to attorneys and representatives for all parties through § 22.10, and need not be restated in § 22.19(e)(5).

More importantly, EPA's ability to enforce an information collection request will depend on whether the request has been made of the proper individual. Some statutory information collection authorities are only applicable to specified persons (e.g., Section 308(a) of the Clean Water Act, authorizes EPA to require the owner or operator of a point source to submit reports and provide information). Although an attorney may represent respondent in a particular proceeding, it is not clear that the scope of that representation will always make the attorney the surrogate of the proper recipient of an information collection request. In addition, EPA is a large and decentralized agency, and regulates many large and decentralized corporations. As a result, it is possible that the individuals responsible for a particular enforcement proceeding and those responsible for a particular information request may have no knowledge of each other's activities. For these reasons, it is not appropriate for EPA to commit itself by rule to send all information collection requests to respondent's attorney.

c. Final Rule. As stated above, EPA is adopting the § 22.19(e) as proposed with three modifications: Paragraph (e)(2) shall contain the language "(such as penalty calculations for purposes of settlement based on Agency settlement policies)". Paragraph (e)(3)(i) will allow depositions on oral questions in circumstances where the information "cannot reasonably be obtained by alternative methods of discovery." Paragraph (e)(5) shall state that ". . . Nothing in paragraph (e) of this section shall limit * * * EPA's authority, under any applicable law, to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information".

EPA has also noted an unintended side effect of moving the subpoena provisions from the supplemental rules into the discovery section of the proposed rule. In many cases, subpoenas are not used as discovery tools, but merely to ensure the attendance of a witness at hearing. The witness may also be totally independent from the parties. In these circumstances, the standards set forth in § 22.19(e)(1) are inappropriate. Therefore, EPA has revised § 22.19(e)(4) so that it applies only to subpoenas issued for discovery purposes. Other subpoenas would be at the Presiding Officer's discretion, pursuant to § 22.4(c)(9). Corresponding language is also added to § 22.21 to provide for subpoenas not used as discovery tools.

17. Supplementing Prior Exchanges, and Failure To Exchange Information (40 CFR 22.19(f) & (g))

a. Summary of Proposed Rule. Section 22.19(f) would clarify that parties may freely supplement their information exchanges, and additionally impose on each party a duty to supplement or correct prior exchanges of information when the party learns that a prior exchange is deficient. Section 22.19(g) clarifies that a failure of a party to provide information within its control pursuant to an order of the Presiding Officer may lead to an inference that the information sought would be adverse to the non-exchanging party, to exclusion of the information from evidence, or to issuance of a default order.

b. Significant Comments and EPA Response. CMA/API support the proposed changes to § 22.19(f). Dow suggests that § 22.19(g) should state that "the Presiding Officer may, in his discretion," impose the specified sanctions, in order to clarify that the "abuse of discretion" standard applies on appeal. EPA accepts this suggestion.

c. Final Rule. EPA is adopting the proposed § 22.19(f) and (g) with minor modifications. In the first sentence of paragraph (f), EPA has replaced the word "responded" with the more expressive phrase "exchanged information in response." In response to Dow's comment noted above, EPA has added the phrase "in his discretion" to the language of § 22.19(g). EPA also corrected an erroneous citation in paragraph (g)(3): it should refer to § 22.17(c) rather than § 22.17(a). For consistency with the other paragraphs in § 22.19, EPA has added a heading to paragraph (g), "Failure to exchange information".

18. Evidence (40 CFR 22.22)

a. Summary of Proposed Rule. Section 22.22(a) proposes both structural and substantive changes. Structurally, EPA proposes splitting subsection (a) into two paragraphs, (a)(1) and (a)(2). Paragraph (a)(1) proposes to add an exclusionary provision for information not provided to the opposing party at least 15 days before the hearing date unless there was good cause and the

information was provided as soon as it had control of it or there was good cause for not providing the information. Paragraph (a)(2) proposes to clarify how and when confidential business information ("CBI") may be used as evidence in accordance with, and specifically referencing EPA's general confidentiality requirements in 40 CFR Part 2. In conforming with Part 2 requirements, a proposed significant change would authorize the Presiding Officer and EAB to consider CBI information outside the presence of the public or a party as necessary to preserve the confidentiality of business information.

b. Significant Comments and EPA Response. Dow opposes the automatic exclusion of information that is not exchanged in a timely manner unless good cause is shown, as proposed in § 22.22(a)(1). Dow presents hypothetical situations where it believes a respondent would be unable to get exculpatory or mitigating information that comes to its attention admitted into evidence, if EPA "deliberately chooses to withhold" such information "instead of exchanging it in a timely manner." In such situations, Dow reasons that there would be no "good cause" for EPA's failure to exchange the information. As a result, Dow advocates the proposed exclusionary provision be revised to state that the "information will be excluded from evidence *only upon objection* by the innocent party (i.e., the party who did not fail to exchange the information in a timely manner)."

Dow's fears are unfounded. If party A withholds information until just before the hearing, and party B seeks to have that information admitted into evidence, then party A's failure to disclose would constitute "good cause" for the innocent party B's inability to produce the information 15 days prior to the hearing. If the party was required to disclose the information in prehearing exchange or other discovery, § 22.19(g) gives the Presiding Officer some authority to sanction the party who withheld the information. Section 22.19(f) prohibits knowing concealment of deficiencies in information that has previously been exchanged. It imposes an affirmative duty to promptly supplement or correct information provided previously in a prehearing exchange, a response to a request for information, or a response to a discovery order when a party learns that the information is "incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party. * * *" Id. An opposing party's failure to supplement as required under § 22.19(f) would provide "good cause" for admission of evidence. In addition, § 22.4(c)(10) empowers the Presiding Officer do all acts and measures needed for a fair adjudication of the proceedings.

The preamble to the proposed rule noted that the CROP is aimed at the practice of full and complete exchange of information in order to expedite hearings and avoid unnecessary and costly motion practice. *E.g.*, 63 FR at 9472, 9473. The Agency believes that the exclusionary provision facilitates this end and provides a mechanism to enforce the failure of a party to engage in such full disclosure. For parties that act in bad-faith, the CROP, as discussed above, provides adequate safeguards to address these situations and ensure a fair adjudication.

Regarding § 22.22(a)(2), CEEC supports the Agency's proposal to allow the Presiding Officer to review CBI evidence outside the presence of a party if it is necessary to preserve the confidentiality of the business information. In contrast, Dow believes that viewing CBI evidence outside the presence of a party can impede the non-attending party's ability to effectively participate in the hearing and the fairness of the hearing. Dow requests that the Agency include a provision for disclosure of CBI to all parties and to neutral experts, as needed, with safeguards to prevent against using the information outside the scope of the hearing.

The Agency acknowledges the legitimacy of Dow's concerns, however, today's rule and 40 CFR part 2 provide adequate mechanisms to accomplish most of Dow's suggestions. Notwithstanding today's revision of § 22.22(a)(2), EPA retains the authority to disclose CBI in a CROP proceeding where appropriate, pursuant to several statute-specific provisions of part 2 (*see, e.g.*, 40 CFR 2.301(g), 2.302(g), 2.304(g), 2.305(g), 2.306(i), 2.310(g)). Disclosure to a neutral expert could be accomplished through these authorities, or through the statute-specific provisions of part 2 that authorize disclosure to persons performing work under contract to EPA (*see, e.g.*, 40 CFR 2.301(h), 2.302(h), 2.304(h), 2.305(h), 2.306(j), 2.307(h), 2.310(h)). The Agency does not, however, have the authority to enforce secrecy agreements between respondent and an intervener, nor does it have the authority to impose sanctions (other than procedural sanctions such as default) for violations of protective orders that might be issued under the authority of § 22.4(a)(2) or (c). Therefore, it may be advisable for owners of CBI to make such agreements enforceable as contracts.

As expressed in the preamble to the proposed rule, the Agency believes that allowing the independent Presiding Officers the "discretion to review confidential evidence outside the presence of a party * * * strike[s] an appropriate balance between the right of confrontation and the statutory mandates to protect confidential business information." 63 FR at 9474. Contrary to the Dow's suggestion, the Presiding Officer is competent to handle these infrequent situations, including the concern about CBI evidence being unduly relied upon to the detriment of the non-present party. The Presiding Officers handle cases daily involving the Agency's technical regulations and corresponding business information. As an impartial trier of fact, trained to assure that all cases are fairly adjudicated, the Presiding Officer can take into account the failure of a party to be present and to rebut any CBI evidence. Additionally, the Presiding Officer can pose questions to the absent party about any non-CBI issues that exist once the hearing resumes in full. Moreover, as this commenter acknowledges, the CROP provides that a party will have access to a redacted version of the CBI documents. Thus, a right to confrontation and to present its defense will not be unfairly impeded.

c. Final Rule. EPA is adopting § 22.22 as proposed, with four minor changes. In addition to excluding information required to be exchanged under § 22.19(a) or (f) that has not been provided to the opposing party at least 15 days before the hearing date, § 22.22(a)(1) should also exclude information that has not been timely provided pursuant to a § 22.19(e) discovery order. This is a technical change, in as much as § 22.19(g)(2) already permits the exclusion of information not provided pursuant to a discovery order, and that it is clearly the intent of the proposed rule to exclude information that has not been provided to opposing parties in a timely manner. EPA has therefore added to § 22.22(a)(1) a reference to § 22.19(e) discovery orders.

To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.22(a) to state the duration of this exclusion period with the numeral "15".

EPA has made an editorial change to § 22.22(b), which requires witnesses to testify "orally, under oath or affirmation, except as otherwise provided in these Consolidated Rules of Practice or by the Presiding Officer." EPA has replaced the phrase "in these Consolidated Rules of Practice" with the more specific language "in paragraphs

(c) and (d) of this section". No provisions of the CROP other than § 22.22(b), (c) and (d) address whether witnesses must testify orally, under oath or affirmation.

EPA notes that although the existing § 22.22(c) places the burden of delivering copies of a witnesses' written testimony on the witness, this burden should fall on the party who would call that witness to testify. EPA has revised this paragraph to require that "the *party who has called the* witness shall deliver a copy of the testimony to the Presiding Officer, the reporter, and opposing counsel."

19. Filing the Transcript (40 CFR 22.25)

a. Summary of Proposed Rule. Section 22.25 provides that the hearing shall be transcribed, and that the reporter shall transmit copies to the Presiding Officer, and to the Regional Hearing Clerk who shall make copies available to the parties. EPA proposed a new provision specifically allowing motions to conform the transcript to the actual testimony, provided that such motions are filed within 20 days after notice of the availability of the transcript.

b. Significant Comments and EPA Response. Dow asserts that 20 days is insufficient time for attorneys and employee witnesses to review, correct, and move to amend a hearing transcript, even if the 20 days commenced upon receipt of the transcript. Dow recommends that § 22.25 be revised to allow motions to conform the transcript to the actual testimony either 30 days from the date the transcript is received, or 45 days from service of the notice of availability. EPA agrees with Dow's recommendation that additional time be allowed.

EPA originally proposed that the time allowed should be measured time from date the parties are notified that the transcript is available, as this appeared to be a single, well-defined reference point. In practice, this has not been the case, because complainants on occasion receive the transcript itself before receiving a formal notice of its availability. Moreover, the proposed standard would generally give complainant more time than respondent, because complainant typically receives the transcript as soon as it becomes available. The commenter's suggestion of 30 days from the date the transcript is received is good benchmark, as it allows each party the same amount of time to review the transcript, however, it is open-ended for so long as a respondent declines to request or pay for its copy of the transcript. In order to balance fairness to each party with the need for finality, EPA has adopt a standard building on both of the commenter's suggestions: "Any party may file a motion to conform the transcript to the actual testimony within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner."

c. Final Rule. EPA is adopting the rule as proposed with the exception of modifying the language of § 22.25 to read "Any party may file a motion to conform the transcript to the actual testimony within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner."

20. Initial Decision (40 CFR 22.27)

a. Summary of Proposed Rule. Section 22.27 is concerned with initial decision, and it consists (in both the existing and proposed versions) of three paragraphs. Paragraph (a) is concerned with the issuance of an initial decision, what it shall contain, and to whom copies shall be sent. Paragraph (b) outlines the factors a Presiding Officer must take into consideration in determining the amount of a civil penalty and the procedures for determining a civil penalty upon a default. Paragraph (c) sets forth when an initial decision becomes a final order and when it does not; this provision also states that the effect of an initial decision appealed to the EAB is stayed pending a decision on an appeal by the EAB.

Many of the changes in § 22.27(a) are intended to clarify the language. Other changes include requiring that an initial decision, where appropriate, include a compliance order, corrective action order or permit revocation, termination or suspension. This provision also designates to whom, in addition to the parties, copies of the initial decision are to be sent.

The revised § 22.27(b) would require that the Presiding Officer explain in the initial decision how the penalty recommended to be assessed therein corresponds to the evidence in the record and any penalty criteria set forth in the statute under which the action has been commenced. It also establishes that in case of default, the penalty recommended to be assessed shall not exceed the lesser of amount sought in either the complaint or motion for default.

In § 22.27(c), the ways in which a party can prevent an initial decision from becoming a final order are set forth. The proposed rule states that pending the issuance of decisions on appeals of them to the EAB, initial decisions are neither final nor operative. This amendment is to prevent a party from seeking judicial review prior to seeking review from EPA's administrative appellate body, the Environmental Appeals Board.

b. Significant Comments and EPA Response. Dow notes that the second sentence of § 22.27(a) arguably requires that every initial decision must include a civil penalty assessment. To remedy this, Dow recommends that the words "if appropriate" be moved so that they follows the phrase "as well as reasons therefor, and". EPA agrees, and adopts Dow's proposed revision.

Dow supports the inclusion in § 22.27(c) of the provision that states, "An initial decision that is appealed to the Environmental Appeals Board shall not be final or operative pending the Environmental Appeals Board's issuance of a final order" as properly balancing the needs of EPA and respondents. While Dow is pleased that this "will avoid premature recourse to Federal courts", Dow argues that EPA should not require appeal to the EAB for those issues that cannot be adjudicated administratively. As examples of matters that an agency cannot address, Dow cites challenges involving constitutional questions, challenges to an agency's interpretation of a statute and challenges to an agency's authority.

EPA does not agree with the recommendation that the CROP should not require an appeal to the EAB of "issues that cannot be adjudicated administratively." It cannot be left to a party to determine the scope of the EAB's jurisdiction, and respondents should not bear the burden of attempting to predict whether a particular issue must be appealed to the EAB as a prerequisite to judicial review. Also, issues that may not be adjudicated administratively are often mixed with issues that may be adjudicated by the Board. It is appropriate, and in the interest of both the Agency and the parties, for the EAB to decide which issues may be adjudicated administratively. This will ensure that the EAB has the opportunity to exercise its full review authority and protect respondents from losing their right to appeal based on a failure to exhaust administrative remedies.

CEEC also objects to the proposed changes to § 22.27(c), arguing that it is inappropriate to require respondents to appeal any initial decisions to the EAB before appealing to the federal courts. CEEC's initial comments (April 27, 1998) gave no reasons why this is inappropriate. CEEC reiterated this objection in its supplemental comments (June 4, 1998), again without significant explanation. CEEC's supplemental comments elaborated on this point only

to the extent of echoing Dow's comment, stating that it is especially inappropriate "where the issue to be addressed is a constitutional challenge, a challenge to an Agency interpretation, or a challenge to the Agency's authority."

As EPA has already discussed issues specific to requiring appeal to the EAB as a prerequisite to judicial review "where the issue to be addressed is a constitutional challenge, a challenge to an Agency interpretation, or a challenge to the Agency's authority", this response will address the larger issue raised by CEEC, whether respondents should be required to appeal any decisions of a Presiding Officer to the EAB as a prerequisite to judicial review.

The EAB is responsible for assuring consistency in Agency adjudications by all of the ALJs and RJOs. The appeal process of the CROP gives the Agency an opportunity to correct erroneous decisions before they are appealed to the federal courts. The EAB assures that final decisions represent with the position of the Agency as a whole, rather than just the position of one Region, one enforcement office, or one Presiding Officer. EPA considers this a necessary and important function, and rejects CEEC's suggestion that this internal appeal and review process be abandoned. In addition to meeting EPA's institutional needs, this process also offers enormous advantages to respondents who are dissatisfied with an initial decision, in that appeals to the EAB are much quicker and much less expensive than appeals to a federal court.

CEEC's comment may be based on a misreading of the proposed rule as requiring respondent to make an interlocutory appeal to the EAB every time there is an adverse decision: "In its Preliminary Comments, CEEC noted its concerns with the proposal requiring appeal to the EAB after every "initial" decision or order of the Presiding Officer before seeking judicial review."

To the extent that this comment is intended to apply to any ruling or order other than an initial decision (as the latter term is defined in § 22.3), it is based on a misreading of the proposed rule. The proposed rule would only require that initial decisions (as specifically defined in § 22.3) be appealed to the EAB as a prerequisite to judicial review. EPA did not propose to require interlocutory appeal of rulings and orders other than initial decisions as a prerequisite to judicial review.

CEEC also objects to the process by which EPA has proposed the revisions relating to exhaustion of remedies. Terming the inclusion of the exhaustion requirement a "major revision" to the CROP, CEEC says that "Given the magnitude of this proposed change, EPA should have brought this proposal to the attention of the regulated community in the summary of its proposed rule-change, and explained it thoroughly."

First, the February 25, 1998, **Federal Register** notice of proposed rule making provided adequate notice of EPA's intention to address the exhaustion doctrine in its rules of administrative procedure. The one-sentence summary that begins the notice of proposed rule making accurately describes the subject of the notice, though it does not attempt to summarize all of the issues raised in the proposal. The body of the notice and the proposed regulations clearly identified and discussed this issue in detail. *See* 63 FR 9474–75, 9489. The proposed rule allowed 60 days for the public to comment on the entire proposal. In addition, in response to CEEC's concern, EPA published a second notice on May 6, 1998, reopening the public comment period for an additional 60 days.

CEEC's contention that the initial proposal did not give adequate notice of the magnitude of the proposed changes is not persuasive. The original notice of proposed rule making attracted the attention of a broad spectrum of the regulated community, and elicited comments from major trade associations representing the chemical manufacturing industry, the petrochemical industry and the utility industry, and individual comments from the U.S. Air Force and one major chemical company, in addition to the companies represented by CEEC. These comments were generally detailed and well considered. Only two of the comments addressed § 22.27(c), and only CEEC considered this an extraordinary revision. CEEC's contention that the initial proposal did not allow enough time to consider and comment on the proposed changes is also undermined by the fact that CEEC's supplemental comments were the only comments received during reopened comment period, as well as by the fact that those supplemental comments did not raise any significant issues that were not raised during the original public comment period.

Second, EPA disagrees with CEEC's characterization of the magnitude of the proposed changes. EPA considers appeals of an initial decision to the EAB as a prerequisite to judicial review under the CROP as previously codified, and that, during such appeal, the initial decision is inoperative. The regulated community also appears to share this understanding, as respondents consistently seek EAB review before appealing to the federal courts. The proposed explicit inclusion of the exhaustion doctrine simply clarifies the status quo, and thus does not represent something that would significantly alter or impact a respondent's rights or position under the CROP.

Although the proposed revision of § 22.27(c) was designed to make it explicit that an initial decision must be appealed to the EAB as a prerequisite for judicial review, Dow points out that § 22.27(c) does not actually say anything about the need for administrative appeal before judicial review. An explicit statement appears in § 22.31(e)(1) of the proposed rule, however, EPA acknowledges that it would be more helpful if the provision advising a respondent of the consequences of failing to appeal an initial decision to the EAB were included in the section discussing initial decisions, rather than the section concerned with final orders. Accordingly, language from § 22.31(e)(1) of the proposed rule now appears in a new § 22.27(d).

c. Final Rule. In response to comment, EPA has moved the words "if appropriate" from the end of the second sentence in § 22.27(a) to follow the phrase "as well as reasons therefor, and", in order to clarify that not all initial decisions will assess a penalty.

Language from § 22.27(c) and § 22.31(e)(1) relating to exhaustion of administrative remedies has been combined in a new § 22.27(d). The remainder of § 22.27(c) has also been subdivided into four paragraphs for easier reading.

EPA has made an additional substantive change to § 22.27(a) on its own initiative. The existing and proposed rules specify that the Regional Hearing Clerk shall forward the entire record of the proceeding to EPA Headquarters as soon as an initial decision is issued, regardless of whether the case is appealed to the EAB. For administrative efficiency, this requirement has been deleted. Regional Hearing Clerks will retain the record of the proceeding unless the EAB requests it. This change should have no effect on respondents' interests.

EPA has made minor editorial changes to § 22.27(a) as well: EPA has deleted the word "reply" from the first sentence to make it more general, and has replaced the phrase "permit revocation and suspension" with "Permit Action", as discussed in connection with revisions to § 22.3(a) and § 22.14(a)(4)(iii)..

In the fourth and fifth sentences of paragraph (b), the proposed rule uses the phrase "penalty recommended to be

assessed in the complaint". The convention elsewhere in the CROP is to describe the penalty proposed by complainant as the "proposed penalty", and the penalty determined by the Presiding Officer as the "recommended penalty". In order to eliminate the "recommended to be assessed" language and to provide for cases where complainant makes its specific penalty proposal in its prehearing exchange, EPA has replaced "penalty recommended to be assessed in the complaint" in the fourth sentence with the phrase "penalty proposed by complainant". In the fifth sentence, EPA has substituted the phrase "proposed by complainant in the complaint, the prehearing information exchange or the motion for default".

EPA has also changed the order of the sentences in paragraph (b). The sentence stating that "[t]he Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to the any penalty criteria set forth in the Act" has been moved up to follow the sentence stating that "the Presiding Officer shall consider any penalty guidelines issued under the Act." This will make it clearer that the obligation to explain in detail how the penalty corresponds to the penalty criteria of the Act is not limited to circumstances where the Presiding Officer assesses a penalty different from that proposed in the complaint.

As discussed above in connection with public comments on § 22.17, EPA has revised the CROP to clarify that a motion for default or a default order may apply to all or part of a proceeding. EPA has made a corresponding change to § 22.27(c)(3), to clarify that it applies only to those default orders that constitute initial decisions.

To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.27(c) to state the time after which an initial decision becomes a final order with the numeral "45".

21. Appeal From or Review of Initial Decision (40 CFR 22.30)

a. Summary of Proposed Rule. The proposed revisions to § 22.30(a) would extend the time to file an appeal from 20 to 30 days, clarify the procedure for filing appeals, including, but not limited to, provisions addressing service and filing, and describing the contents of any appeal brief. The proposed rule also contained a new provision whereby a party who initially declined to appeal, but who receives a notice of appeal from another party, is granted an additional 20 days to raise other issues on appeal. This change would eliminate the need for protective filings by parties who otherwise would have elected not to file an appeal.

Proposed revisions to paragraph (b) would clarify the respective roles of the Regional Hearing Clerk and the Clerk of the Board. Paragraph (c) of the proposed rule added a provision expressly limiting the scope of appeals to issues raised during the course of the proceeding or by the initial decision. Minor editorial changes were made to the proposed paragraph (d), as well as to the other paragraphs.

EPA proposed a new paragraph (e) that would specify that the general requirements for motions at § 22.16 apply to motions made in appeals to the EAB. EPA proposed a new paragraph (f), consisting largely of the language formerly contained in § 22.31(a). Paragraph (f) describes the scope of review by the EAB and its authority to increase or decrease a penalty, or to modify any compliance order, corrective action order, or any permit revocation, termination and suspension. The proposed § 22.30(f) would allow the EAB to increase the amount of a penalty assessed in a default order, but would not allow the EAB to increase the default penalty to an amount greater than that proposed in the complaint or in a motion for default, whichever is less.

b. Significant Comments and EPA Responses. CMA/API support the provision extending the time for filing appeals from 20 to 30 days, while Dow objects that 30 days is not sufficient time to review the initial decision and file an appeal brief. CROP proceedings have worked effectively since 1980 with a 20 day appeal period, and with extensions in appropriate cases. Expanding the appeal period by fifty percent should substantially reduce the burdens felt by counsel, as well as allow improvement in the quality of the briefs filed. While today's final rule expands several time periods, EPA still intends that CROP proceedings should progress quickly from the filing of the complaint to the issuance of a final order. EPA believes that further expansion of the appeals period is not necessary at this time.

Dow also commented that the deadline for response briefs would be ambiguous under the proposed § 22.30(a)(2) in cases where two or more notices of appeal are filed in serial fashion. EPA concedes that in such cases there would not be a single date upon which all reply briefs are due, however, the proposed CROP is clear as to when the response briefs are due: A brief responding to an appeal is due within 20 days of service of the appeal brief to which it responds. Requiring all reply briefs to be filed on the same day would give the person filing the last appeal the most time to respond to the opposing party's appeal, while EPA's proposed approach gives each party the same amount of time to respond.

CEEC recommends that the CROP include procedures to ensure that members of the regulated community have access to all administrative complaints, decisions, orders, settlements, etc. EPA notes that all such documents appear in the public docket for each case. The formal opinions of the EAB are published in a series of bound volumes titled Environmental Administrative Decisions (E.A.D.), which may be purchased from the U.S. Superintendent of Documents. The full text of all formal EAB opinions may also be accessed electronically at the EAB's World Wide Web Site (http://www.epa.gov.eab). Decisions and "substantive" orders (i.e., having some discussion of legal argument) of the Agency's ALJs are on http://www.epa.gov/oalj going back to November 1996. A web site for RJO decisions is under construction. Hard copies of ALJ decisions (and substantive orders since 1997) may be obtained from the Headquarters Hearing Clerk, and RJO decisions may be obtained from the Regional Hearing Clerks. Several commercial sources also make available the EAB formal opinions, most ALJ decisions and orders, and some RJO decisions and orders.

The Agency's practice has been for the Regional Hearing Clerk to maintain a complete docket up through the initial decision, and for the Clerk of the Board to maintain the docket of subsequent proceedings. EPA acknowledges that this system has made it difficult for persons reviewing a case docket in an EPA Regional office to review the entire case record. In order that the Regional Hearing Clerk's docket should indicate that a case had been appealed, EPA proposed in § 22.30(a)(1) that each appellant shall serve copies of its notice of appeal and brief with the Regional Hearing Clerk. In response to CEEC's comment, EPA has revised § 22.30(a) and (b) to require that copies of all documents filed with, or by, the EAB shall also be served on the Regional Hearing Clerk.

Finally, Dow notes that despite EPA's stated intention of removing the words "sua sponte" from the CROP, EPA neglected to replace this expression in the title of § 22.30(b). EPA has finished this task by revising this title to read "Review initiated by the Environmental Appeals Board."

000043

c. *Final Rule.* EPA has adopted § 22.30 as proposed, with several modifications. As discussed above, EPA has revised the title of § 22.30(b) to read "Review initiated by the Environmental Appeals Board", and has revised § 22.30(a) to require that copies of all documents filed with, or by, the EAB shall also be served on the Regional Hearing Clerk. EPA has made several other minor revisions on its own initiative:

As discussed above in connection with the revisions to § 22.11, EPA has replaced the term "amicus curie" in § 22.30(a)(1) and (a)(2) with the term "non-party participant."

In order that the Presiding Officer may be aware of the status of his or her decision, EPA has also revised paragraph (a)(1) to require that a copy of the notice of appeal be served on the Presiding Officer, and revised paragraph (b) to require that the EAB serve on the Presiding Officer a copy of its notice of intent to review a decision.

EPA has also replaced the expression "Clerk of the Environmental Appeals Board" with "Clerk of the Board," using the term defined at § 22.3(a) for consistency.

Because response briefs are to be filed with the Clerk of the Board, the words "and serve" are unnecessary and potentially confusing as they appear in the proposed § 22.30(a)(2), and have therefore been deleted from today's final rule.

The proposed § 22.30(c) included a new provision: "The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision." In order to reflect the well established principle that the question of subject matter jurisdiction cannot be waived and may be raised at any stage of a proceeding, EPA has revised this provision by adding the clause "and to issues concerning subject matter jurisdiction."

The proposed § 22.30(f) may incorrectly suggest that a final order is the only possible outcome from an EAB decision on appeal of an initial decision. However, it is not uncommon for the EAB to remand a case. EPA has revised paragraph (f) by adding the following sentence: "The Environmental Appeals Board may remand the case to the Presiding Officer for further action."

EPA has replaced the phrase "any permit revocation, termination or suspension" in § 22.30(f) with "Permit Action", as discussed in connection with revisions to § 22.3(a) and § 22.14(a)(4)(iii). To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.30 to state all time periods with numerals only.

22. Final Order (40 CFR 22.31)

a. *Summary of Proposed Rule.* Section 22.31 is concerned with final orders, and the proposed section consists of six sub-paragraphs. Paragraph (a) would specify the effect of the final order. It states that a final order constitutes final Agency action and specifies that a final order neither affects the right of the United States to seek criminal or civil relief for any violation of law nor waives a respondent's obligations to comply with applicable law. Paragraph (b) would establish the effective date of a final order. Paragraph (c) would set forth procedures for paying any civil penalties assessed in a final order. Paragraph (d) would establish that any corrective action or compliance order, or any permit revocation, termination or suspension becomes effective and enforceable as of the effective date of a final order unless otherwise specified in the final order. The proposed paragraph (e) is concerned with exhaustion of administrative remedies, and would specify that where a respondent fails to appeal an initial decision or enters into a consent agreement, the right of subsequent judicial review is waived. The proposed paragraph (f) discusses final orders issued to Federal agencies. This provision would specify that where the head of an affected agency seeks the intervention of the EPA Administrator, the decision by the Administrator will be the final order; this provision would also specify that a motion for reconsideration does not affect the 30-day time period for the effective date of final orders against Federal agencies.

b. *Significant Comments and EPA Responses.* The proposed inclusion in § 22.31(e) of a provision explicitly addressing exhaustion of administrative remedies as a prerequisite to judicial review is viewed by CEEC as a "major" revision of the CROP. CEEC argues that:

> "Given the magnitude of this proposed change, EPA should have brought this proposal to the attention of the regulated community in the summary of its proposed rule-change, and explained it thoroughly."

As discussed in EPA's response to comments on § 22.27(c), above, EPA disagrees with CEEC's characterization of the magnitude of this change, and maintains that the proposed rule gave adequate notice of the proposed change.

As discussed in EPA's response to comments on § 22.27(c), above, EPA agrees with Dow's comment that the requirement that an administrative appeal is a predicate for subsequent judicial review should appear in § 22.27. Therefore, the language that appeared in the proposed § 22.31(e)(1) has been deleted and moved to § 22.27(c). The proposed § 22.31(e)(2), which would specify that "[a] respondent which elects to resolve a proceeding pursuant to § 22.18 waives its rights to judicial review", is redundant with § 22.18(a)(3) and (b)(2) and can be deleted without substantive change. The proposed § 22.31(f) has been redesignated as § 22.31(e) in today's final rule.

The proposed § 22.31(f) describes the manner in which the head of another Federal agency may bring disputes over a final order directly to the EPA Administrator, and provides that the EAB's decision shall not be effective pending the Administrator's review. Essentially the same provision already appears in the supplemental rule governing Solid Waste Disposal Act cases, § 22.37(g). The proposed rule would move this provision from that supplemental rule into the main body of the CROP, in order that this process should be available in any CROP case brought against a Federal agency.

The USAF opposes moving this provision from the supplemental rule governing Solid Waste Disposal Act cases into the main text of the CROP. USAF argues that instead of a generally applicable provision, such procedures should be confined to the statute-specific supplemental rules. USAF argues that EPA should be required to amend the CROP each time Congressional action expands EPA's authority to enforce against another Federal agency, in order to provide a forum for resolving constitutional and jurisdictional issues.

The proposed change does not expand EPA's jurisdiction to assess civil penalties against a Federal facility, nor does it expand the scope of the CROP as it pertains to Federal facilities. EPA can assess penalties against Federal facilities for violations of the Safe Drinking Water Act (42 U.S.C. 300j-6), the Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. 6961), and the Clean Air Act (42 U.S.C. 7413(d), 7524(c) and 7545(d)(1)) through a CROP proceeding regardless of whether the proposed language is adopted. Should other authorities for assessing penalties against Federal facilities become available in the future, this will be true for those authorities as well. The only effect of the change proposed in § 22.31(f) is to provide a mutually understood process for staying a final order while the head of the respondent Federal Agency confers with the EPA Administrator.

The proposed § 22.31(f) is a procedural provision, not a jurisdictional provision. It does not, on its own, establish authority to assess administrative penalties. It merely provides the process to follow where Congress has provided such authority to EPA. Although EPA has not made the change USAF seeks, EPA has made a minor change to the proposed § 22.31(f)(1) (promulgated today as § 22.31(e)(1)) that should help reduce the chance that this might be misperceived as a jurisdictional provision, by moving the words "pursuant to § 22.30", to follow the word "issued."

c. Final Rule. EPA has made no substantive change in response to the comments on the proposed § 22.31. As described above, EPA has deleted the proposed § 22.31(e) because equivalent provisions now appear in §§ 22.18 and 22.27(c). Also as noted above, EPA has changed the proposed paragraph (f) to "(e)", and has moved the words "pursuant to § 22.30", to follow the word "issued" in § 22.31(e)(1).

On its own initiative, EPA has made several other editorial changes to § 22.31. First, the third sentence of the proposed § 22.31(a) is inartfully drafted and subject to misinterpretation. The relevance of the terms "liability" and "violation" is not clear in relation to proceedings for permit actions. For example, permit actions may often involve facts which could establish violations of the permit or of environmental regulations, however, permit action proceedings do not adjudicate respondents' liability for such violations. In order to avoid the implication that a final order in permit action proceeding might "resolve Respondent's liability for a civil penalty", or conversely, that a final order in a penalty proceeding might resolve "the status of a permit or authority to operate", this sentence must be revised. In addition, this sentence does not address proceedings commenced with a consent agreement and final order pursuant to § 22.13(b). Accordingly, EPA has revised the third sentence of the proposed § 22.31(a) to state that: "The final order shall resolve only those causes of action alleged in the complaint, or for proceedings commenced pursuant to § 22.13(b), alleged in the consent agreement."

Second, EPA has significantly simplified the second sentence of § 22.31(c), by removing the requirements concerning who shall be the payee on the check and where the check should be sent, and by amending § 22.14(a) to require that these be specified in the complaint. EPA notes that the proposed § 22.31(c) was deficient in that it did not provide a mechanism to accommodate changes in the lock box banks or bank addresses other than by amending the CROP, and that it did not provide for cases under Section 311(b)(6) of the Clean Water Act, where penalties must be paid to the "Oil Spill Liability Trust Fund." Moreover, the focus on the "check" left it unclear whether interbank funds transfers were permitted. Requiring that the complaint address these issues allows EPA to replace the second and third sentences of § 22.31(c) with a much simpler statement:

> "Payment shall be made by sending a cashier's check or certified check to the payee specified in the complaint, unless otherwise instructed by the complainant. The check shall note the case title and docket number. Respondent shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on complainant."

Third, EPA has replaced the phrase "permit revocation, termination or suspension" in § 22.31(d) with "Permit Action", as discussed in connection with revisions to § 22.3(a) and § 22.14(a)(4)(iii).

Fourth, EPA has clarified an imprecise sentence in the proposed § 22.31(f)(1) (now § 22.31(e)(1). The last sentence of the proposed § 22.31(f)(1) stated that "In that event, a decision by the Administrator shall become the final order." EPA has replaced "In that event" with the more explicit statement, "If a timely request is made".

Finally, to conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.31 to state all time periods with numerals only.

23. Motion to Reconsider a Final Order (40 CFR 22.32)

a. Summary of Proposed Rule. Section 22.32 of the 1980 CROP provides that parties may move for reconsideration of a final order within 10 days of service of the final order, and describes the procedure. The proposed rule made only trivial editorial changes.

b. Significant Comments and EPA Response. Dow objects that 10 days is insufficient time to perform the extensive reviews and legal research on specific issues raised by the final order. Dow concedes that 10 days is sufficient to file a motion for reconsideration, provided that additional time is allowed for the filing of briefs in support of the motion.

The purpose of § 22.32 is to provide a mechanism to bring to the EAB's attention a manifest error, such as a simple oversight, or a mistake of law or fact, or a change in the applicable law. *See In the Matter of Cypress Aviation, Inc.*, 4 E.A.D. 390, 392 (EAB 1992). The motion for reconsideration is not intended as a forum for rearguing positions already considered or raising new arguments that could have been made before. This narrow scope of § 22.32 is reflected in the fact that the CROP does not require a respondent to seek reconsideration in order to exhaust its administrative remedies as a prerequisite for judicial review. Accordingly, EPA has not expanded the time allotted to file a motion for reconsideration or to file briefs in support of a motion for reconsideration.

c. Final Rule. EPA is adopting § 22.32 as proposed, with two modifications. As noted in the discussion of public comments on § 22.18(b)&(c), EPA has eliminated the term "consent order," and is using the term "final order" instead. In the interests of exhaustion of remedies and finality, motions for reconsideration are not appropriate where the final order results from settlement or quick resolution, nor where the parties have declined to appeal an initial decision and it has become final by operation of § 22.27(c). Accordingly, EPA has amended § 22.32 to clarify that it is limited to motions for reconsideration of a final order issued pursuant to § 22.30. In addition, to conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.32 to state the time period allowed for motions for reconsideration with the numeral "10"

24. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Clean Air Act (40 CFR 22.34)

a. Summary of Proposed Rule. Section 22.34 presents supplemental rules applicable to Clean Air Act penalty cases. Paragraph (b) reiterates the requirement of 42 U.S.C. 7413(d)(2)(A) that before issuing an order assessing a civil penalty (i.e., a final order), EPA shall give written notice to the person against whom penalty is to be assessed the order is to be issued, and give that person the opportunity to request a hearing. It clarifies the relationship between this statutory requirement and the CROP by stating that the such notice shall be provided by issuance of a complaint. EPA proposed only minor editorial changes to § 22.34(b).

EPA proposed a new paragraph (c), which would apply to default orders for failure to answer a field citation. Section 59.5(d) of the proposed rule governing CAA field citations (59 FR 22776, May 3, 1994) would provide that when a respondent fails to file a timely answer to a field citation (and fails to offer to pay the penalty under the quick

resolution procedure at § 22.18(a)(2)), the Presiding Officer shall issue a default order assessing the penalty proposed in the complaint.

b. Significant Comments and EPA Response. Dow commented that respondents should be able to waive the written notice required pursuant to § 22.34(b), because this is a procedural protection provided merely for respondents' benefit. EPA agrees that the second sentence of § 22.34(b) appears to require issuance of a complaint in every case. In order to allow the parties to take full advantage of the efficiencies of § 22.13(b) where prefiling negotiations produce a settlement, EPA has amended this provision to specify that a complaint is sufficient to satisfy this notice requirement, but without requiring that a complaint necessarily must be served. The second sentence of § 22.34(b) now reads: "Service of a complaint or a consent agreement and final order pursuant to § 22.13 satisfies this notice requirement."

c. Final Rule. EPA is adopting § 22.34(a) as proposed, and has adopted the proposed § 22.34(b) with the exception of modifying the second sentence to read "Service of a complaint or a consent agreement and final order pursuant to § 22.13 satisfies this notice requirement." EPA has deleted the proposed § 22.34(c), pending adoption of a final rule governing CAA field citations. Any changes necessary to accommodate field citations will be made when the proposed Field Citation rule is finalized.

25. Scope of Subpart I (40 CFR 22.50)

a. Summary of Proposed Rule. Section 22.50 defines the scope of subpart I and its relationship to other provisions of Part 22. The proposed paragraph (a) would restrict the scope of subpart I to adjudicatory proceedings that are initiated by a complaint stating that subpart I shall apply. The proposed paragraph (a) would clarify that subpart I does not apply to any proceeding where the statute requires a hearing subject to section 554 of the Administrative Procedure Act (APA).

Paragraph (b) lists the provisions of subparts A through G which do not apply to subpart I proceedings. Almost all provisions of subparts A through G apply to a subpart I proceeding. Paragraph (b) also addresses the potential for conflicting provisions in the preceding sections of the CROP, providing that where any provisions of subparts A though G conflict with any provision of subpart I, the latter supersedes the former.

The preamble to the proposed rule stated that EPA does not intend to alter its present practice of providing the full APA process in cases pursuant to section 109(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (42 U.S.C. 9609(a)) or section 325(b)(1), (c), and (d) of the Emergency Planning and Community Right-To-Know Act ("EPCRA") (42 U.S.C. 11045(b)(1), (c), and (d)), but invited comment as to the types of CERCLA and EPCRA penalty cases for which non-APA procedures would be appropriate, if the Agency decides in the future to assess EPCRA and CERCLA penalties through non-APA proceedings.

b. Significant comments and EPA response. Most commenters (Dow, CEEC, UWAG, UARG) oppose any proposed expansion of the role of RJOs under subpart I. The preamble to the proposed rule stated that EPA did not expect to use non-APA procedures except in the kinds of cases where they have historically been used for the foreseeable future. As discussed in the response to comments on § 22.4(b), EPA has revised § 22.50(a) to expressly limit the applicability of subpart I to cases under CWA sections 309(g)(2)(A) and 311(b)(6)(B)(i) (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)), and SDWA sections 1414(g)(3)(B) and 1423(c)(42 U.S.C. 300g-3(g)(3)(B) and 300h-2(c)). This change makes clear that the scope of the RJOs' activities will remain much the same as it has been in recent years.

All who commented on the proposed subpart I (CMA/API, Dow, CEEC, UWAG, UARG) expressed concern that it would not protect constitutional due process rights. In particular, CEEC considers such a proposal a "major concern" and submits that subpart I procedures do not meet the due process standard set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Dow, UWAG and UARG believe that there is too great a chance that RJOs would have a pro-Agency bias, and suggest that EPA should eliminate subpart I and apply APA procedures universally. Dow suggests in the alternative that either party should be allowed to opt out of subpart I and have APA procedures applied upon request.

EPA has addressed this due process question in the discussion of public comments on § 22.4(b). Also as noted above in the discussion of § 22.4(b), the Agency has implemented adequate measures to ensure the impartiality of the Regional Judicial Officers. If a litigant has reason to believe that a Regional Judicial Officer is biased, then a motion for disqualification pursuant to § 22.4(d) may be submitted.

As to Dow's suggestion of providing parties the option of having APA procedures apply upon request, Congress has provided for this option only in section 1414(g)(3)(B) of the Safe Drinking Water Act. If APA procedures were provided upon respondent's request in all proceedings brought under subpart I, the regulated community, rather than EPA, would be determining the course of the Agency's enforcement program, and imbalances of Agency resources might result. Nevertheless, the Agency acknowledges that, on occasion, a complainant may not recognize until after a case has been commenced that the subpart I procedures would not be adequate, for example, where intervention, amici, subpoena, or additional discovery appear crucial to the case, or where the issues are such that the proceeding would greatly benefit from the unquestioned independence of an ALJ. In those instances, a complainant may move to withdraw the complaint without prejudice in order that the proceeding be recommenced as an APA proceeding, or either party might move that subpart I should not be applied to the proceeding.

As to paragraph (b), Dow and CEEC suggest deleting the reference to § 22.11 and allowing intervention and amici curiae. This would be inconsistent with the purpose of subpart I, that is to have simpler and more efficient proceedings. To add to subpart I more of the provisions of subparts A through G would frustrate this purpose. If a party believes that intervention or amici curiae would be of crucial importance to a particular case, then as discussed above, it may file a motion requesting withdrawal or dismissal without prejudice to allow refiling under the APA procedures.

c. Final Rule. EPA has revised § 22.50(a) to limit the applicability of subpart I to cases under CWA sections 309(g)(2)(A) and 311(b)(6)(B)(i) (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)), and SDWA sections 1414(g)(3)(B) and 1423(c) (42 U.S.C. 300g-3(g)(3)(B) and 300h-2(c)). EPA adopts § 22.50(b) as proposed, with one correction. The February 25, 1998, FR notice included a typographical error in § 22.50(b). The section number that appeared as "22011" has been corrected to read "22.1."

26. Presiding Officer (40 CFR 22.51)

a. Summary of Proposed Rule. The proposed § 22.51 presents the key modification to the CROP facilitating use of the CROP in administrative adjudications not subject to section 554 of the APA, that the Presiding Officer

need not be an Administrative Law Judge ("ALJ"). Instead, the Presiding Officer in a "non-APA", subpart I proceeding would be a Regional Judicial Officer ("RJO"). Unlike an APA proceeding, where an RJO presides until an answer is filed and the RJO is replaced by an ALJ, in a subpart I proceeding the RJO serves as Presiding Officer until the initial decision has become final or has been appealed.

b. *Significant Comments and EPA Responses.* Several commenters objected to EPA attorneys, rather than ALJs, serving as Presiding Officers in subpart I proceedings. Their objections have been fully addressed in the discussion of public comments on the proposed § 22.4, and are not repeated here.

c. *Final Rule.* EPA has adopted § 22.51 as proposed, but with a minor addition. EPA has observed that while § 22.51 provides that the Presiding Officer "shall rule on all motions until an initial decision has become final or has been appealed", it does not explicitly state that the Presiding Officer will conduct the hearing. As is clear from the preamble to the proposed rule, and from the responses of the commenters, conduct of the hearing is the key element in the Presiding Officer's role in such cases, as it is for ALJ Presiding Officers in APA cases. In order to avoid any future confusion, the final rule includes an explicit statement that: "The Presiding Officer shall conduct the hearing, and rule on all motions * * *"

27. Information Exchange and Discovery (40 CFR 22.52)

a. Summary of Proposed Rule. The proposed § 22.52 would define the parameters of an information exchange in non-APA proceedings. Parties would be subject to the prehearing exchange authorized in § 22.19(a), but most additional discovery would be prohibited under Subpart I. The proposed § 22.52 would require the respondent to provide in its prehearing exchange information concerning any economic benefit it may have enjoyed as a result of the alleged non-compliance or a failure to act.

Although proposed § 22.52 would prohibit most additional discovery that would otherwise be allowed under § 22.19(e), the complainant would be entitled to discovery of information concerning respondent's economic benefit of non-compliance and of financial records probative of respondent's ability to pay a penalty.

b. Significant Comments and EPA Response. CMA/API and CEEC believe that it is unfair to prohibit discovery by private parties but authorize discovery by EPA for penalty information. CMA/API and Dow oppose requiring respondents to provide information on economic benefit in the prehearing exchange because this requirement imposes a burden only upon the respondent. CMA/API argues that the prehearing exchange burdens for each party should be made equivalent, particularly given EPA's far greater information collection powers.

Dow asserts that § 22.52 is unnecessary because § 22.19(d) already provides ways to avoid excessive discovery. Dow argues that § 22.19(d) provides ample authority for the Presiding Officer to protect against excessive or abusive discovery practices. Dow expresses concern that the comparatively less formal procedures of subpart I might be used in very complex cases involving a multitude of separate alleged violations. In such cases, it is likely that additional discovery would be needed and appropriate. Dow urges that EPA abandon the subpart I modifications and apply the standard CROP procedures universally, as this would allow Presiding Officers to tailor the scope of discovery to the needs of each individual case.

While EPA acknowledges that the prehearing exchange requirements and discovery limits of the proposed § 22.52 are asymmetric, EPA disagrees with the contention that they are unfair. The comments suggest that the commenters perceive "fairness" to require that the parties be exact equals subject to the exact same rules. However, the parties are never equals in a CROP proceeding: The complainant alone carries the burden of persuasion, and carries most of the burden of presentation. Yet the statutes generally require penalty assessment to be based in large part on information held by the respondent, not the complainant. The proposed discovery regime redresses this imbalance in knowledge and burden by requiring a respondent to provide such information to the party required to put it forward to the neutral. There is nothing "unfair" about this arrangement. Indeed, it is a logistical necessity.

Being subject to such discovery does not invest in the respondent a reciprocal right to make discovery of the complainant on "fairness" grounds. EPA is not obligated to provide additional discovery in order to satisfy the requirements of the due process clause. *Matthews* v. *Eldridge*, 424 U.S. 319, 344–45 (1976); also see *Chemical Waste Management, Inc.* v. *U.S.E.P.A.*, 873 F.2d 1477 (D.C. Cir. 1989).

Non-APA proceedings are typically for enforcement cases that do not raise significant factual or legal issues. See, e.g., Sen. Rep. 99–50 (99th Cong., 1st. Sess.), reprinted in "A Legislative History of the Water Quality Act of 1987, Congressional Research Service of the Library of Congress (November 1988) at 1448, which states:

> "To serve its intended function, this administrative enforcement tool should be tailored to the less complex cases for which it is intended. Administrative enforcement should be as flexible and unencumbered by procedural complexities as possible, consistent with due process considerations while providing for effective input by citizens who may be affected by the violations. Administrative cases should be resolved promptly * * *. Because administrative penalty assessments will be used in smaller cases and often will be based on discharge monitoring reports routinely submitted by permittees, formal administrative procedures strictly in accordance with the formal adjudicatory procedures of the Administrative Procedures [sic] Act are not required. EPA therefore has the flexibility to streamline its decisionmaking process and procedural rules through promulgation of procedural regulations that provide appropriate due process protection."

Requiring that subpart I provide discovery equal to § 22.19(e) would undermine the objective of subpart I: non-APA proceedings that are more efficient than APA proceedings. See, Superfund Reauthorization: Judicial and Legal Issues, Oversight Hearings before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, 99 Cong. 1st Sess. 64 (1985)(statement of F. Henry Habicht II, Assistant Attorney General, Land and Resources Division)(EPA objected to requiring APA procedures for imposition of administrative penalties under CERCLA, stating that such procedures were too lengthy and laborious). Section 22.52 accounts for most of the streamlining in these non-APA procedures relative to the APA procedures. If the same procedures apply to subpart I proceedings as apply to APA proceedings, the only differences remaining are the qualifications and independence of the adjudicator and the absence of the right to interlocutory appeal. Congress intended that the non-APA process provide faster, simpler, less costly and more efficient administrative proceedings, not just an additional corps of adjudicators.

The types of cases that are to be brought under the non-APA provisions are typically factually simple. Expanding discovery in subpart I would raise costs to the litigants and invite

000047

delaying motions and fishing expeditions. The inquiry should be centered on the conduct of the respondent and any penalty assessment factors. Allowing additional discovery of EPA beyond the prehearing exchange would not serve those goals, but would raise the complexity and cost of proceedings that Congress intended to be as unencumbered as possible.

c. Final Rule. EPA adopts § 22.52 as proposed. EPA notes that this section does not affect the authority of the Presiding Order to require the attendance of witnesses by subpoena, if authorized by the Act, in accordance with § 22.4(c).

28. Interlocutory Orders or Rulings (40 CFR 22.53)

a. Summary of Proposed Rule. The proposed § 22.53 stated that, for proceedings subject to subpart I, "[i]nterlocutory review as set forth in § 22.29 is prohibited."

b. Significant Comments and EPA Response. Dow argues that the prohibition on interlocutory appeals in subpart I proceedings is unnecessary, because § 22.29 already imposes substantial limits on interlocutory appeals. Dow believes that interlocutory appeal is warranted in any case where the criteria of § 22.29(b) are met (i.e., "(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 an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.")

EPA intends to use subpart I primarily for cases where EPA has substantial prior enforcement experience, which do not appear to present significant new issues of law, and where the sanctions sought are relatively modest. In these circumstances, meritless appeals are likely to greatly exceed meritorious appeals. Because the likely advantages of interlocutory appeal are outweighed by the anticipated delays that would result from meritless appeals, the final rule retains the prohibition on interlocutory appeal in subpart I cases.

c. Final Rule. In today's final rule, EPA adopts the proposed prohibition on interlocutory appeals in subpart I cases. However, EPA has concluded that the proposed § 22.53 is redundant, because § 22.50(b) states that § 22.29, which provides for interlocutory appeals, does not apply to subpart I proceedings. Although the proposed § 22.53 highlighted this provision for purposes of soliciting public comment, EPA has concluded that this redundancy is inappropriate in the final rule. Accordingly, EPA has deleted the proposed § 22.53. The prohibition against interlocutory appeals in subpart I cases is accomplished through § 22.50(b)'s exclusion of § 22.29.

29. Clean Air Act Field Citations

a. Summary of Proposed Rule. EPA proposed that revisions to the CROP would supersede and replace the rules governing non-APA hearings on field citations under section 113(d)(3) of the Clean Air Act ("CAA"). The Field Citation rules were proposed (59 FR 22776, May 3, 1994) but not yet final at the time EPA proposed the CROP revisions, and EPA expected that the Field Citation rules would be published as a final rule before the CROP revisions. The preamble to the proposed CROP stated that EPA intended to use the procedures that would appear as subpart B of the Field Citation rules until the CROP revisions were made final.

b. Significant Comments and EPA Response. CMA/API, Dow and CEEC opposed the interim use of the procedures in subpart B of the Field Citation rules pending publication of the final CROP. These commenters urged EPA to postpone publication of the Field Citation rules until after publication of the final CROP procedures

EPA agrees that commencing a field citation program using one set of procedures for a short time before switching to the CROP procedures could result in unnecessary burdens and confusion. EPA has postponed issuing a final rule governing hearing procedures for CAA field citations.

c. Final Rule. Today's final rule does not contain the provisions in the proposed rule relating to the removal from the CFR of procedures for CAA field citations. A decision on appropriate hearing procedures for field citations, inclusion in subpart I of the CROP, will be made when the Field Citation rules are finalized.

30. Other Comments Not Related to a Particular Section of the Proposed Rule

a. Significant Comments and EPA Response. CEEC suggests that the CROP should provide respondents an opportunity to review enforcement related press releases and raise objections to the Presiding Officer. CEEC notes that unfair and misleading press releases reduce incentives to reach settlement. EPA makes every effort to assure that press releases are accurate, based on the information available to the Agency at the time. A complainant may, at its discretion, allow a respondent to review a press release before issuance, but EPA does not negotiate the terms of enforcement related press releases. To include in the CROP a provision providing respondents the right to review EPA's press releases and raise objections to the Presiding Officer would create the appearance that the government's ability to communicate with the public is subject to a private party's control. EPA therefore rejects this suggestion.

b. Final Rule. EPA has made no changes to the proposed rule in response to CEEC's suggestion that the CROP should provide respondents an opportunity to review enforcement related press releases and raise objections to the Presiding Officer.

III. Miscellaneous Revisions

Through the process of analyzing the public comments, and pursuant to EPA's own internal review of the proposed rule, EPA has identified a number of typographical and drafting errors. In addition, EPA has identified parts of the proposed rule that could be stated more clearly, as mandated by Executive Order 12866 (September 30, 1993) and the President's memorandum of June 1, 1998, which require each agency to write all rules in plain language. In this final rule EPA adopts a number of changes on its own initiative, and not in response to any particular public comment. Where such revisions pertain to a section of the proposed rule that received significant public comment, the changes have already been discussed above. This section identifies the remaining revisions, which pertain to sections of the proposed rule that received no significant public comment. Public notice of proposed rule making is not required "when the agency for good cause finds * * * that notice and public procedure thereon are impractical, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(3)(B). EPA has determined that the following revisions do not significantly affect respondents' substantive or procedural rights. Accordingly, EPA has determined that providing an additional round of public notice before making these minor changes to this procedural rule would be unnecessary and contrary to the public interest.

A. Section Numbering

EPA has converted those section numbers that had contained a preceding zero (§§ 22.01, 22.02, etc.) to conform the CROP to the standard numbering of the Code of Federal Regulations set out in the regulations of the Administrative

Committee of the Federal Register at CFR 21.11 (§§ 22.1, 22.2, etc.) in this final rule. For simplicity, this preamble uses the new numbering system throughout, even when referring to sections of the proposed rule or the 1980 CROP.

B. Definitions (40 CFR 22.3)

EPA has deleted from the definition of "Administrative Law Judge" the superfluous Public Law citation.

EPA has revised the definition of "Clerk of the Board" to clarify that it means the Clerk of the Environmental Appeals Board.

In the definition of "Complainant", EPA has replaced the ambiguous word "decision" with "adjudication".

Under the proposed § 22.3, "Hearing means a hearing on the record open to the public and conducted under these Consolidated Rules of Practice." It is not clear from this definition whether the hearing is the proceeding as a whole, or just the oral evidentiary hearing. "Hearing" is used throughout the CROP, most often in reference to the oral evidentiary hearing (e.g., prehearing exchange, motion to reopen a hearing), and sometimes in the more general sense (e.g., in the definition of "party" and "Hearing Clerk"). Moreover, the definition of hearing does not acknowledge the fact that protection of confidential business information may require that all or part of a hearing be closed to the public. EPA has clarified the definition of "hearing" as follows:

> *Hearing* means an evidentiary hearing on the record, open to the public (to the extent consistent with § 22.22(a)(2)), conducted as part of a proceeding under these Consolidated Rules of Practice.

Although the terms "proceeding" and "action" are used throughout the CROP, they have not previously been defined. In the final rule, EPA avoids the term "action" in reference to a particular proceeding, and has added to the CROP the following definition:

> *Proceeding* means the entirety of a single administrative adjudication, from the filing of the complaint through the issuance of a final order, including any action on a motion to reconsider under § 22.32.

For consistency with these new definitions of "hearing" and "proceeding", EPA has substituted "proceeding" for "hearing" in the definition of "party."

EPA has simplified the definition of "Initial Decision" by deleting the superfluous phrase "based on the record of the proceedings out of which it arises."

EPA has converted the definition of "permit" into a definition of a new term "Permit Action." By its nature, the CROP provides a set of common procedures applicable to various administrative proceedings under a large number of regulatory statutes, each of which have their own specific terminology. In order to avoid conflict between terms used differently in different regulatory programs, EPA has adopted the new term "Permit Action" as a generic term applicable solely within the CROP. This change allows EPA to replace the unwieldy "permit revocation, termination or suspension" language elsewhere in the CROP with "Permit Action," improving the clarity of the CROP and facilitating any future efforts to bring other permit actions within the scope of the CROP.

EPA has deleted from this definition the references to permits issued under section 402(a) of the Clean Water Act (33 U.S.C. 1342(a)) and permits issued under sections 3005(d) and 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and 6928(h)). EPA anticipates that these references will be restored when the Round Two permit streamlining rule (61 FR 65,268) is finalized, involving revocation of 40 CFR part 124, subpart E. In addition, EPA has added a parallel citation to the U.S. Code.

EPA has made two revisions to the definition of "Regional Hearing Clerk." First, EPA has added a clause to the first sentence, specifying that the Regional Hearing Clerk "shall be neutral in every proceeding." Second, EPA has revised the second sentence, which in the proposed rule states that "Correspondence may be addressed to the Regional Hearing Clerk, U.S. Environmental Protection Agency (address of Regional Office—see Appendix A)." EPA has created a new § 22.14(a)(7) which requires that the complaint contain the address of the Regional Hearing Clerk, which should provide more effective and more specific notice than the reference to Appendix A contained in the definition of Regional Hearing Clerk. EPA has therefore revised this sentence as follows: "Correspondence with the Regional Hearing Clerk shall be addressed to the Regional Hearing Clerk at the address specified in the complaint."

EPA has revised the definition of "Respondent" for clarity, replacing "any person proceeded against in the complaint" with "any person against whom the complaint states a claim for relief."

C. Filing and Service of Rulings, Orders and Decisions (40 CFR 22.6)

The proposed revisions to § 22.6 were intended to delete certain references as surplusage and to allow documents issued by adjudicators to be served by any reliable commercial delivery service. The proposed deletions, however, are inconsistent with the current practice that copies of all rulings, orders and decisions (except initial decisions) issued by an Administrative Law Judge are served on all parties by the Administrative Law Judge's legal staff assistant. Copies of all initial decisions are served on the parties by the Regional Hearing Clerk. Section 22.6 is amended to be consistent with this practice.

As noted in the response to comments on § 22.5(b)(2), the U.S. Postal Service considers overnight express and priority mail to be forms of first class mail. In addition, the proposed rule makes no mention of EPA's internal mail system. EPA's internal mail delivery system has proven to be generally effective, and it is in fact ultimately responsible for delivering first class mail (including certified mail) to individual EPA personnel. To address these points, EPA has revised § 22.6 to allow service "by first class mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), by EPA's internal mail, or by any reliable commercial delivery service."

EPA has also replaced the expression "Clerk of the Environmental Appeals Board" with "Clerk of the Board," using the term defined at § 22.3(a) for consistency.

D. Examination of Documents Filed (40 CFR 22.9)

EPA has replaced the term "Environmental Appeals Board" with "Clerk of the Board," to specify the official document custodian.

E. Consolidation and Severance (40 CFR 22.12)

EPA has added "or the Environmental Appeals Board" to § 22.12(a) and (b), in order to clarify that the EAB has authority to consolidate or sever cases. This authority applies to cases pending before the EAB and to cases before a Presiding Officer through interlocutory appeal of a denial of a motion to consolidate or sever. In order to keep subpart I proceedings expeditious, EPA has also added a new requirement that subpart I proceedings may be consolidated only where all parties agree. This should eliminate the risk of litigation delays over whether one proceeding might be consolidated with another.

F. Motions (40 CFR 22.16)

EPA is adopting § 22.16 as proposed, except that a reference to § 22.51 has been added to § 22.16(c) in order to avoid any apparent conflict between § 22.16(c) and § 22.51, and the implication that an ALJ must rule on motions in proceedings under subpart I. EPA has also rearranged the sentences of § 22.16(a) to improve clarity. To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.16(b) to state the time allowed for responses and replies with the numerals "15" and "10", respectively.

G. Record of the Prehearing Conference (40 CFR 22.19(c))

The scope of the requirement that the Presiding Officer prepare and file "for the record a written summary of the action taken" at a prehearing conference is not clear. Just as a transcript of a prehearing conference may discourage frank and open discussion, the implication that the Presiding Officer may produce a formal summary of the conference may also reduce the effectiveness of such conferences. Moreover, the CROP is not clear whether the Presiding Officer's summary is supposed to constitute a finding of law or fact, nor is it clear whether the parties have the right to object and change the summary. EPA has revised the last two sentences in order to clarify that the Presiding Officer is only responsible for ensuring that the record of the proceeding includes any stipulations and agreements reached, and rulings and orders issued, during the conference.

H. Accelerated Decision; Decision to Dismiss (40 CFR 22.20)

Section 22.20(b)(2) provides for accelerated decisions and decisions to dismiss some but not all issues or claims in a proceeding. The last sentence requires that the Presiding Officer "shall issue an interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed." This sentence is somewhat ambiguous, in that it might be construed as requiring an interlocutory order separate from, and in addition to, any partial accelerated decision or decision to dismiss certain counts. Such an interpretation would be unwarranted, would unnecessarily complicate the CROP, and would be contrary to the customary practice of the Agency's ALJs. Rule 56(d) of the Federal Rules of Civil Procedure, from which this language is derived, does not require a separate interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed. To clarify that a single decision or order can accomplish all the requirements of § 22.20(b)(2), EPA has amended the last sentence of that paragraph to state that: "The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed."

I. Assignment of Presiding Officer; Scheduling a Hearing (40 CFR 22.21)

EPA has amended § 22.21(a) to clarify that the Regional Hearing Clerk forwards copies, not originals, of the complaint, answer, and other documents in the record to the Chief Administrative Law Judge upon receipt of the answer.

According to § 22.20(a), an accelerated decision is appropriate "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." Where this standard is not met, a hearing is appropriate. EPA has revised § 22.21(b) to use the same criterion as § 22.20(a): The first sentence of § 22.21(b) now states that, "The Presiding Officer shall hold a hearing if the proceeding presents genuine issues of material fact." In addition to making § 22.20 and § 22.21 more clearly complementary, this change clarifies that the mere request for a hearing does not require that a hearing be held. Neither § 22.21(b) nor § 22.15(c) of the 1980 CROP required an oral evidentiary hearing merely upon respondent's request for a hearing. See, e.g., In re Green Thumb Nursery, Inc., 6 E.A.D. 782 (EAB 1997) (holding that there is no right to an oral evidentiary hearing).

EPA has also expanded the notice period before a hearing from 20 to 30 days. This will allow the parties, their attorneys, and witnesses additional time to make travel arrangements and to prepare for the hearing.

As noted in the discussion of § 22.19(e), EPA has added to § 22.21(b) an explicit statement of the Presiding Officer's authority (where provided by the Act) to require the attendance of witnesses or the production of documentary evidence by subpoena. This statement includes criteria for issuing subpoenas that appeared in the 1980 CROP (see, e.g., § 22.37(f)(1).

J. Offers of Proof (40 CFR 22.23(b))

The proposed § 22.23(b) provides for offers of proof regarding "evidence * * * excluded from the record." Although the Presiding Officer may decline to admit certain documents, exhibits or testimony into evidence, and may refuse to consider them in his or her decision, it is incorrect to describe the status of such documents as "excluded from the record." This information is indisputably part of "the record" of the proceeding for purposes of appellate review. Accordingly, EPA has revised this paragraph to state that "Whenever the Presiding Officer denies a motion for admission into evidence, the party offering the information may make an offer of proof * * *." For purposes of clarity, EPA has revised this paragraph (b) using the word "information" in place of "evidence" where the subject is information which has not been admitted into evidence.

K. Proposed Findings, Conclusions, and Order (40 CFR 22.26)

Section 22.26 provides that the Presiding Officer must allow 20 days after receipt of notice of the availability of the transcript before requiring the parties to file proposed findings of fact, conclusions of law, and a proposed order. In the response to public comments on § 22.25 above, EPA announced that it would amend that section to allow motions to conform the transcript to the actual testimony to be filed "within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is less." EPA has amended § 22.26 in order to assure that parties need not file proposed findings of fact, conclusions of law, and the proposed order before the last date for filing motions to conform the transcript to the actual testimony pursuant to § 22.26. For additional clarity, EPA has reorganized this section and has also substituted the word "filed" for the undefined term "submitted."

After the hearing, any party may file proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a schedule for filing these documents and any reply briefs, but shall not require them before the last date for filing motions under § 22.25 to conform the transcript to the actual testimony. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

L. Motion to Reopen a Hearing (40 CFR 22.28)

The CROP does not specify when a motion is "made", so in the interest of clarity, EPA has substituted the word "filed" for "made" in the first sentence of § 22.28(a). To conform to the

000050

preferred style of the U.S. Government Printing Office, EPA has revised § 22.28(a) and (b) to state the time periods associated with a motion to reopen a hearing with numerals only.

M. Interlocutory Appeals (40 CFR 22.29)

EPA has corrected a typographical error in the last sentence of the proposed § 22.29(a) "forward the order or ruling to the Environmental Appeals Board * * *." EPA has corrected a typographical error in the proposed § 22.29(b) by replacing the semicolon that follows "proceeding" with a comma. EPA has also changed the title of paragraph (c) from "Decision" to "Interlocutory review." The CROP does not specify when a motion is "made", so in the interest of clarity, EPA has substituted the word "filed" for "made" in the last sentence of § 22.29(c). To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.29 to state all time periods with numerals only.

N. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act (40 CFR 22.35)

As discussed below, EPA has deleted Appendix A. In § 22.35(b), EPA has replaced the reference to Appendix A with a reference to 40 CFR 1.7, which contains the same EPA offices.

O. Supplemental Rules of Practice Governing the Administrative Assessment of Civil Penalties Under the Clean Water Act (40 CFR 22.38)

EPA has revised § 22.38(b) to provide notice to State agencies in proceedings commenced without a complaint, pursuant to § 22.13(b). For ease of administration, EPA has made the timing of such notice consistent with the public notice requirements of § 22.45(b)(1). Where § 22.38(c) refers to section 509(b)(1) of the CWA, EPA has added a parallel citation to 33 U.S.C. 1369(b)(1). As discussed above, EPA deleted from the proposed § 22.31(c) the requirement specifying to whom payment of penalties must be made, in favor of the more flexible requirement that complainant direct respondent as to how payment should be made. In view of this change to § 22.31(c), the proposed § 22.38(d) is unnecessary and has been deleted.

P. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under CERCLA Section 109 (40 CFR 22.39)

The proposed § 22.39(b) says petitions for judicial review must be filed "within 30 days of the date the order making the assessment was issued." As the CROP does not specify when an order is "issued," EPA has amended this provision to state that petitions for judicial review must be filed within 30 days after the order has been served on the parties. Where § 22.39(b) refers to CERCLA section 109, EPA has specified the relevant paragraphs and has added parallel citations to the U.S. Code.

EPA has deleted from § 22.39 a superfluous quotation mark that appeared in the proposed rule.

Q. Supplemental Rules Governing The Administrative Assessment of Civil Penalties for Violations of Compliance Orders Issued to Owners or Operators of Public Water Systems Under Part B of the Safe Drinking Water Act (40 CFR 22.42)

EPA has revised the title of this section to explicitly state that it applies to cases against owners or operators of public water systems.

Where § 22.42(a) refers to section 1414(g)(3)(B) of the SDWA, EPA has added a parallel citation to 42 U.S.C. § 300g-3(g)(3)(B).

EPA has also revised § 22.42(b) to provide more certain notice to respondents in subpart I proceedings of their right to choose that hearings be conducted in accordance with section 554 of the APA. Paragraph (b) now requires that the complaint must include notice of such right to choose, and notice that the right is waived if respondent does not indicate such choice in its answer. EPA has also revised the final sentence to require that the hearing clerk notify the parties of any changes if the pleadings have been recaptioned.

R. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Against a Federal Agency Under the Safe Drinking Water Act (40 CFR 22.43)

Where § 22.43(a) refers to section 1447(b) of the SDWA, EPA has added a parallel citation to 42 U.S.C. § 300j-6(b). To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.43(b) and (c)(6) to state time periods with the numeral "30".

In paragraph (c)(6), EPA has added a missing comma after the word "may", and has clarified the reference to 40 CFR part 135. The proposed rule required that the public notice include reference to the requirements of 40 CFR 135. EPA has expanded this clause to state that the public notice shall instruct prospective appellants to provide copies of any appeal to the persons described in 40 CFR 135.11(a).

S. Supplemental Rules Governing the Termination of Permits Under Section 402(a) of the Clean Water Act or Under Section 3005(d) of the Resource Conservation and Recovery Act (40 CFR 22.44)

In the December 11, 1996, "Round Two" permit streamlining proposed rule, EPA proposed to remove the procedures existing in 40 CFR part 124, subpart E, for proceedings to revoke or suspend a permit issued under section 402(a) of the Clean Water Act (33 U.S.C. 1342(a)) or to revoke or suspend a permit under sections 3005(d) and 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and 6928(h)). See 61 FR 65,268 (December 11, 1996). EPA proposed that such proceedings would be conducted pursuant to the CROP procedures, and proposed CROP revisions to accomplish this. These changes were incorporated into the February 25, 1998, proposed CROP revisions. As EPA has not yet finalized the Round Two permit streamlining rule and 40 CFR part 124, subpart E remains in effect, EPA has removed and reserved § 22.44. EPA anticipates that this section will be restored when the Round Two permit streamlining rule is finalized.

T. Supplemental Rules Governing Public Notice and Comment in Proceedings Under Section 309(g) of the Clean Water Act and Section 300h-2(c) of the Safe Drinking Water Act (40 CFR 22.45)

The proposed § 22.45 contains several minor errors. The paragraph number "(1)" was omitted from § 22.45(b), and the reference to "paragraph (d)(1) of this section" in § 22.45(c)(3) should instead refer to section (c)(1). EPA has corrected these typographical errors in today's final rule. EPA has revised the heading of this section to refer to "section 1423(c)" of the SDWA, rather than "section 300h-2(c)," which is the U.S. Code section number.

In addition to correcting the above-mentioned errors, EPA has expanded the scope of § 22.45 so that these public comment procedures shall apply to class II civil penalty cases under the oil pollution provisions of Section 311(b)(6)(B)(ii) of the Clean Water Act (33 U.S.C. 1321(b)(6)(B)(ii)). Section 311(b)(6)(C)(i) (33 U.S.C. 1321(b)(6)(C)(i)) requires that EPA provide public notice of and reasonable opportunity to comment on the proposed issuance of a class II civil penalty order.

EPA has also revised paragraphs (b)(1), (b)(2)(i), (c)(1) and (c)(3) to better accommodate cases commenced through the filing of a consent

agreement and final order pursuant to § 22.13(b).

EPA has revised paragraphs (b)(1) and (c)(1) to clarify when the public comment period begins and ends.

EPA has revised § 22.45(b)(2)(ii) and (v) to clarify that comments must be submitted to the Regional Hearing Clerk.

EPA has replaced the undefined word "action" in paragraphs (b)(2)(ii), (c)(1)(i), (c)(4)(v)(C), (c)(4)(vii) and (c)(4)(viii), with the word "proceeding," which today's rule defines as discussed above.

In § 22.45(b)(2)(iv), EPA has added the word "and" after the semi-colon.

EPA has edited § 22.45(c)(1)(iii) and (iv) to refer to commenters in the singular, for consistency with the other provisions of § 22.45.

EPA has also revised § 22.45(c)(4)(ii) to more clearly and succinctly state that a commenter may petition to set aside a consent agreement and proposed final order only on the basis that material evidence was not considered.

EPA has edited the proposed § 22.45(c)(4)(vii) to correct deficiencies in grammar.

U. Appendices

The information in Appendix A of the proposed CROP ("Appendix" in the 1980 CROP) is redundant with 40 CFR 1.7. For that reason, EPA has deleted Appendix A. This deletion should have no substantive effect. Section 22.5(c)(4) requires that the complaint include complainant's address, and the revised § 22.14(a)(7) requires that the complaint contain the address of the Regional Hearing Clerk, so respondents will have ample notice of the addresses relevant to their cases.

EPA has observed that the names and addresses of the lock box banks change often, and that it would be difficult to keep the proposed Appendix B up to date. EPA has decided to delete the proposed Appendix B, and instead to require under § 22.14(a)(8) that the complaint provide information on how to pay penalties.

IV. Administrative Requirements

A. The Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, whenever an agency is required to publish a general notice of rule making for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the impact of the rule on small entities, *i.e.*, small business, small organizations, and small governmental jurisdictions. The analysis is not required, however, where the Administrator certifies that the rule will not have a significant economic impact on a substantial number of small entities.

This regulation will impose no significant costs on any small entities, because it creates no new regulatory requirements, but instead simplifies existing procedural rules. The overall economic impact on small entities is therefore believed to be nominal, if any at all. Accordingly, I hereby certify that this final regulation will not have a significant impact on a substantial number of small entities.

B. Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

C. Paperwork Reduction Act

This rule contains no information collection activities and, therefore, no information collection request ("ICR") will be submitted to the Office of Management and Budget for review in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 ("UMRA"), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When a written statement is needed for an EPA rule, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, giving them meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising them on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. The rule imposes no enforceable duties on any of these governmental entities or the private sector.

E. Executive Order 12875

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to

develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input to the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on State, local or tribal governments. This rule does not impose any enforceable duties on these entities. Instead, it merely revises the procedural rules governing EPA's administrative enforcement proceedings.

F. Executive Order 13045

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the E.O. 13045 because it is not "economically significant" as defined in E.O. 12866, and because it does not involve decisions based on environmental health or safety risks.

G. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

H. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA requires EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

I. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 22

Environment protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Hazardous waste, Penalties, Pesticides and pests, Poison prevention, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Dated: June 30, 1999.

Carol M. Browner,

Administrator.

Therefore, 40 CFR part 22 is revised to read as follows:

PART 22—COSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

Sec.
22.1 Scope of this part.
22.2 Use of number and gender.
22.3 Definitions.
22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.
22.5 Filing, service, and form of all filed documents; business confidentiality claims.
22.6 Filing and service of rulings, orders and decisions.
22.7 Computation and extension of time.
22.8 Ex parte discussion of proceeding.
22.9 Examination of documents filed.

Subpart B—Parties and Appearances

22.10 Appearances.
22.11 Intervention and non-party briefs.
22.12 Consolidation and severance.

Subpart C—Prehearing Procedures

22.13 Commencement of a proceeding.
22.14 Complaint.
22.15 Answer to the complaint.
22.16 Motions.
22.17 Default.
22.18 Quick resolution; settlement; alternative dispute resolution.
22.19 Prehearing information exchange; prehearing conference; other discovery.
22.20 Accelerated decision; decision to dismiss.

Subpart D—Hearing Procedures

22.21 Assignment of Presiding Officer; scheduling the hearing.
22.22 Evidence.
22.23 Objections and offers of proof.
22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.
22.25 Filing the transcript.
22.26 Proposed findings, conclusions, and order.

Subpart E—Initial Decision and Motion to Reopen a Hearing

22.27 Initial decision.
22.28 Motion to reopen a hearing.

Subpart F—Appeals and Administrative Review

22.29 Appeal from or review of interlocutory orders or rulings.
22.30 Appeal from or review of initial decision.

Subpart G—Final Order

22.31 Final order.
22.32 Motion to reconsider a final order.

Subpart H—Supplemental Rules

22.33 [Reserved]
22.34 Supplemental rules governing the administrative assessment of civil penalties under the Clean Air Act.
22.35 Supplemental rules governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.
22.36 [Reserved]
22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.
22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.
22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.
22.40 [Reserved]
22.41 Supplemental rules governing the administrative assessment of civil penalties under Title II of the Toxic Substance Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).
22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.
22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.
22.44 [Reserved]
22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.
22.46–22.49 [Reserved]

Subpart I—Administrative Proceedings Not Governed by Section 554 of the Administrative Procedure Act

22.50 Scope of this subpart.
22.51 Presiding Officer.
22.52 Information exchange and discovery.

Authority: 7 U.S.C. 136*l*; 15 U.S.C. 2610(c), 2615(a) and 2647; 33 U.S.C. 1319(g), 1321(b)(6), 1342(a), 1415(a) and (f) and 1418; 42 U.S.C. 300g-3(g)(3)(B), 300h-2(c), 300j-6(a), 6912, 6925, 6928, 6945(c)(2), 6961, 6991b, 6991e, 7413(d), 7524(c), 7545(d), 7547(d), 7601, 7607(a), 9609, 11045, and 14304.

Subpart A—General

§ 22.1 Scope of this part.

(a) These Consolidated Rules of Practice govern all administrative adjudicatory proceedings for:

(1) The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136*l*(a));

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

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

(4)(i) The issuance of a compliance order pursuant to section 3008(a), section 4005(c)(2), section 6001(b), or section 9006(a) of the Solid Waste Disposal Act ("SWDA") (42 U.S.C. 6925(d) & (e), 6928(a), 6945(c)(2), 6961(b), or 6991e(a)); or the assessment of any administrative civil penalty under sections 3008, 4005(c)(2), 6001(b), and 9006 of the SWDA (42 U.S.C. 6928, 6945(c)(2), 6961(b), and 6991e), except as provided in 40 CFR parts 24 and 124.

(ii) The issuance of corrective action orders under section 3008(h) of the SWDA only when such orders are contained within an administrative order which:

(A) Includes claims under section 3008(a) of the SWDA; or

(B) Includes a suspension or revocation of authorization to operate under section 3005(e) of the SWDA; or

(C) Seeks penalties under section 3008(h)(2) of the SWDA for non-compliance with a order issued pursuant to section 3008(h).

(iii) The issuance of corrective action orders under section 9003(h)(4) of the SWDA only when such orders are contained within administrative orders which include claims under section 9006 of the SWDA;

(5) The assessment of any administrative civil penalty under sections 16(a) and 207 of the Toxic Substances Control Act (15 U.S.C. 2615(a) and 2647);

(6) The assessment of any administrative civil penalty under sections 309(g) and 311(b)(6) of the Clean Water Act (33 U.S.C. 1319(g) and 1321(b)(6));

(7) The assessment of any administrative civil 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 civil 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 administrative civil penalty under sections 1414(g)(3)(B), 1423(c), and 1447(b) of the Safe Drinking Water Act as amended (42 U.S.C. 300g-3(g)(3)(B), 300h-2(c), and 300j-6(b)), or the issuance of any order requiring both compliance and the assessment of an administrative civil penalty under section 1423(c);

(10) The assessment of any administrative civil penalty or the issuance of any order requiring compliance under Section 5 of the Mercury-Containing and Rechargeable Battery Management Act (42 U.S.C. 14304).

(b) The supplemental rules set forth in subparts H and I of this part establish special procedures for proceedings identified in paragraph (a) of this section where the Act allows or requires procedures different from the procedures in subparts A through G of this part. Where inconsistencies exist between subparts A through G of this part and subpart H or I of this part, subparts H or I of this part shall apply.

(c) Questions arising at any stage of the proceeding which are not addressed in these Consolidated Rules of Practice shall be resolved at the discretion of the Administrator, Environmental Appeals Board, Regional Administrator, or Presiding Officer, as provided for in these Consolidated Rules of Practice.

§ 22.2 Use of number and gender.

As used in these Consolidated 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.

§ 22.3 Definitions.

(a) The following definitions apply to these Consolidated Rules of Practice:

Act means the particular statute authorizing the proceeding at issue.

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105.

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

Agency means the United States Environmental Protection Agency.

Business confidentiality claim means a confidentiality claim as defined in 40 CFR 2.201(h).

Clerk of the Board means the Clerk of the Environmental Appeals Board, Mail Code 1103B, U.S. Environmental Protection Agency, 401 M St. S.W., Washington, DC 20460.

Commenter means any person (other than a party) or representative of such person who timely

000054

(1) Submits in writing to the Regional Hearing Clerk that he is providing or intends to provide comments on the proposed assessment of a penalty pursuant to sections 309(g)(4) and 311(b)(6)(C) of the Clean Water Act or section 1423(c) of the Safe Drinking Water Act, whichever applies, and intends to participate in the proceeding; and

(2) Provides the Regional Hearing Clerk with a return address.

Complainant means any person authorized to issue a complaint in accordance with §§ 22.13 and 22.14 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 adjudication.

Consolidated Rules of Practice means the regulations in this part.

Environmental Appeals Board means the Board within the Agency described in 40 CFR 1.25.

Final order means:

(1) An order issued by the Environmental Appeals Board or the Administrator after an appeal of an initial decision, accelerated decision, decision to dismiss, or default order, disposing of the matter in controversy between the parties;

(2) An initial decision which becomes a final order under § 22.27(c); or

(3) A final order issued in accordance with § 22.18.

Hearing means an evidentiary hearing on the record, open to the public (to the extent consistent with § 22.22(a)(2)), conducted as part of a proceeding under these Consolidated Rules of Practice.

Hearing Clerk means the Hearing Clerk, Mail Code 1900, U.S. Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

Initial decision means the decision issued by the Presiding Officer pursuant to §§ 22.17(c), 22.20(b) or 22.27 resolving all outstanding issues in the proceeding.

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

Permit Action means the revocation, suspension or termination of all or part of a permit issued under section 102 of the Marine Protection, Research and Sanctuaries Act (33 U.S.C. 1412).

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 an individual who presides in an administrative adjudication until an initial decision becomes final or is appealed. The Presiding Officer shall be an Administrative Law Judge, except where §§ 22.4(b), 22.16(c) or 22.51 allow a Regional Judicial Officer to serve as Presiding Officer.

Proceeding means the entirety of a single administrative adjudication, from the filing of the complaint through the issuance of a final order, including any action on a motion to reconsider under § 22.32.

Regional Administrator means, for a case initiated in an EPA Regional Office, the Regional Administrator for that Region or any officer or employee thereof to whom his authority is duly delegated.

Regional Hearing Clerk means an individual duly authorized to serve as hearing clerk for a given region, who shall be neutral in every proceeding. Correspondence with the Regional Hearing Clerk shall be addressed to the Regional Hearing Clerk at the address specified in the complaint. For a case initiated at EPA Headquarters, the term Regional Hearing Clerk means the Hearing Clerk.

Regional Judicial Officer means a person designated by the Regional Administrator under § 22.4(b).

Respondent means any person against whom the complaint states a claim for relief.

(b) Terms defined in the Act and not defined in these Consolidated Rules of Practice are used consistent with the meanings given in the Act.

§ 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.

(a) *Environmental Appeals Board.* (1) The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice; acts as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters; and approves settlement of proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters. The Environmental Appeals Board may refer any case or motion to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and references to the Environmental Appeals Board in these Consolidated Rules of Practice 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 § 22.8. Motions directed to the Administrator shall not be considered except for motions for disqualification pursuant to paragraph (d) of this section, or motions filed in matters that the Environmental Appeals Board has referred to the Administrator.

(2) In exercising its duties and responsibilities under these Consolidated Rules of Practice, the Environmental Appeals Board may do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding, including imposing procedural sanctions against a party who without adequate justification fails or refuses to comply with these Consolidated Rules of Practice or with an order of the Environmental Appeals Board. Such sanctions may include drawing adverse inferences against a party, striking a party's pleadings or other submissions from the record, and denying any or all relief sought by the party in the proceeding.

(b) *Regional Judicial Officer.* Each Regional Administrator shall delegate to one or more Regional Judicial Officers authority to act as Presiding Officer in proceedings under subpart I of this part, and to act as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice to which subpart I of this part does not apply. The Regional Administrator may also delegate to one or more Regional Judicial Officers the authority to approve settlement of proceedings pursuant to § 22.18(b)(3). These delegations will not prevent a Regional Judicial Officer from referring any motion or case to the Regional Administrator. A Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or another Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as a Regional Judicial Officer. A Regional Judicial Officer shall not knowingly preside over a case involving any party concerning whom the

Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. A Regional Judicial Officer shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel.

(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 may:

(1) Conduct administrative hearings under these Consolidated Rules of Practice;

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

(3) Administer oaths and affirmations and take affidavits;

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

(5) Order a party, or an officer or agent thereof, to produce testimony, documents, or other non-privileged 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 Consolidated Rules of Practice.

(d) *Disqualification, withdrawal and reassignment.* (1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may not perform functions provided for in these Consolidated Rules of Practice regarding any matter in which they have a financial interest or 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 to the Administrator, Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer or the Administrative Law Judge request that he or she disqualify himself or herself from the proceeding. If such a motion to disqualify the Regional Administrator, Regional Judicial Officer or Administrative Law Judge is denied, a party may appeal that ruling to the Environmental Appeals Board. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator. There shall be no interlocutory appeal of the ruling on a motion for disqualification. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason.

(2) If the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Administrative Law Judge 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 as a replacement. The Administrator shall assign a replacement for a Regional Administrator who withdraws or is disqualified. Should the Administrator withdraw or be disqualified, the Regional Administrator from the Region where the case originated shall replace the Administrator. 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 Regional Judicial Officer if the original Regional Judicial Officer withdraws or is disqualified. The Chief Administrative Law Judge shall assign a new Administrative Law Judge if the original Administrative Law Judge withdraws or is disqualified.

(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.

§ 22.5 Filing, service, and form of all filed documents; business confidentiality claims.

(a) *Filing of documents.* (1) The original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer, or filed with the Clerk of the Board when the proceeding is before the Environmental Appeals Board. A document is filed when it is received by the appropriate Clerk. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic filing, subject to any appropriate conditions and limitations.

(2) When the Presiding Officer corresponds directly with the parties, the original of the correspondence shall be filed with the Regional Hearing Clerk. Parties who correspond directly with the Presiding Officer shall file a copy of the correspondence with the Regional Hearing Clerk.

(3) A certificate of service shall accompany each document filed or served in the proceeding.

(b) *Service of documents.* A copy of each document filed in the proceeding shall be served on the Presiding Officer or the Environmental Appeals Board, and on each party.

(1) *Service of complaint.* (i) Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

(ii)(A) Where respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.

(B) Where respondent is an agency of the United States complainant shall serve that agency as provided by that agency's regulations, or in the absence of controlling regulation, as otherwise permitted by law. Complainant should also provide a copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii)(A) of this section.

(C) Where respondent is a State or local unit of government, agency, department, corporation or other instrumentality, complainant shall serve the chief executive officer thereof, or as otherwise permitted by law. Where respondent is a State or local officer, complainant shall serve such officer.

(iii) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed receipt. Such proof of service

shall be filed with the Regional Hearing Clerk immediately upon completion of service.

(2) *Service of filed documents other than the complaint, rulings, orders, and decisions.* All filed documents other than the complaint, rulings, orders, and decisions shall be served personally, by first class mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), or by any reliable commercial delivery service. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic service, subject to any appropriate conditions and limitations.

(c) *Form of documents.* (1) Except as provided in this section, 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 filed document shall contain a caption identifying the respondent and the docket number. All legal briefs and legal memoranda greater than 20 pages in length (excluding attachments) shall contain a table of contents and a table of authorities with page references.

(3) The original of any filed document (other than exhibits) shall be signed by the party filing or by its attorney or other representative. The signature constitutes a representation by the signer that he has read the 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 first document filed by any person shall contain the name, address, and telephone number of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Regional Hearing Clerk, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information and any changes thereto, service to the party's last known address shall satisfy the requirements of paragraph (b)(2) of this section and § 22.6.

(5) The Environmental Appeals Board or the Presiding Officer may exclude from the record any document which does not comply with this section. Written notice of such exclusion, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any excluded document upon motion granted by the Environmental Appeals Board or the Presiding Officer, as appropriate.

(d) *Confidentiality of business information.* (1) A person who wishes to assert a business confidentiality claim with regard to any information contained in any document to be filed in a proceeding under these Consolidated Rules of Practice shall assert such a claim in accordance with 40 CFR part 2 at the time that the document is filed. A document filed without a claim of business confidentiality shall be available to the public for inspection and copying.

(2) Two versions of any document which contains information claimed confidential shall be filed with the Regional Hearing Clerk:

(i) One version of the document shall contain the information claimed confidential. The cover page shall include the information required under paragraph (c)(2) of this section and the words "Business Confidentiality Asserted". The specific portion(s) alleged to be confidential shall be clearly identified within the document.

(ii) A second version of the document shall contain all information except the specific information claimed confidential, which shall be redacted and replaced with notes indicating the nature of the information redacted. The cover page shall state that information claimed confidential has been deleted and that a complete copy of the document containing the information claimed confidential has been filed with the Regional Hearing Clerk.

(3) Both versions of the document shall be served on the Presiding Officer and the complainant. Both versions of the document shall be served on any party, non-party participant, or representative thereof, authorized to receive the information claimed confidential by the person making the claim of confidentiality. Only the redacted version shall be served on persons not authorized to receive the confidential information.

(4) Only the second, redacted version shall be treated as public information. An EPA officer or employee may disclose information claimed confidential in accordance with paragraph (d)(1) of this section only as authorized under 40 CFR part 2.

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

All rulings, orders, decisions, and other documents issued by the Regional Administrator or Presiding Officer 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 Board. Copies of such rulings, orders, decisions or other documents shall be served personally, by first class mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), by EPA's internal mail, or any reliable commercial delivery service, upon all parties by the Clerk of the Environmental Appeals Board, the Office of Administrative Law Judges or the Regional Hearing Clerk, as appropriate.

§ 22.7 Computation and extension of time.

(a) *Computation.* In computing any period of time prescribed or allowed in these Consolidated 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 holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal holiday, the stated time period shall be extended to include the next business day.

(b) Extensions of time. The Environmental Appeals Board or the Presiding Officer may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or upon its own initiative. Any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer or Environmental Appeals Board reasonable opportunity to issue an order.

(c) *Service by mail or commercial delivery service.* Service of the complaint is complete when the return receipt is signed. Service of all other documents is complete upon mailing or when placed in the custody of a reliable commercial delivery service. Where a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document.

§ 22.8 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 Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, 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, 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. The requirements of this section shall not apply to any person who has formally recused himself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to § 22.18(b)(3).

§ 22.9 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 Clerk of the Board, as appropriate.

(b) The cost of duplicating documents shall be borne by the person seeking copies of such documents. The Agency may waive this cost in its discretion.

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.

§ 22.11 Intervention and non-party briefs.

(a) *Intervention.* Any person desiring to become a party to a proceeding may move for leave to intervene. A motion for leave to intervene that is filed after the exchange of information pursuant to § 22.19(a) shall not be granted unless the movant shows good cause for its failure to file before such exchange of information. All requirements of these Consolidated Rules of Practice shall apply to a motion for leave to intervene as if the movant were a party. The Presiding Officer shall grant leave to intervene in all or part of the proceeding if: the movant claims an interest relating to the cause of action; a final order may as a practical matter impair the movant's ability to protect that interest; and the movant's interest is not adequately represented by existing parties. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding unless otherwise ordered by the Presiding Officer or the Environmental Appeals Board for good cause.

(b) *Non-party briefs.* Any person who is not a party to a proceeding may move for leave to file a non-party brief. The motion shall identify the interest of the applicant and shall explain the relevance of the brief to the proceeding. All requirements of these Consolidated Rules of Practice shall apply to the motion as if the movant were a party. If the motion is granted, the Presiding Officer or Environmental Appeals Board shall issue an order setting the time for filing such brief. Any party to the proceeding may file a response to a non-party brief within 15 days after service of the non-party brief.

§ 22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer or the Environmental Appeals Board may consolidate any or all matters at issue in two or more proceedings subject to these Consolidated Rules of Practice where: there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings. Proceedings subject to subpart I of this part may be consolidated only upon the approval of all parties. Where a proceeding subject to the provisions of subpart I of this part is consolidated with a proceeding to which subpart I of this part does not apply, the procedures of subpart I of this part shall not apply to the consolidated proceeding.

(b) *Severance.* The Presiding Officer or the Environmental Appeals Board may, for good cause, order any proceedings severed with respect to any or all parties or issues.

Subpart C—Prehearing Procedures

§ 22.13 Commencement of a proceeding.

(a) Any proceeding subject to these Consolidated Rules of Practice is commenced by filing with the Regional Hearing Clerk a complaint conforming to § 22.14.

(b) Notwithstanding paragraph (a) of this section, where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to § 22.18(b)(2) and (3).

§ 22.14 Complaint.

(a) *Content of complaint.* Each complaint 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, implementing regulations, permit or order which respondent is alleged to have violated;

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

(4) A description of all relief sought, including one or more of the following:

(i) The amount of the civil penalty which is proposed to be assessed, and a brief explanation of the proposed penalty;

(ii) Where a specific penalty demand is not made, the number of violations (where applicable, days of violation) for which a penalty is sought, a brief explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint;

(iii) A request for a Permit Action and a statement of its proposed terms and conditions; or

(iv) A request for a compliance or corrective action order and a statement of the terms and conditions thereof;

(5) Notice of respondent's right to request a hearing on any material fact alleged in the complaint, or on the appropriateness of any proposed penalty, compliance or corrective action order, or Permit Action;

(6) Notice if subpart I of this part applies to the proceeding;

(7) The address of the Regional Hearing Clerk; and

(8) Instructions for paying penalties, if applicable.

(b) *Rules of practice.* A copy of these Consolidated Rules of Practice shall accompany each complaint served.

(c) *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. Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer.

(d) *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.

§ 22.15 Answer to the complaint.

(a) *General.* Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file an original and one copy of a written answer to the complaint with the Regional Hearing Clerk and shall serve copies of the answer on all other parties. Any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.

(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: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested.

(c) *Request for a hearing.* A hearing upon the issues raised by the complaint and answer may be held if requested by respondent in its answer. If the respondent does not request a hearing, the Presiding Officer may hold a hearing 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.

(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.* Motions shall be served as provided by § 22.5(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate. 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 sought; and

(4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

(b) *Response to motions.* A party's response to any written motion must be filed within 15 days after service of such motion. The movant's reply to any written response must be filed within 10 days after service of such response and shall be limited to issues raised in the response. The Presiding Officer or the Environmental Appeals Board may set a shorter or longer time for response or reply, or make other orders concerning the disposition of motions. The response or reply shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Any party who fails to respond within the designated period waives any objection to the granting of the motion.

(c) *Decision.* The Regional Judicial Officer (or in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board) shall rule on all motions filed or made before an answer to the complaint is filed. Except as provided in §§ 22.29(c) and 22.51, an Administrative Law Judge shall rule on all motions filed or made after an answer is filed and before an initial decision has become final or has been appealed. The Environmental Appeals Board shall rule as provided in § 22.29(c) and on all motions filed or made after an appeal of the initial decision is filed, except as provided pursuant to § 22.28.

(d) *Oral argument.* The Presiding Officer or the Environmental Appeals Board may permit oral argument on motions in its discretion.

§ 22.17 Default.

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

(b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) *Default order.* When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

(d) *Payment of penalty; effective date of compliance or corrective action orders, and Permit Actions.* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c). Any default order requiring compliance or corrective action shall be effective and enforceable without further proceedings on the date the default order becomes final under § 22.27(c). Any Permit Action ordered in the default order shall become effective without further proceedings on the date that the default order becomes final under § 22.27(c).

§ 22.18 Quick resolution; settlement; alternative dispute resolution.

(a) *Quick resolution.* (1) A respondent may resolve the proceeding at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. If the complaint contains a specific proposed penalty and respondent pays that proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed. This paragraph (a) shall not apply to any complaint which seeks a compliance or corrective action order or Permit Action. In a proceeding subject to the public comment provisions of § 22.45, this quick resolution is not available until 10 days after the close of the comment period.

(2) Any respondent who wishes to resolve a proceeding by paying the proposed penalty instead of filing an answer, but who needs additional time to pay the penalty, may file a written statement with the Regional Hearing Clerk within 30 days after receiving the complaint stating that the respondent agrees to pay the proposed penalty in accordance with paragraph (a)(1) of this section. The written statement need not contain any response to, or admission of, the allegations in the complaint.

Within 60 days after receiving the complaint, the respondent shall pay the full amount of the proposed penalty. Failure to make such payment within 60 days of receipt of the complaint may subject the respondent to default pursuant to § 22.17.

(3) Upon receipt of payment in full, the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, shall issue a final order. Payment by respondent shall constitute a waiver of respondent's rights to contest the allegations and to appeal the final order.

(b) *Settlement.* (1) 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 parties may engage in settlement discussions whether or not the respondent requests a hearing. Settlement discussions shall not affect the respondent's obligation to file a timely answer under § 22.15.

(2) *Consent agreement.* Any and all terms and conditions of a settlement shall be recorded in a written consent agreement signed by all parties or their representatives. The consent agreement shall state that, for the purpose of the proceeding, respondent: Admits the jurisdictional allegations of the complaint; admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; consents to the assessment of any stated civil ·nalty, to the issuance of any specified npliance or corrective action order, to conditions specified in the consent agreement, and to any stated Permit Action; and waives any right to contest the allegations and its right to appeal the proposed final order accompanying the consent agreement. Where complainant elects to commence a proceeding pursuant to § 22.13(b), the consent agreement shall also contain the elements described at § 22.14(a)(1)-(3) and (8). The parties shall forward the executed consent agreement and a proposed final order to the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board.

(3) *Conclusion of proceeding.* No settlement or consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without a final order from the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, ratifying the parties' consent agreement.

(c) *Scope of resolution or settlement.* Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall only resolve respondent's liability for Federal civil penalties for the violations and facts alleged in the complaint.

(d) *Alternative means of dispute resolution.* (1) The parties may engage in any process within the scope of the Alternative Dispute Resolution Act ("ADRA"), 5 U.S.C. 581 *et seq.*, which may facilitate voluntary settlement efforts. Such process shall be subject to the confidentiality provisions of the ADRA.

(2) Dispute resolution under this paragraph (d) does not divest the Presiding Officer of jurisdiction and does not automatically stay the proceeding. All provisions of these Consolidated Rules of Practice remain in effect notwithstanding any dispute resolution proceeding.

(3) The parties may choose any person to act as a neutral, or may move for the appointment of a neutral. If the Presiding Officer grants a motion for the appointment of a neutral, the Presiding Officer shall forward the motion to the Chief Administrative Law Judge, except in proceedings under subpart I of this part, in which the Presiding Officer shall forward the motion to the Regional Administrator. The Chief Administrative Law Judge or Regional Administrator, as appropriate, shall designate a qualified neutral.

§ 22.19 Prehearing information exchange; prehearing conference; other discovery.

(a) *Prehearing information exchange.* (1) In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange. Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify. Parties are not required to exchange information relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer.

(2) Each party's prehearing information exchange shall contain:

(i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.

(3) If the proceeding is for the assessment of a penalty and complainant has already specified a proposed penalty, complainant shall explain in its prehearing information exchange how the proposed penalty was calculated in accordance with any criteria set forth in the Act, and the respondent shall explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated.

(4) If the proceeding is for the assessment of a penalty and complainant has not specified a proposed penalty, each party shall include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty. Within 15 days after respondent files its prehearing information exchange, complainant shall file a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in the Act.

(b) *Prehearing conference.* The Presiding Officer, at any time before the hearing begins, may direct the parties and their counsel or other representatives to participate in a conference to consider:

(1) Settlement of the case;

(2) 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) The time and place for the hearing; and

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

(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. The Presiding Officer

shall ensure that the record of the proceeding includes any stipulations, agreements, rulings or orders made during the conference.

(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 the Presiding Officer determines that there is good cause to hold it at another location or by telephone.

(e) *Other discovery.* (1) After the information exchange provided for in paragraph (a) of this section, a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted). The Presiding Officer may order such other discovery only if it:

(i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

(ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

(iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

(2) Settlement positions and information regarding their development (such as penalty calculations for purposes of settlement based upon Agency settlement policies) shall not be discoverable.

(3) The Presiding Officer may order depositions upon oral questions only in accordance with paragraph (e)(1) of this section and upon an additional finding that:

(i) The information sought cannot reasonably be obtained by alternative methods of discovery; 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.

(4) The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act. The Presiding Officer may issue a subpoena for discovery purposes only in accordance with paragraph (e)(1) of this section and upon an additional showing of the grounds and necessity therefor. Subpoenas shall be served in accordance with § 22.5(b)(1). 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. Any fees shall be paid by the party at whose request the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(5) Nothing in this paragraph (e) shall limit a party's right to request admissions or stipulations, a respondent's right to request Agency records under the Federal Freedom of Information Act, 5 U.S.C. 552, or EPA's authority under any applicable law to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information.

(f) *Supplementing prior exchanges.* A party who has made an information exchange under paragraph (a) of this section, or who has exchanged information in response to a request for information or a discovery order pursuant to paragraph (e) of this section, shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

(g) *Failure to exchange information.* Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:

(1) Infer that the information would be adverse to the party failing to provide it;

(2) Exclude the information from evidence; or

(3) Issue a default order under § 22.17(c).

§ 22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts 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. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding 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.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all 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. The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Subpart D—Hearing Procedures

§ 22.21 Assignment of Presiding Officer; scheduling the hearing.

(a) *Assignment of Presiding Officer.* When an answer is filed, the Regional Hearing Clerk shall forward a copy of the complaint, the answer, and any other documents filed in the proceeding to the Chief Administrative Law Judge who shall serve as Presiding Officer or assign another Administrative Law Judge as Presiding Officer. 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.* The Presiding Officer shall hold a hearing if the proceeding presents genuine issues of material fact. The Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing not later than 30 days prior to the date set for the hearing. The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act, upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced.

(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).

§ 22.22 Evidence.

(a) *General.* (1) The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly

repetitious, 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 (28 U.S.C.) is not admissible. If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

(2) In the presentation, admission, disposition, and use of oral and written evidence, EPA officers, employees and authorized representatives shall preserve the confidentiality of information claimed confidential, whether or not the claim is made by a party to the proceeding, unless disclosure is authorized pursuant to 40 CFR part 2. A business confidentiality claim shall not prevent information from being introduced into evidence, but shall instead require that the information be treated in accordance with 40 CFR part 2, subpart B. The Presiding Officer or the Environmental Appeals Board may consider such evidence in a proceeding closed to the public, and which may be before some, but not all, parties, as necessary. Such proceeding shall be closed only to the extent necessary to comply with 40 CFR part 2, subpart B, for information claimed confidential. Any affected person may move for an order protecting the information claimed confidential.

(b) *Examination of witnesses.* Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in paragraphs (c) and (d) of this section 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.

(c) *Written testimony.* The Presiding Officer may admit and insert into the record as evidence, in lieu of oral testimony, written testimony prepared by a witness. The admissibility of any part of the testimony shall be subject to the same rules as if the testimony were produced under oral examination. Before any such testimony is read or admitted into evidence, the party who has called the witness shall deliver a copy of the testimony to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the testimony shall swear to or affirm the testimony and shall be subject to appropriate oral cross-examination.

(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.

(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.

(f) *Official notice.* Official notice may be taken of any matter which can be 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) *Offers of proof.* Whenever the Presiding Officer denies a motion for admission into evidence, the party offering the information 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 information excluded. The offer of proof for excluded documents or exhibits shall consist of the documents or exhibits excluded. Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the information from evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

§ 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

§ 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 ordered to be kept confidential by the Presiding Officer. Any party may file a motion to conform the transcript to the actual testimony within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner.

§ 22.26 Proposed findings, conclusions, and order.

After the hearing, any party may file proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a schedule for filing these documents and any reply briefs, but shall not require them before the last date for filing motions under § 22.25 to conform the transcript to the actual testimony. 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.* After the period for filing briefs under § 22.26 has expired, the Presiding Officer shall issue an initial decision. The initial decision shall contain findings of fact,

conclusions regarding all material issues of law or discretion, as well as reasons therefor, and, if appropriate, a recommended civil penalty assessment, compliance order, corrective action order, or Permit Action. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward copies of the initial decision to the Environmental Appeals Board and the Assistant Administrator for the Office of Enforcement and Compliance Assurance.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become a final order 45 days after its service upon the parties and without further proceedings unless:

(1) A party moves to reopen the hearing;

(2) A party appeals the initial decision to the Environmental Appeals Board;

(3) A party moves to set aside a default order that constitutes an initial decision; or

(4) The Environmental Appeals Board elects to review the initial decision on its own initiative.

(d) *Exhaustion of administrative remedies.* Where a respondent fails to appeal an initial decision to the Environmental Appeals Board pursuant to § 22.30 and that initial decision becomes a final order pursuant to paragraph (c) of this section, respondent waives its rights to judicial review. An initial decision that is appealed to the Environmental Appeals Board shall not be final or operative pending the Environmental Appeals Board's issuance of a final order.

§ 22.28 Motion to reopen a hearing.

(a) *Filing and content.* A motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. Where the movant seeks to introduce new evidence, the motion shall: state briefly the nature and purpose of the evidence to be adduced; show that such evidence is not cumulative; and 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 15 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 a response. A reopened hearing shall be governed by the applicable sections of these Consolidated Rules of Practice. The filing of a motion to reopen a hearing shall automatically stay the running of the time periods for an initial decision becoming final under § 22.27(c) and for appeal under § 22.30. These time periods shall begin again in full when the motion is denied or an amended initial decision is served.

Subpart F—Appeals and Administrative Review

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

(a) *Request for interlocutory appeal.* Appeals from orders or rulings other than an initial decision shall be allowed only at the discretion of the Environmental Appeals Board. A party seeking interlocutory appeal of such orders or rulings to the Environmental Appeals Board shall file a motion within 10 days of service of the order or ruling, requesting that the Presiding Officer forward the order or ruling to the Environmental Appeals Board for review, and stating briefly the grounds for the appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may recommend any order or ruling for review by 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 an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

(c) *Interlocutory review.* If the Presiding Officer has recommended review and the Environmental Appeals Board determines that interlocutory review is inappropriate, or takes no action within 30 days of the Presiding Officer's recommendation, the appeal is dismissed. When the Presiding Officer declines to recommend review of an order or ruling, 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 filed within 10 days of service of an order of the Presiding Officer refusing to recommend such order or ruling for interlocutory review.

§ 22.30 Appeal from or review of initial decision.

(a) *Notice of appeal.* (1) Within 30 days after the initial decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board (Clerk of the Board (Mail Code 1103B), United States Environmental Protection Agency, 401 M Street, SW, Washington, DC, 20460. Hand deliveries may be made at Suite 500, 607 14th Street, NW.). One copy of any document filed with the Clerk of the Board shall also be served on the Regional Hearing Clerk. Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer. Appellant shall simultaneously serve one copy of the notice and brief upon all other parties and non-party participants. The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with page references), 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 (with appropriate references to the record), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal on any issue within 20 days after the date on which the first notice of appeal was served.

(2) Within 20 days of service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or non-party participant may

file with the Environmental Appeals Board an original and one copy of a response brief responding to argument raised by the appellant, together with reference to the relevant portions of the record, initial decision, or opposing brief. Appellee shall simultaneously serve one copy of the response brief upon each party , non-party participant, and the Regional Hearing Clerk. Response briefs shall be limited to the scope of the appeal brief. Further briefs may be filed only with the permission of the Environmental Appeals Board.

(b) *Review initiated by the Environmental Appeals Board.* Whenever the Environmental Appeals Board determines to review an initial decision on its own initiative, it shall file notice of its intent to review that decision with the Clerk of the Board, and serve it upon the Regional Hearing Clerk, the Presiding Officer and the parties within 45 days after the initial decision was served upon the parties. The notice shall include a statement of issues to be briefed by the parties and a time schedule for the filing and service of briefs.

(c) *Scope of appeal or review.* The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction. If the Environmental Appeals Board determines that issues raised, but not appealed by the parties, should be argued, it shall give the parties reasonable written notice of such determination to permit preparation of adequate argument. The Environmental Appeals Board may remand the case to the Presiding Officer for further proceedings.

(d) *Argument before the Environmental Appeals Board.* The Environmental Appeals Board may, at its discretion, order oral argument on any or all issues in a proceeding.

(e) *Motions on appeal.* All motions made during the course of an appeal shall conform to § 22.16 unless otherwise provided.

(f) *Decision.* The Environmental Appeals Board shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion 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 assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed or from the amount sought in the complaint, except that if the order being reviewed is a default order, the Environmental Appeals Board may not increase the amount of the penalty above that proposed in the complaint or in the motion for default, whichever is less. The Environmental Appeals Board may adopt, modify or set aside any recommended compliance or corrective action order or Permit Action. The Environmental Appeals Board may remand the case to the Presiding Officer for further action.

Subpart G—Final Order

§ 22.31 Final order.

(a) *Effect of final order.* A final order constitutes the final Agency action in a proceeding. The final order shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. The final order shall resolve only those causes of action alleged in the complaint, or for proceedings commenced pursuant to § 22.13(b), alleged in the consent agreement. The final order does not waive, extinguish or otherwise affect respondent's obligation to comply with all applicable provisions of the Act and regulations promulgated thereunder.

(b) *Effective date.* A final order is effective upon filing. Where an initial decision becomes a final order pursuant to § 22.27(c), the final order is effective 45 days after the initial decision is served on the parties.

(c) *Payment of a civil penalty.* The respondent shall pay the full amount of any civil penalty assessed in the final order within 30 days after the effective date of the final order unless otherwise ordered. Payment shall be made by sending a cashier's check or certified check to the payee specified in the complaint, unless otherwise instructed by the complainant. The check shall note the case title and docket number. Respondent shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on complainant. Collection of interest on overdue payments shall be in accordance with the Debt Collection Act, 31 U.S.C. 3717.

(d) *Other relief.* Any final order requiring compliance or corrective action, or a Permit Action, shall become effective and enforceable without further proceedings on the effective date of the final order unless otherwise ordered.

(e) *Final orders to Federal agencies on appeal.* (1) A final order of the Environmental Appeals Board issued pursuant to § 22.30 to a department, agency, or instrumentality of the United States shall become effective 30 days after its service upon the parties unless the head of the affected department, agency, or instrumentality requests a conference with the Administrator in writing and serves a copy of the request on the parties of record within 30 days of service of the final order. If a timely request is made, a decision by the Administrator shall become the final order.

(2) A motion for reconsideration pursuant to § 22.32 shall not toll the 30-day period described in paragraph (e)(1) of this section unless specifically so ordered by the Environmental Appeals Board.

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order issued pursuant to § 22.30 shall be filed within 10 days after service of the final order. Motions 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 § 22.4(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 so ordered by the Environmental Appeals Board.

Subpart H—Supplemental Rules

§ 22.33 [Reserved]

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under sections 113(d), 205(c), 211(d), and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d), and 7547(d)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Issuance of notice.* Prior to the issuance of a final 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. Service of a complaint or a consent agreement and final order pursuant to § 22.13 satisfies this notice requirement.

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1361(a)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section 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. For a person whose residence is outside the United States and outside any territory or possession of the United States, the prehearing conference and the hearing shall be held at the EPA office listed at 40 CFR 1.7 that is closest to either the person's primary place of business within the United States, or the primary place of business of the person's U.S. agent, unless otherwise agreed by all parties.

§ 22.36 [Reserved].

§ 22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings under sections 3005(d) and (e), 3008, 9003 and 9006 of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and (e), 6928, 6991b and 6991e) ("SWDA"). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Corrective action and compliance orders.* A complaint may contain a compliance order issued under section 3008(a) or section 9006(a), or a corrective action order issued under section 3008(h) or section 9003(h)(4) of the SWDA. Any such order shall automatically become a final order unless, no later than 30 days after the order is served, the respondent requests a hearing pursuant to § 22.15.

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32 and § 22.45, in administrative proceedings for the assessment of any civil penalty under section 309(g) or section 311(b)(6) of the Clean Water Act ("CWA")(33 U.S.C. 1319(g) and 1321(b)(6)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Consultation with States.* For proceedings pursuant to section 309(g), the complainant shall provide the State agency with the most direct authority over the matters at issue in the case an opportunity to consult with the complainant. Complainant shall notify the State agency within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty.

(c) *Administrative procedure and judicial review.* Action of the Administrator for which review could have been obtained under section 509(b)(1) of the CWA, 33 U.S.C. 1369(b)(1), shall not be subject to review in an administrative proceeding for the assessment of a civil penalty under section 309(g) or section 311(b)(6).

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.10 through 22.32, in 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 this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Judicial review.* Any person who requested a hearing with respect to a Class II civil penalty under section 109(b) of CERCLA, 42 U.S.C. 9609(b), 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(a)(4) of CERCLA, 42 U.S.C. 9609(a)(4), 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 served on the parties.

(c) *Payment of civil penalty assessed.* Payment of civil penalties assessed in the final order 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.

§ 22.40 [Reserved].

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 207 of the Toxic Substances Control Act ("TSCA") (15 U.S.C. 2647). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Collection of civil penalty.* Any civil penalty collected under TSCA section 207 shall be used by the local educational agency for purposes of complying with Title II of TSCA. 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.

§ 22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty under section 1414(g)(3)(B) of the Safe Drinking Water Act, 42 U.S.C. 300g-3(g)(3)(B). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Choice of forum.* A complaint which specifies that subpart I of this part applies shall also state that respondent has a right to elect a hearing on the record in accordance with 5 U.S.C. 554, and that respondent waives this right unless it requests in its answer a hearing on the record in accordance with 5 U.S.C. 554. Upon such request, the Regional Hearing Clerk shall recaption the documents in the record as necessary, and notify the parties of the changes.

§ 22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty against a federal agency under section 1447(b) of the Safe Drinking Water Act, 42 U.S.C. 300j-6(b).

Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Effective date of final penalty order.* Any penalty order issued pursuant to this section and section 1447(b) of the Safe Drinking Water Act shall become effective 30 days after it has been served on the parties.

(c) *Public notice of final penalty order.* Upon the issuance of a final penalty order under this section, the Administrator shall provide public notice of the order by publication, and by providing notice to any person who requests such notice. The notice shall include:

(1) The docket number of the order;

(2) The address and phone number of the Regional Hearing Clerk from whom a copy of the order may be obtained;

(3) The location of the facility where violations were found;

(4) A description of the violations;

(5) The penalty that was assessed; and

(6) A notice that any interested person may, within 30 days of the date the order becomes final, obtain judicial review of the penalty order pursuant to section 1447(b) of the Safe Drinking Water Act, and instruction that persons seeking judicial review shall provide copies of any appeal to the persons described in 40 CFR 135.11(a).

§ 22.44 [Reserved]

§ 22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings for the assessment of any civil penalty under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act (33 U.S.C. 1319(g) and 1321(b)(6)(B)(ii)), and under section 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300h-2(c)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Public notice.*—(1) *General.* Complainant shall notify the public before assessing a civil penalty. Such notice shall be provided within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty. The notice period begins upon first publication of notice.

(2) *Type and content of public notice.* The complainant shall provide public notice of the complaint (or the proposed consent agreement if § 22.13(b) is applicable) by a method reasonably calculated to provide notice, and shall also provide notice directly to any person who requests such notice. The notice shall include:

(i) The docket number of the proceeding;

(ii) The name and address of the complainant and respondent, and the person from whom information on the proceeding may be obtained, and the address of the Regional Hearing Clerk to whom appropriate comments shall be directed;

(iii) The location of the site or facility from which the violations are alleged, and any applicable permit number;

(iv) A description of the violation alleged and the relief sought; and

(v) A notice that persons shall submit comments to the Regional Hearing Clerk, and the deadline for such submissions.

(c) *Comment by a person who is not a party.* The following provisions apply in regard to comment by a person not a party to a proceeding:

(1) *Participation in proceeding.* (i) Any person wishing to participate in the proceedings must notify the Regional Hearing Clerk in writing within the public notice period under paragraph (b)(1) of this section. The person must provide his name, complete mailing address, and state that he wishes to participate in the proceeding.

(ii) The Presiding Officer shall provide notice of any hearing on the merits to any person who has met the requirements of paragraph (c)(1)(i) of this section at least 20 days prior to the scheduled hearing.

(iii) A commenter may present written comments for the record at any time prior to the close of the record.

(iv) A commenter wishing to present evidence at a hearing on the merits shall notify, in writing, the Presiding Officer and the parties of its intent at least 10 days prior to the scheduled hearing. This notice must include a copy of any document to be introduced, a description of the evidence to be presented, and the identity of any witness (and qualifications if an expert), and the subject matter of the testimony.

(v) In any hearing on the merits, a commenter may present evidence, including direct testimony subject to cross examination by the parties.

(vi) The Presiding Officer shall have the discretion to establish the extent of commenter participation in any other scheduled activity.

(2) *Limitations.* A commenter may not cross-examine any witness in any hearing and shall not be subject to or participate in any discovery or prehearing exchange.

(3) *Quick resolution and settlement.* No proceeding subject to the public notice and comment provisions of paragraphs (b) and (c) of this section may be resolved or settled under § 22.18, or commenced under § 22.13(b), until 10 days after the close of the comment period provided in paragraph (c)(1) of this section.

(4) *Petition to set aside a consent agreement and proposed final order.* (i) Complainant shall provide to each commenter, by certified mail, return receipt requested, but not to the Regional Hearing Clerk or Presiding Officer, a copy of any consent agreement between the parties and the proposed final order.

(ii) Within 30 days of receipt of the consent agreement and proposed final order a commenter may petition the Regional Administrator (or, for cases commenced at EPA Headquarters, the Environmental Appeals Board), to set aside the consent agreement and proposed final order on the basis that material evidence was not considered. Copies of the petition shall be served on the parties, but shall not be sent to the Regional Hearing Clerk or the Presiding Officer.

(iii) Within 15 days of receipt of a petition, the complainant may, with notice to the Regional Administrator or Environmental Appeals Board and to the commenter, withdraw the consent agreement and proposed final order to consider the matters raised in the petition. If the complainant does not give notice of withdrawal within 15 days of receipt of the petition, the Regional Administrator or Environmental Appeals Board shall assign a Petition Officer to consider and rule on the petition. The Petition Officer shall be another Presiding Officer, not otherwise involved in the case. Notice of this assignment shall be sent to the parties, and to the Presiding Officer.

(iv) Within 30 days of assignment of the Petition Officer, the complainant shall present to the Petition Officer a copy of the complaint and a written response to the petition. A copy of the response shall be provided to the parties and to the commenter, but not to the Regional Hearing Clerk or Presiding Officer.

(v) The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:

(A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;

000066

(B) Whether complainant adequately considered and responded to the petition; and

(C) Whether a resolution of the proceeding by the parties is appropriate without a hearing.

(vi) Upon a finding by the Petition Officer that a hearing is appropriate, the Presiding Officer shall order that the consent agreement and proposed final order be set aside and shall establish a schedule for a hearing.

(vii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial. The Petition Officer shall:

(A) File the order with the Regional Hearing Clerk;

(B) Serve copies of the order on the parties and the commenter; and

(C) Provide public notice of the order.

(viii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Regional Administrator may issue the proposed final order, which shall become final 30 days after both the order denying the petition and a properly signed consent agreement are filed with the Regional Hearing Clerk, unless further petition for review is filed by a notice of appeal in the appropriate United States District Court, with coincident notice by certified mail to the Administrator and the Attorney General. Written notice of appeal also shall be filed with the Regional Hearing Clerk, and sent to the Presiding Officer and the parties.

(ix) If judicial review of the final order is denied, the final order shall become effective 30 days after such denial has been filed with the Regional Hearing Clerk.

§§ 22.46–22.49 [Reserved].

Subpart I—Administrative Proceedings Not Governed by Section 554 of the Administrative Procedure Act

§ 22.50 Scope of this subpart.

(a) *Scope.* This subpart applies to all adjudicatory proceedings for:

(1) The assessment of a penalty under sections 309(g)(2)(A) and 311(b)(6)(B)(i) of the Clean Water Act (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)).

(2) The assessment of a penalty under sections 1414(g)(3)(B) and 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300g–3(g)(3)(B) and 300h–2(c)), except where a respondent in a proceeding under section 1414(g)(3)(B) requests in its answer a hearing on the record in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. 554.

(b) *Relationship to other provisions.* Sections 22.1 through 22.45 apply to proceedings under this subpart, except for the following provisions which do not apply: §§ 22.11, 22.16(c), 22.21(a), and 22.29. Where inconsistencies exist between this subpart and subparts A through G of this part, this subpart shall apply. Where inconsistencies exist between this subpart and subpart H of this part, subpart H shall apply.

§ 22.51 Presiding Officer.

The Presiding Officer shall be a Regional Judicial Officer. The Presiding Officer shall conduct the hearing, and rule on all motions until an initial decision has become final or has been appealed.

§ 22.52 Information exchange and discovery.

Respondent's information exchange pursuant to § 22.19(a) shall include information on any economic benefit resulting from any activity or failure to act which is alleged in the administrative complaint to be a violation of applicable law, including its gross revenues, delayed or avoided costs. Discovery under § 22.19(e) shall not be authorized, except for discovery of information concerning respondent's economic benefit from alleged violations and information concerning respondent's ability to pay a penalty.

[FR Doc. 99–17337 Filed 7–22–99; 8:45 am]
BILLING CODE 6560–50–P

Statutory Penalties Sections Requiring Consideration of Enumerated Factors

Commentary - The following statutory sections require consideration of enumerated factors in determining the amount of a civil penalty assessed. The statutes provide the authority for assessing penalties, and establish a maximum penalty that may be assessed. However, only in rare instances will the maximum be assessed. The factors that must be considered tend to lower assessed penalties.

EPA penalty policies provide detailed guidance as to how to determine penalty amounts and take the statutory factors into account. Each penalty policy is specific to a statute, and may even be specific to a section within a statute. The penalty policy for each statute should be checked to determine which sections of the statute the policy applies to.

I. TSCA - section 2615(a)

(1)Any person who violates a provision of section 2614 or 2689 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 or 2689 of this title.

(2) (B)In determining the amount of a civil penalty, the Administrator shall *take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.*

(2)(C)The Administrator may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

II. RCRA - section 6928(a)(3)

Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subchapter and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty, the Administrator shall *take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.*

section 6991e (underground storage tank regulation)

(a)(3)If a violator fails to comply with an order under this subsection within the time specified in the order, he shall be liable for a civil penalty of not more than $25,000 for each day of continued noncompliance.

(c)Any order issued under this section shall state with reasonable specificity the nature of the violation, specify a reasonable time for compliance, and assess a penalty, if any, which the Administrator determines is reasonable *taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.*

section 6992d (medical waste tracking program)

(d)Any person who violates any requirement of or regulation under this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this section, constitute a separate violation.

(E)Civil penalties assessed by the United States or by the States under this subchapter shall be *assessed in accordance with the Administrator's "RCRA Civil Penalty Policy"*, as such policy may be amended from time to time.

III. CERCLA - section 9609(a)(3)

In determining the amount of any penalty assessed pursuant to this subsection, the President shall *take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.*

IV. EPCRTKA - section 11045

(b)(1)(C) [penalty for emergency notification] In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall *take into account the nature, circumstances, extent and gravity* of the violation or violations and, with respect to the violator, *ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.*

V. FIFRA - section 136*l*(a)(4)

In determining the amount of the penalty, the Administrator shall *consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in the business, and the gravity of the violation.* Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or environment, the Administrator may issue a warning in lieu of assessing a penalty.

VI. CAA - section 7413(e)(1)

In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall *take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.* The court shall not assess penalties for noncompliance with administrative subpoenas under section 7607(a) of this title, or actions under section 7414 of this title, where the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action.

section 7524(c)(2) [motor vehicle emissions]

In determining the amount of any civil penalty assessed under this subsection, the Administrator shall *take into account the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require.*

VII. CWA [FWPCA] - section 1319

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

VIII. ESA - section 1540(a)

Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this chapter, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than regulation relating to recordkeeping or filing of reports), (f) or (g) of section 1538 of this title, may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision under this chapter may be assessed a civil penalty by the Secretary of not more than $12,000 for each such violation. Any person who otherwise violates any provision of this chapter, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than $500 for each such violation. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. *Any such civil penalty may be remitted or mitigated by the Secretary.* Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 21

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

Introduction

This document, Policy on Civil Penalties, establishes a single set of goals for penalty assessment in EPA administrative and judicial enforcement actions. These goals - deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems - are presented here in general terms. An outline of the general process for the assessment of penalties is contained in Attachment A.

A companion document, A Framework for Statute-Specific Approaches to Penalty Assessments, will also be issued today. This document provides guidance to the user of the policy on how to write penalty assessment guidance specific to the user's particular program. The first part of the Framework provides general guidance on developing program-specific guidance; the second part contains a detailed appendix which explains the basis for that guidance. Thus, the user need only refer to the appendix when he wants an explanation of the guidance in the first part of the Framework.

In order to achieve the above Agency policy goals, all administratively imposed penalties and settlements of civil penalty actions should, where possible, be consistent with the guidance contained in the Framework document. Deviations from the Framework's methodology, where merited, are authorized as long as the reasons for the deviations are documented. Documentation for deviations from the Framework in program-specific guidance should be located in that guidance. Documentation for deviations from the program-specific guidance in calculating individual penalties should be contained in both the case files and in any memoranda that accompany the settlements.

The Agency will make every effort to urge administrative law judges to impose penalties consistent with this policy and any medium-specific implementing guidance. For cases that go to court, the Agency will request the statutory maximum penalty in the filed complaint. And, as proceedings warrant, EPA will continue to pursue a penalty no less than that supported by the applicable program policy. Of course, all penalties must be consistent with applicable statutory provisions, based upon the number and duration of the violations at issue.

Applicability

This policy statement does not attempt to address the specific mechanisms for achieving the goals set out for penalty assessment. Nor does it prescribe a negotiation strategy to achieve the penalty target figures. Similarly, it does not address differences between statutes or between priorities of different programs. Accordingly, it cannot be used, by itself, as a basis for determining an appropriate penalty in a specific

action. Each EPA program office, in a joint effort with the Office of Enforcement and Compliance Monitoring, will revise existing policies, or write new policies as needed. These policies will guide the assessment of penalties under each statute in a manner consistent with this document and, to the extent reasonable, the accompanying Framework.

Until new program-specific policies are issued, the current penalty policies will remain in effect. Once new program-specific policies are issued, the Agency should calculate penalties as follows:

- For cases that are substantially settled, apply the old policy.
- For cases that will require further substantial negotiation, apply the new policy if that will not be too disruptive.

Because of the unique issues associated with civil penalties in certain types of cases, this policy does not apply to the following areas:

- CERCLA §107. This is an area in which Congress has directed a particular kind of response explicitly oriented toward recovering the cost of Government cleanup activity and natural resource damage.
- Clean Water Act §311(f) and (g). This also is cost recovery in nature. As in CERCLA §107 actions, the penalty assessment approach is inappropriate.
- Clean Air Act §120. Congress has set out in considerable detail the level of recovery under this section. It has been implemented with regulations which, as required by law, prescribe a non-exclusive remedy which focuses on recovery of the economic benefit of noncompliance. It should be noted, however, that this general penalty policy builds upon, and is consistent with the approach Congress took in that section.

Much of the rationale supporting this policy generally applies to non-profit institutions, including government entities. In applying this policy to such entities, EPA must exercise judgment case-by-case in deciding, for example, how to apply the economic benefit and ability to pay sanctions, if at all. Further guidance on the issue of seeking penalties against non-profit entities will be forthcoming.

Deterrence

The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment. In addition, it reduces the resources necessary to administer the laws by addressing noncompliance before it occurs.

If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from noncompliance. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law. This amount will be referred to as the "benefit component" of the penalty.

Where the penalty fails to remove the significant economic benefit, as defined by the program-specific guidance, the case development team must explain in the case file why it fails to do so. The case development team must then include this explanation in the memorandum accompanying each settlement for the signature of the Assistant Administrator of Enforcement and Compliance Monitoring, or the appropriate Regional official.

The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation. In doing so, the penalty will be perceived as fair. In addition the penalty's size will tend to deter other potential violators.

In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if, for example, there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. In such cases, the case development team should consider increasing the gravity component sufficient to

achieve general deterrence. These extra assessments should balance the other goals of this policy, particularly equitable treatment of the regulated community.

This approach is consistent with the civil penalty provisions in the environmental laws. Almost all of them require consideration of the seriousness of the violation. This additional amount which reflects the seriousness of the violation is referred to as the "gravity component". The combination of the benefit and gravity components yields the "preliminary deterrence figure."

As explained later in this policy, the case development team will adjust this figure as appropriate. Nevertheless, EPA typically should seek to recover, at a minimum, a penalty which includes the benefit component plus some non-trivial gravity component. This is important because otherwise, regulated parties would have a general economic incentive to delay compliance until the Agency commenced an enforcement action. Once the Agency brought the action, the violator could then settle for a penalty less than their economic benefit of noncompliance. This incentive would directly undermine the goal of deterrence.

Fair and Equitable Treatment of the Regulated Community

The second goal of penalty assessment is the fair and equitable treatment of the regulated community. Fair and equitable treatment requires that the Agency's penalties must display both consistency and flexibility. The consistent application of a penalty policy is important because otherwise the resulting penalties might be seen as being arbitrarily assessed. Thus violators would be more inclined to litigate over those penalties. This would consume Agency resources and make swift resolution of environmental problems less likely.

But any system for calculating penalties must have enough flexibility to make adjustments to reflect legitimate differences between similar violations. Otherwise the policy might be viewed as unfair. Again, the result would be to undermine the goals of the Agency to achieve swift and equitable resolutions of environmental problems.

Methods for quantifying the benefit and gravity components are explained in the Framework guidance. These methods significantly further the goal of equitable treatment of violators. To begin with, the benefit component promotes equity by removing the unfair economic advantage which a violator may have gained over complying parties. Furthermore, because the benefit and gravity components are generated systematically, they

will exhibit relative consistency from case to case. Because the methodologies account for a wide range of relevant factors, the penalties generated will be responsive to legitimate differences between cases.

However, not all the possibly relevant differences between cases are accounted for in generating the preliminary deterrence amount. Accordingly, all preliminary deterrence amounts should be increased or mitigated for the following factors to account for differences between cases:

- Degree of willfulness and/or negligence
- History of noncompliance.
- Ability to pay.
- Degree of cooperation/noncooperation.
- Other unique factors specific to the violator or the case.

Mitigation based on these factors is appropriate to the extent the violator clearly demonstrates that it is entitled to mitigation.

The preliminary deterrence amount adjusted prior to the start of settlement negotiations yields the "initial penalty target figure". In administrative actions, this figure generally is the penalty assessed in the complaint. In judicial actions, EPA will use this figure as the first settlement goal. This settlement goal is an internal target and should not be revealed to the violator unless the case development team feels that it is appropriate. The initial penalty target may be further adjusted as negotiations proceed and additional information becomes available or as the original information is reassessed.

Swift Resolution of Environmental Problems

The third goal of penalty assessment is swift resolution of environmental problems. The Agency's primary mission is to protect the environment. As long as an environmental violation continues, precious natural resources, and possibly public health, are at risk. For this reason, swift correction of identified environmental problems must be an important goal of any enforcement action. In addition, swift compliance conserves Agency personnel and resources.

The Agency will pursue two basic approaches to promoting quick settlements which include swift resolution of environmental problems without undermining deterrence. Those two approaches are as follows:

1. Provide incentives to settle and institute prompt remedial action.

EPA policy will be to provide specific incentives to settle, including the following:

- The Agency will consider reducing the gravity component of the penalty for settlements in which the violator already has instituted expeditious remedies to the identified violations prior to the commencement of litigation.1/ This would be considered in the adjustment factor called degree of cooperation/noncooperation discussed above.

- The Agency will consider accepting additional environmental cleanup, and mitigating the penalty figures accordingly. But normally, the Agency will only accept this arrangement if agreed to in pre-litigation settlement.

Other incentives can be used, as long as they do not result in allowing the violator to retain a significant economic benefit.

2. Provide disincentives to delaying compliance.

The preliminary deterrence amount is based in part upon the expected duration of the violation. If that projected period of time is extended during the course of settlement negotiations due to the defendant's actions, the case development team should adjust that figure upward. The case development team should consider making this fact known to the violator early in the negotiation process. This will provide a strong disincentive to delay compliance.

1/ For the purposes of this document, litigation is deemed to begin:

- for administrative actions - when the respondent files a response to an administrative complaint or when the time to file expires or

- for judicial actions - when an Assistant United States Attorney files a complaint in court.

Intent of Policy and Information Requests for Penalty Calculations

The policies and procedures set out in this document and in the Framework for Statute-Specific Approaches to Penalty Assessment are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice. In addition, any penalty calculations under this policy made in anticipation of litigation are exempt from disclosure under the Freedom of Information Act. Nevertheless as a matter of public interest, the Agency may elect to release this information in some cases.

Courtney M. Price
Assistant Administrator for
Enforcement and Compliance Monitoring

Attachment

ATTACHMENT A

Outline of Civil Penalty Assessment

I. Calculate Preliminary Deterrence Amount

A. Economic benefit component and

B. Gravity component

(This yields the preliminary deterrence amount.)

II. Apply Adjustment Factors

A. Degree of cooperation/noncooperation (indicated through pre-settlement action.)

B. Degree of willfulness and/or negligence.

C. History of noncompliance.

D. Ability to pay (optional at this stage.)

E. Other unique factors (including strength of case, competing public policy concerns.)

(This yields the initial penalty target figure.)

III. Adjustments to Initial Penalty Target Figure After Negotiations Have Begun

A. Ability to pay (to the extent not considered in calculating initial penalty target.)

B. Reassess adjustments used in calculating initial penalty target. (Agency may want to reexamine evidence used as a basis for the penalty in the light of new information.)

C. Reassess preliminary deterrence amount to reflect continued periods of noncompliance not reflected in the original calculation.

D. Alternative payments agreed upon prior to the commencement of litigation.

(This yields the adjusted penalty target figure.)

A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS: IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 22

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

000082

Contents

	Page
Introduction	1
Writing a Program-Specific Policy	2
I. Developing a Penalty Figure	2
II. Calculating a Preliminary Deterrence Amount	2
III. Adjusting the Preliminary Deterrence Amount to Derive the Initial Penalty Target Figure	3
IV. Adjusting the Initial Penalty Target Figure During Negotiations	4
Use of the Policy in Litigation	4
Use of the Policy as a Feedback Device	5
Appendix	6
Introduction	6
The Preliminary Deterrence Amount	6
I. The Benefit Component	6
A. Benefit from delayed costs	7
B. Benefit from avoided costs	9
C. Benefit from competitive advantage	10
D. Settling a case for an amount less than the economic benefit component	11
II. The Gravity Component	13
A. Quantifying the gravity of a violation	13
B. Gravity factors	14
Initial and Adjusted Penalty Target Figure	16
I. Flexibility-Adjustment Factors	17
A. Degree of willfulness and/or negligence	17
B. Degree of cooperation/noncooperation	19
C. History of noncompliance	21
D. Ability to pay	23
E. Other unique factors	24

Appendix (Con't)

II. Alternative Payments 24

III. Promoting Consistency 27

Use of Penalty Figure in Settlement Negotiations 28

Introduction

This document, A Framework for Statute-Specific Approaches to Penalty Assessment, provides guidance to the user of the Policy on Civil Penalties on how to develop a medium-specific penalty policy. Such policies will apply to administratively imposed penalties and settlements of both administrative and judicial penalty actions.

In the Policy on Civil Penalties, the Environmental Protection Agency establishes a single set of goals for penalty assessment. Those goals - deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems - will be substantially impaired unless they are pursued in a consistent fashion. Even different terminology could cause confusion that would detract from the achievement of these goals. At the same time, too much rigidity will stifle negotiation and make settlement impossible.

The purpose of this document is to promote the goals of the Policy on Civil Penalties by providing a framework for medium-specific penalty policies. The Framework is detailed enough to allow individual programs to develop policies that will consistently further the Agency's goals and be easy to administer. In addition, it is general enough to allow each program to tailor the policy to the relevant statutory provisions and the particular priorities of each program.

While this document contains detailed guidance, it is not cast in absolute terms. Nevertheless, the policy does not encourage deviation from this guidance in either the development of medium-specific policies or in developing actual penalty figures. Where there are deviations in developing medium-specific policies, the reasons for those changes must be recorded in the actual policy. Where there are deviations from medium-specific policies in calculating a penalty figure, the case development team must detail the reasons for those changes in the case file. In addition, the rationale behind the deviations must be incorporated in the memorandum accompanying the settlement package to Headquarters or the appropriate Regional official.

This document is divided into two sections. The first one gives brief instructions to the user on how to write a medium-specific policy. The second section is an appendix that gives detailed guidance on implementing each section of the instructions and explains how the instructions are intended to further the goals of the policy.

Writing a Program Specific Policy

Summarized below are those elements that should be present in a program-specific penalty policy. For a detailed discussion of each of these ideas, the corresponding portions of the appendix should be consulted.

I. Developing a Penalty Figure

The development of a penalty figure is a two step process. First the case development team must calculate a preliminary deterrence figure. This figure is composed of the economic benefit component (where applicable) and the gravity component. The second step is to adjust the preliminary deterrence figure through a number of factors. The resulting penalty figure is the initial penalty target figure. In judicial actions, the initial penalty target figure is the penalty amount which the government normally sets as a goal at the outset of settlement negotiations. It is essentially an internal settlement goal and should not be revealed to the violator unless the case development team feels it is appropriate. In administrative actions, this figure generally is the penalty assessed in the complaint. While in judicial actions, the government's complaint will request the maximum penalty authorized by law.

This initial penalty target figure may be further adjusted in the course of negotiations. Each policy should ensure that the penalty assessed or requested is within any applicable statutory constraints, based upon the number and duration of violations at issue.

II. Calculating a Preliminary Deterrence Amount

Each program-specific policy must contain a section on calculating the preliminary deterrence figure. That section should contain materials on each of the following areas:

- Benefit Component. This section should explain:

  a. the relevent measure of economic benefit for various types of violations,
  b. the information needed,
  c. where to get assistance in computing this figure and
  d. how to use available computer systems to compare a case with similar previous violations.

- Gravity Component. This section should first rank different types of violations according to the seriousness of the act. In creating that ranking, the following factors should be considered:

  a. actual or possible harm,
  b. importance to the regulatory scheme and
  c. availability of data from other sources.

In evaluating actual or possible harm, your scheme should consider the following facts:

- amount of pollutant,
- toxicity of pollutant,
- sensitivity of the environment,
- length of time of a violation and
- size of the violator.

The policy then should assign appropriate dollar amounts or ranges of amounts to the different ranked violations to constitute the "gravity component". This amount, added to the amount reflecting economic benefit, constitutes the preliminary deterrence figure.

III. Adjusting the Preliminary Deterrence Amount to Derive the Initial Penalty Target Figure (Prenegotiation Adjustment)

Each program-specific penalty policy should give detailed guidance on applying the appropriate adjustments to the preliminary deterrence figure. This is to ensure that penalties also further Agency goals besides deterrence (i.e. equity and swift correction of environmental problems). Those guidelines should be consistent with the approach described in the appendix. The factors may be separated according to whether they can be considered before or after negotiation has begun or both.

Adjustments (increases or decreases, as appropriate) that can be made to the preliminary deterrence penalty to develop an initial penaly target to use at the outset of negotiation include:

- Degree of willfulness and/or negligence
- Cooperation/noncooperation through pre-settlement action.
- History of noncompliance.

- Ability to pay.

- Other unique factors (including strength of case, competing public policy considerations).

The policy may permit consideration of the violator's ability to pay as an adjustment factor before negotiations begin. It may also postpone consideration of that factor until after negotiations have begun. This would allow the violator to produce evidence substantiating its inability to pay.

The policy should prescribe appropriate amounts, or ranges of amounts, by which the preliminary deterrence penalty should be adjusted. Adjustments will depend on the extent to which certain factors are pertinent. In order to preserve the penalty's deterrent effect, the policy should also ensure that, except for the specific exceptions described in this document, the adjusted penalty will: 1) always remove any significant economic benefit of noncompliance and 2) contain some non-trivial amount as a gravity component.

IV. Adjusting the Initial Penalty Target During Negotiations

Each program-specific policy should call for periodic reassessment of these adjustments during the course of negotiations. This would occur as additional relevant information becomes available and the old evidence is re-evaluated in the light of new evidence. Once negotiations have begun, the policy also should permit adjustment of the penalty target to reflect "alternative payments" the violator agrees to make in settlement of the case. Adjustments for alternative payments and pre-settlement corrective action are generally permissible only before litigation has begun.

Again, the policy should be structured to ensure that any settlement made after negotiations have begun reflects the economic benefit of noncompliance up to the date of compliance plus some non-trivial gravity component. This means that if lengthy settlement negotiations cause the violation to continue longer than initially anticipated, the penalty target figure should be increased. The increase would be based upon the extent that the violations continue to produce ongoing environmental risk and increasing economic benefit.

Use of the Policy In Litigation

Each program-specific policy should contain a section on the use of the policy in litigation. Requests for penalties

should account for all the factors identified in the relevant statute and still allow for compromises in settlement without exceeding the parameters outlined in this document. (For each program, all the statutory factors are contained in the Framework either explicitly or as part of broader factors.) For administrative proceedings, the policy should explain how to formulate a penalty figure, consistent with the policy. The case development team will put this figure in the administrative complaint.

In judicial actions, the EPA will use the initial penalty target figure as its first settlement goal. This settlement goal is an internal target and should not be revealed to the violator unless the case development team feels it is appropriate. In judicial litigation, the government should request the maximum penalty authorized by law in its complaint. The policy should also explain how it and any applicable precedents should be used in responding to any explicit requests from a court for a minimum assesment which the Agency would deem appropriate.

Use of the Policy as a Feedback Device

Each program-specific policy should first explain in detail what information needs to be put into the case file and into the relevant computer tracking system. Furthermore, each policy should cover how to use that system to examine penalty assessments in other cases. This would thereby assist the Agency in making judgments about the size of adjustments to the penalty for the case at hand. Each policy should also explain how to present penalty calculations in litigation reports.

Courtney M. Price
Assistant Administrator for
Enforcement and Compliance Monitoring

Attachment

APPENDIX

Introduction

This appendix contains three sections. The first two sections set out guidelines for achieving the goals of the Policy on Civil Penalties. The first section focuses on achieving deterrence by assuring that the penalty first removes any economic benefit from noncompliance. Then it adds an amount to the penalty which reflects the seriousness of the violation. The second section provides adjustment factors so that both a fair and equitable penalty will result and that there will be a swift resolution of the environmental problem. The third section of the framework presents some practical advice on the use of the penalty figures generated by the policy.

The Preliminary Deterrence Amount

The Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment. More specifically, it specifies that any penalty should, at a minimum, remove any significant benefits resulting from noncompliance. In addition, it should include an amount beyond removal of economic benefit to reflect the seriousness of the violation. That portion of the penalty which removes the economic benefit of noncompliance is referred to as the "benefit component;" that part of the penalty which reflects the seriousness of the violation is referred to as the "gravity component." When combined, these two components yield the "preliminary deterrence amount."

This section of the document provides guidelines for calculating the benefit component and the gravity component. It will also present and discuss a simplified version of the economic benefit calculation for use in developing quick penalty determinations. This section will also discuss the limited circumstances which justify settling for less than the benefit component. The uses of the preliminary deterrence amount will be explained in subsequent portions of this document.

I. The Benefit Component

In order to ensure that penalties remove any significant economic benefit of noncompliance, it is necessary to have reliable methods to calculate that benefit. The existence of reliable methods also strengthens the Agency's position in both litigation and negotiation. This section sets out guidelines for computing the benefit component. It first addresses costs which are delayed by noncompliance. Then it addresses costs which are avoided completely by noncompliance. It also identifies issues

to be considered when computing the benefit component for those violations where the benefit of noncompliance results from factors other than cost savings. This section concludes with a discussion of the proper use of the benefit component in developing penalty figures and in settlement negotiations.

A. Benefit from delayed costs

In many instances, the economic advantage to be derived from noncompliance is the ability to delay making the expenditures necessary to achieve compliance. For example, a facility which fails to construct required settling ponds will eventually have to spend the money needed to build those ponds in order to achieve compliance. But, by deferring these one-time nonrecurring costs until EPA or a State takes an enforcement action, that facility has achieved an economic benefit. Among the types of violations which result in savings from deferred cost are the following:

- Failure to install equipment needed to meet discharge or emission control standards.
- Failure to effect process changes needed to eliminate pollutants from products or waste streams.
- Testing violations, where the testing still must be done to demonstrate achieved compliance.
- Improper disposal, where proper disposal is still required to achieve compliance.
- Improper storage where proper storage is still required to achieve compliance.
- Failure to obtain necessary permits for discharge, where such permits would probably be granted. (While the avoided cost for many programs would be negligible, there are programs where the the permit process can be expensive).

The Agency has a substantial amount of experience under the air and water programs in calculating the economic benefit that results from delaying costs necessary to achieve compliance. This experience indicates that it is possible to estimate the benefit of delayed compliance through the use of a simple formula. Specifically, the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital cost for the period from the date the violation began until the date

compliance was or is expected to be achieved. This will be referred to as the "rule of thumb for delayed compliance" method. Each program may adopt its own "rule of thumb" if appropriate. The applicable medium-specific guidance should state what that method is.

The rule of thumb method can usually be used in making decisions on whether to develop a case or in setting a penalty target for settlement negotiations. In using this rule of thumb method in settlement negotiations, the Agency may want to make the violator fully aware that it is using an estimate and not a more precise penalty determination procedure. The decision whether to reveal this information is up to the negotiators.

The "rule of thumb" method only provides a first-cut estimate of the benefit of delayed compliance. For this reason, its use is probably inappropriate in situations where a detailed analysis of the economic effect of noncompliance is needed to support or defend the Agency's position. Accordingly, this "rule of thumb" method generally should not be used in any of the following circumstances:

- A hearing is likely on the amount of the penalty.
- The defendant wishes to negotiate over the amount of the economic benefit on the basis of factors unique to the financial condition of the company.
- The case development team has reason to believe it will produce a substantially inaccurate estimate; for example, where the defendant is in a highly unusual financial position, or where noncompliance has or will continue for an unusually long period.

There usually are avoided costs associated with this type of situation. Therefore, the "rule of thumb for avoided costs" should also be applied. (See pages 9-10). For most cases, both figures are needed to yield the major portion of the economic benefit component.

When the rule of thumb method is not applicable, the economic benefit of delayed compliance should be computed using the Methodology for Computing the Economic Benefit of Noncompliance. This document, which is under development, provides a method for computing the economic benefit of noncompliance based on a detailed economic analysis. The method will largely be a refined version of the method used in the previous Civil Penalty Policy issued July 8, 1980, for the Clean Water Act and Title I of the Clean Air Act. It will also be consistent with the regulations

implementing Section 120 of the Clean Air Act. A computer program will be available to the Regions to perform the analysis, together with instructions for its use. Until the Methodology is issued, the economic model contained in the July 8, 1980, Civil Penalty Policy should be used. It should be noted that the Agency recently modified this guidance to reflect changes in the tax law.

B. Benefit from avoided costs

Many kinds of violations enable a violator to permanently avoid certain costs associated with compliance.

- Cost savings for operation and maintenance of equipment that the violator failed to install.
- Failure to properly operate and maintain existing control equipment.
- Failure to employ sufficient number of adequately trained staff.
- Failure to establish or follow precautionary methods required by regulations or permits.
- Improper storage, where commercial storage is reasonably available.
- Improper disposal, where redisposal or cleanup is not possible.
- Process, operational, or maintenance savings from removing pollution equipment.
- Failure to conduct necessary testing.

As with the benefit from delayed costs, the benefit component for avoided costs may be estimated by another "rule of thumb" method. Since these costs will never be incurred, the estimate is the expenses avoided until the date compliance is achieved less any tax savings. The use of this "rule of thumb" method is subject to the same limitations as those discussed in the preceding section.

Where the "rule of thumb for avoided costs" method cannot be used, the benefit from avoided costs must be computed using the Methodology for Computing the Economic Benefit of Noncompliance. Again, until the Metholology is issued, the method contained in the July 8, 1980, Civil Penalty Policy should be used as modified to reflect recent changes in the tax law.

C. Benefit from competitive advantage

For most violations, removing the savings which accrue from noncompliance will usually be sufficient to remove the competitive advantage the violator clearly has gained from noncompliance. But there are some situations in which noncompliance allows the violator to provide goods or services which are not available elsewhere or are more attractive to the consumer. Examples of such violations include:

- Selling banned products.
- Selling products for banned uses.
- Selling products without required labelling or warnings.
- Removing or altering pollution control equipment for a fee, (e.g., tampering with automobile emission controls.)
- Selling products without required regulatory clearance, (e.g., pesticide registration or premanufacture notice under TSCA.)

To adequately remove the economic incentive for such violations, it is helpful to estimate the net profits made from the improper transactions (i.e. those transactions which would not have occurred if the party had complied). The case development team is responsible for identifying violations in which this element of economic benefit clearly is present and significant. This calculation may be substantially different depending on the type of violation. Consequently the program-specific policies should contain guidance on identifying these types of violations and estimating these profits. In formulating that guidance, the following principles should be followed:

- The amount of the profit should be based on the best information available concerning the number of transactions resulting from noncompliance.
- Where available, information about the average profit per transaction may be used. In some cases, this may be available from the rulemaking record of the provision violated.
- The benefit derived should be adjusted to reflect the present value of net profits derived in the past.

It is recognized that the methods developed for estimating the profit from those transactions will sometimes rely substantially on expertise rather than verifiable data. Nevertheless, the programs should make all reasonable efforts to ensure that the estimates developed are defensible. The programs are encouraged to work with the Office of Policy, Planning and Evaluation to ensure that the methods developed are consistent with the forthcoming Methodology for Computing the Economic Benefit of Noncompliance and with methods developed by other programs. The programs should also ensure that sufficient contract funds are available to obtain expert advice in this area as needed to support penalty development, negotiation and trial of these kinds of cases.

D. Settling cases for an amount less than the economic benefit

As noted above, settling for an amount which does not remove the economic benefit of noncompliance can encourage people to wait until EPA or the State begins an enforcement action before complying. For this reason, it is general Agency policy not to settle for less than this amount. There are three general areas where settling for less than economic benefit may be appropriate. But in any individual case where the Agency decides to settle for less than enconomic benefit, the case development team must detail those reasons in the case file and in any memoranda accompanying the settlement.

1. Benefit component involves insignificant amount

It is clear that assessing the benefit component and negotiating over it will often represent a substantial commitment of resources. Such a commitment of resources may not be warranted in cases where the magnitude of the benefit component is not likely to be significant, (e.g. not likely to have a substantial impact on the violator's competitive positions). For this reason, the case development team has the discretion not to seek the benefit component where it appears that the amount of that component is likely to be less than $10,000. (A program may determine that other cut-off points are more reasonable based on the likelihood that retaining the benefit could encourage noncomplying behavior.) In exercising that discretion, the case development team should consider the following factors:

- Impact on violator: The likelihood that assessing the benefit component as part of the penalty will have a noticeable effect on the violator's competitive position or overall profits. If no such effect appears likely, the benefit component should probably not be pursued.

- The size of the gravity component: If the gravity component is relatively small, it may not provide a sufficient deterrent, by

itself, to achieve the goals of this policy.

- The certainty of the size of the benefit component: If the economic benefit is quite well defined, it is not likely to require as much effort to seek to include it in the penalty assessment. Such circumstances also increase the likelihood that the economic benefit was a substantial motivation for the noncompliance. This would make the inclusion of the benefit component more necessary to achieve specific deterrence.

It may be appropriate not to seek the benefit component in an entire class of violation. In that situation, the rationale behind that approach should be clearly stated in the appropriate medium-specific policy. For example, the most appropriate way to handle a small non-recurring operation and maintenance violation may be a small penalty. Obviously it makes little sense to assess in detail the economic benefit for each individual violation because the benefit is likely to be so small. The medium-specific policy would state this as the rationale.

2. Compelling public concerns

The Agency recognizes that there may be some instances where there are compelling public concerns that would not be served by taking a case to trial. In such instances, it may become necessary to consider settling a case for less than the benefit component. This may be done only if it is absolutely necessary to preserve the countervailing public interests. Such settlements might be appropriate where the following circumstances occur:

- There is a very substantial risk of creating precedent which will have a significant adverse effect upon the Agency's ability to enforce the law or clean up pollution if the case is taken to trial.

- Settlement will avoid or terminate an imminent risk to human health or the environment. This is an adequate justification only if injunctive relief is unavailable for some reason, and if settlement on remedial responsibilities could not be reached independent of any settlement of civil penalty liability.

- Removal of the economic benefit would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business.

Alternative payment plans should be fully explored before resorting to this option. Otherwise, the Agency will give the perception that shirking one's environmental responsibilities is a way to keep a failing enterprise afloat. This exemption does not apply to situations where the plant was likely to close anyway, or where there is a likelihood of continued harmful noncompliance.

3. Litigation practicalities

The Agency realizes that in certain cases, it is highly unlikely the EPA will be able to recover the economic benefit in litigation. This may be due to applicable precedent, competing public interest considerations, or the specific facts, equities, or evidentiary issues pertaining to a particular case. In such a situation it is unrealistic to expect EPA to obtain a penalty in litigation which would remove the economic benefit. The case development team then may pursue a lower penalty amount.

II. The Gravity Component

As noted above, the Policy on Civil Penalties specifies that a penalty, to achieve deterrence, should not only remove any economic benefit of noncompliance, but also include an amount reflecting the seriousness of the violation. This latter amount is referred to as the "gravity component." The purpose of this section of the document is to establish an approach to quantifying the gravity component. This approach can encompass the differences between programs and still provide the basis for a sound consistent treatment of this issue.

A. Quantifying the gravity of a violation

Assigning a dollar figure to represent the gravity of a violation is an essentially subjective process. Nevertheless, the relative seriousness of different violations can be fairly accurately determined in most cases. This can be accomplished by reference to the goals of the specific regulatory scheme and the facts of each particular violation. Thus, linking the dollar amount of the gravity component to these objective factors is a useful way of insuring that violations of approximately equal seriousness are treated the same way.

Such a linkage promotes consistency. This consistency strengthens the Agency's position both in negotiation and before a trier of fact. This approach consequently also encourages swift resolution of environmental problems.

Each program must develop a system for quantifying the gravity of violations of the laws and regulations it administers.

This development must occur within the context of the penalty amounts authorized by law for that program. That system must be based, whenever possible, on objective indicators of the seriousness of the violation. Examples of such indicators are given below. The seriousness of the violation should be based primarily on: 1) the risk of harm inherent in the violation at the time it was committed and 2) the actual harm that resulted from the violation. In some cases, the seriousness of the risk of harm will exceed that of the actual harm. Thus, each system should provide enough flexibility to allow EPA to consider both factors in assessing penalties.

Each system must also be designed to minimize the possibility that two persons applying the system to the same set of facts would come up with substantially different numbers. Thus, to the extent the system depends on categorizing events, those categories must be clearly defined. That way there is little possibility for argument over the category in which a violation belongs. In addition, the categorization of the events relevant to the penalty decision should be noted in the penalty development portion of the case file.

B. Gravity Factors

In quantifying the gravity of a violation, a program-specific policy should rank different types of violations according to the seriousness of the act. The following is a suggested approach to ranking the seriousness of violations. In this approach to ranking, the following factors should be considered:

- Actual or possible harm: This factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in an unpermitted discharge or exposure.

- Importance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goal of the statute or regulation. For example, if labelling is the only method used to prevent dangerous exposure to a chemical, then failure to label should result in a relatively high penalty. By contrast, a warning sign that was visibly posted but was smaller than the required size would not normally be considered as serious.

- Availability of data from other sources: The violation of any recordkeeping or reporting requirement is a very serious

matter. But if the involved requirement is the only source of information, the violation is far more serious. By contrast, if the Agency has another readily available and cheap source for the necessary information, a smaller penalty may be appropriate. (E.g. a customer of the violator purchased all the violator's illegally produced substance. Even though the violator does not have the required records, the customer does.)

- Size of violator: In some cases, the gravity component should be increased where it is clear that the resultant penalty will otherwise have little impact on the violator in light of the risk of harm posed by the violation. This factor is only relevant to the extent it is not taken into account by other factors.

The assessment of the first gravity factor listed above, risk or harm arising from a violation, is a complex matter. For purposes of ranking violations according to seriousness, it is possible to distinguish violations within a category on the basis of certain considerations, including the following:

- Amount of pollutant: Adjustments for the concentration of the pollutant may be appropriate, depending on the regulatory scheme and the characteristics of the pollutant. Such adjustments need not be linear, especially if the pollutant can be harmful at low concentrations.

- Toxicity of the pollutant: Violations involving highly toxic pollutants are more serious and should result in relatively larger penalties.

- Sensitivity of the environment: This factor focuses on the location where the violation was committed. For example, improper discharge into waters near a drinking water intake or a recreational beach is usually more serious than discharge into waters not near any such use.

- The length of time a violation continues: In most circumstances, the longer a violation continues uncorrected, the greater is the risk of harm.

Although each program-specific policy should address each of the factors listed above, or determine why it is not relevant, the factors listed above are not meant to be exhaustive. The programs should make every effort to identify all factors relevant to assessing the seriousness of any violation. The programs should then systematically prescribe a dollar amount to yield gravity component for the penalty. The program-specific policies may prescribe a dollar range for a certain category of violation rather than a precise dollar amount within that range based on the specific facts of an individual case.

The process by which the gravity component was computed must be memorialized in the case file. Combining the benefit component with the gravity component yields the preliminary deterrence amount.

In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. The medium specific policies should address this issue. One possible approach would be to direct the case development team to consider increasing the gravity component within a certain range to achieve general deterrence. These extra assessments should be consistent with the other goals of this policy.

Initial and Adjusted Penalty Target Figure

The second goal of the Policy on Civil Penalties is the equitable treatment of the regulated community. One important mechanism for promoting equitable treatment is to include the benefit component discussed above in a civil penalty assessment. This approach would prevent violators from benefitting economically from their noncompliance relative to parties which have complied with environmental requirements.

In addition, in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Yet it still must produce enough consistent results to treat similarly-situated violators similarly. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for how to adjust the preliminary deterrence amount when those facts occur. The application of these adjustments to the preliminary deterrence amount prior to the commencement of negotiation yields the initial penalty target figure. During the course of negotiation, the case development team may further adjust this figure to yield the adjusted penalty target figure.

Nevertheless, it should be noted that equitable treatment is a two-edged sword. While it means that a particular violator will receive no higher penalty than a similarly situated violator, it also means that the penalty will be no lower.

I. Flexibility-Adjustment Factors

The purpose of this section of the document is to establish additional adjustment factors to promote flexibility and to identify management techniques that will promote consistency. This section sets out guidelines for adjusting penalties to account for some factors that frequently distinguish different cases. Those factors are: degree of willfulness and/or negligence, degree of cooperation/noncooperation, history of noncompliance, ability to pay, and other unique factors. Unless otherwise specified, these adjustment factors will apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose based on these factors.

Within each factor there are three suggested ranges of adjustment. The actual ranges for each medium-specific policy will be determined by those developing the policy. The actual ranges may differ from these suggested ranges based upon program specific needs. The first, typically a 0-20% adjustment of the gravity component, is within the absolute discretion of the case development team. 1/ The second, typically a 21-30% adjustment, is only appropriate in unusual circumstances. The third range, typically beyond 30% adjustment, is only appropriate in extraordinary circumstances. Adjustments in the latter two ranges, unusual and extraordinary circumstances, will be subject to scrutiny in any performance audit. The case development team may wish to reevaluate these adjustment factors as the negotiations progress. This allows the team to reconsider evidence used as a basis for the penalty in light of new information.

Where the Region develops the penalty figure, the application of adjustment factors will be part of the planned Regional audits. Headquarters will be responsible for proper application of these factors in nationally-managed cases. A detailed discussion of these factors follows.

A. Degree of Willfulness and/or Negligence

Although most of the statutes which EPA administers are strict liability statutes, this does not render the violator's

1/ Absolute discretion means that the case development team may make penalty development decisions independent of EPA Headquarters. Nevertheless it is understood that in all judicial matters, the Department of Justice can still review these determinations if they so desire. Of course the authority to exercise the Agency's concurrence in final settlements is covered by the applicable delegations.

willfulness and/or negligence irrelevant. Knowing or willful violations can give rise to criminal liability, and the lack of any culpability may, depending upon the particular program, indicate that no penalty action is appropriate. Between these two extremes, the willfulness and/or negligence of the violator should be reflected in the amount of the penalty.

In assessing the degree of willfulness and/or negligence, all of the following points should be considered in most cases:

- How much control the violator had over the events constituting the violation.
- The forseeability of the events constituting the violation.
- Whether the violator took reasonable precautions against the events constituting the violation.
- Whether the violator knew or should have known of the hazards associated with the conduct.
- The level of sophistication within the industry in dealing with compliance issues and/or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology forcing nature of the statute, where applicable.
- Whether the violator in fact knew of the legal requirement which was violated.

It should be noted that this last point, lack of knowledge of the legal requirement, should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, knowledge of the law should serve only to enhance the penalty.

The amount of control which the violator had over how quickly the violation was remedied is also relevent in certain circumstances. Specifically, if correction of the environmental problem was delayed by factors which the violator can clearly show were not reasonably foreseeable and out of its control, the penalty may be reduced.

The suggested approach for this factor is for the case development team to have absolute discretion to adjust the penalty up or down by 20% of the gravity component. Adjustments in the $\pm$ 21-30% range should only be made in unusual circumstances.

Adjustments for this factor beyond ± 30% should be made only in extraordinary circumstances. Adjustments in the unusual or extraordinary circumstance range will be subject to scrutiny in any audit of performance.

B. Degree of Cooperation/Noncooperation

The degree of cooperation or noncooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. Such adjustments are mandated by both the goals of equitable treatment and swift resolution of environmental problems. There are three areas where this factor is relevant.

1. Prompt reporting of noncompliance

Cooperation can be manifested by the violator promptly reporting its noncompliance. Assuming such self-reporting is not required by law, such behavior should result in the mitigation of any penalty.

The suggested ranges of adjustment are as follows. The case development team has absolute discretion on any adjustments up to ± 10% of the gravity component for cooperation/noncooperation. Adjustments can be made up to ± 20% of the gravity component, but only in unusual circumstances. In extraordinary circumstances, such as self reporting of a TSCA premanufacture notice violation, the case development team may adjust the penalty beyond the ± 20% factor. Adjustments in the unusual or extraordinary circumstances ranges will be subject to scrutiny in any performance audit.

2. Prompt correction of environmental problems

The Agency should provide incentives for the violator to commit to correcting the problem promptly. This correction must take place before litigation is begun, except in extraordinary circumstances.2/ But since these incentives must be consistent with deterrence, they must be used judiciously.

2/ For the purposes of this document, litigation is deemed to begin:

- for administrative actions - when the respondent files a response to an administrative complaint or when the time to file expires or
- for judicial actions - when an Assistant United States Attorney files a complaint in court.

The circumstances under which the penalty is reduced depend on the type of violation involved and the source's response to the problem. A straightforward reduction in the amount of the gravity component of the penalty is most appropriate in those cases where either: 1) the environmental problem is actually corrected prior to initiating litigation, or 2) ideally, immediately upon discovery of the violation. Under this approach, the reduction typically should be a substantial portion of the unadjusted gravity component.

In general, the earlier the violator instituted corrective action after discovery of the violation and the more complete the corrective action instituted, the larger the penalty reduction EPA will consider. At the discretion of the case development team, the unadjusted gravity component may be reduced up to 50%. This would depend on how long the environmental problem continued before correction and the amount of any environmental damage. Adjustments greater than 50% are permitted, but will be the subject of close scrutiny in auditing performance.

It should be noted that in some instances, the violator will take all necessary steps toward correcting the problem but may refuse to reach any agreement on penalties. Similarly, a violator may take some steps to ameliorate the problem, but choose to litigate over what constitutes compliance. In such cases, the gravity component of the penalty may be reduced up to 25% at the discretion of the case development team. This smaller adjustment still recognizes the efforts made to correct the environmental problem, but the benefit to the source is not as great as if a complete settlement is reached. Adjustments greater than 25% are permitted, but will be the subject of close scrutiny in auditing performance.

In all instances, the facts and rationale justifying the penalty reduction must be recorded in the case file and included in any memoranda accompanying settlement.

3. Delaying compliance

Swift resolution of environmental problems will be encouraged if the violator clearly sees that it will be financially disadvantageous for the violator to litigate without remedying noncompliance. The settlement terms described in the preceding section are only available to parties who take steps to correct a problem prior to initiation of litigation. To some extent, this is an incentive to comply as soon as possible. Nevertheless, once litigation has commenced, it should be clear that the defendant litigates at its own risk.

In addition, the methods for computing the benefit component and the gravity component are both structured so that the penalty target increases the longer the violation remains uncorrected. The larger penalty for longer noncompliance is systematically linked to the benefits accruing to the violator and to the continuing risk to human health and the environment. This occurs even after litigation has commenced. This linkage will put the Agency in a strong position to convince the trier of fact to impose such larger penalties. For these reasons, the Policy on Civil Penalties provides substantial disincentives to litigating without complying.

C. History of noncompliance

Where a party has violated a similar environmental requirement before, this is usually clear evidence that the party was not deterred by the Agency's previous enforcement response. Unless the previous violation was caused by factors entirely out of the control of the violator, this is an indication that the penalty should be adjusted upwards.

In deciding how large these adjustments should be, the case development team should consider the following points:

- How similar the previous violation was.
- How recent the previous violation was.
- The number of previous violations.
- Violator's response to previous violation(s) in regard to correction of the previous problem.

Detailed criteria for what constitutes a "similar violation" should be contained in each program-specific policy. Nevertheless a violation should generally be considered "similar" if the Agency's previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts that indicate a "similar violation" was committed are as follows:

- The same permit was violated.
- The same substance was involved.
- The same process points were the source of the violation.
- The same statutory or regulatory provision was violated.

- A similar act or omission (e.g. the failure to properly store chemicals) was the basis of the violation.

For purposes of this section, a "prior violation" includes any act or omission for which a formal enforcement response has occurred (e.g. notice of violation, warning letter, complaint, consent decree, consent agreement, or final order). It also includes any act or omission for which the violator has previously been given written notification, however informal, that the Agency believes a violation exists.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, the case development team should ascertain who in the organization had control and oversight responsibility for the conduct resulting in the violation. In some situations the same persons or the same organizational unit had or reasonably should have had control or oversight responsibility for violative conduct. In those cases, the violation will be considered part of the compliance history of that regulated party.

In general, the case development team should begin with the assumption that if the same corporation was involved, the adjustments for history of noncompliance should apply. In addition, the case development team should be wary of a party changing operators or shifting responsibility for compliance to different groups as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance should probably apply unless the violator can demonstrate that the other violating corporate facilities are independent.

The following are the Framework's suggested adjustment ranges. If the pattern is one of "dissimilar" violations, relatively few in number, the case development team has absolute discretion to raise the penalty amount by 35%. For a relatively large number of dissimilar violations, the gravity component can be increased up to 70%. If the pattern is one of "similar" violations, the case development team has absolute discretion to raise the penalty amount up to 35% for the first repeat violation, and up to 70% for further repeated similar violations. The case development team may make higher adjustments in extraordinary circumstances, but such adjustments will be subject to scrutiny in any performance audit.

D. Ability to pay

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore EPA should consider the ability to pay a penalty in arriving at a specific final penalty assessment. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business.

For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The financial ability adjustment will normally require a significant amount of financial information specific to the violator. If this information is available prior to commencement of negotiations, it should be assessed as part of the initial penalty target figure. If it is not available, the case development team should assess this factor after commencement of negotiation with the source.

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of any mitigating circumstances, rests on the defendant. If the violator fails to provide sufficient information, then the case development team should disregard this factor in adjusting the penalty. The National Enforcement Investigations Center (NEIC) has developed the capability to assist the Regions in determining a firm's ability to pay. Further information on this system will be made available shortly under separate cover.

When it is determined that a violator cannot afford the penalty prescribed by this policy, the following options should be considered:

- Consider a delayed payment schedule: Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business. This approach is a real burden on the Agency and should only be considered on rare occasions.

- Consider non-monetary alternatives, such as public service activities: For example, in the mobile source program, fleet operators who tampered with pollution control devices

on their vehicles agreed to display anti-tampering ads on their vehicles. Similar solutions may be possible in other industries.

- Consider straight penalty reductions as a last recourse: If this approach is necessary, the reasons for the case development team's conclusion as to the size of the necessary reduction should be made a part of the formal enforcement file and the memorandum accompanying the settlement. 3/

- Consider joinder of the violator's individual owners: This is appropriate if joinder is legally possible and justified under the circumstances.

Regardless of the Agency's determination of an appropriate penalty amount to pursue based on ability to pay considerations, the violator is still expected to comply with the law.

E. Other unique factors

Individual programs may be able to predict other factors that can be expected to affect the appropriate penalty amount. Those factors should be identified and guidelines for their use set out in the program-specific policies. Nevertheless, each policy should allow for adjustment for unanticipated factors which might affect the penalty in each case.

It is suggested that there be absolute discretion to adjust penalties up or down by 10% of the gravity component for such reasons. Adjustments beyond the absolute discretion range will be subject to scrutiny during audits. In addition, they will primarily be allowed for compelling public policy concerns or the strengths and equities of the case. The rationale for the reduction must be expressed in writing in the case file and in any memoranda accompanying the settlement. See the discussion on pages 12 and 13 for further specifics on adjustments appropriate on the basis of either compelling public policy concerns or the strengths and equities of the case.

II. Alternative Payments

In the past, the Agency has accepted various environmentally beneficial expenditures in settlement of a case and chosen not to

3/ If a firm fails to pay the agreed-to penalty in an administrative or judicial final order, then the Agency must follow the Federal Claims Collection Act procedures for obtaining the penalty amount.

pursue more severe penalties. In general, the regulated community has been very receptive to this practice. In many cases, violators have found "alternative payments" to be more attractive than a traditional penalty. Many useful projects have been accomplished with such funds. But in some instances, EPA has accepted for credit certain expenditures whose actual environmental benefit has been somewhat speculative.

The Agency believes that these alternative payment projects should be reserved as an incentive to settlement before litigation. For this reason, such arrangements will be allowed only in prelitigation agreements except in extraordinary circumstances.

In addition, the acceptance of alternative payments for environmentally beneficial expenditures is subject to certain conditions. The Agency has designed these conditions to prevent the abuse of this procedure. Most of the conditions below applied in the past, but some are new. All of these conditions must be met before alternative payments may be accepted:[4]/

- No credits can be given for activities that currently are or will be required under current law or are likely to be required under existing statutory authority in the forseeable future (e.g., through upcoming rulemaking).

- The majority of the project's environmental benefit should accrue to the general public rather than to the source or any particular governmental unit.

- The project cannot be something which the violator could reasonably be expected to do as part of sound business practices.

4/ In extraordinary circumstances, the Agency may choose not to pursue higher penalties for "alternative" work done prior to commencement of negotiations. For example, a firm may recall a product found to be in violation despite the fact that such recall is not required. In order for EPA to forgo seeking higher penalties, the violator must prove that it has met the other conditions herein stated. If the violator fails to prove this in a satisfactory manner, the case development team has the discretion to completely disallow the credit project. As with all alternative projects, the case development team has the discretion to still pursue some penalties in settlement.

- EPA must not lower the amount it decides to accept in penalties by more than the after-tax amount the violator spends on the project.5/

In all cases where alternative payments are allowed, the case file should contain documentation showing that each of the conditions listed above have been met in tha particular case. In addition when considering penalty credits, Agency negotiators should take into account the following points:

- The project should not require a large amount of EPA oversight for its completion. In general the less oversight the proposed credit project would require from EPA to ensure proper completion, the more receptive EPA can be toward accepting the project in settlement.

- The project should receive stronger consideration if it will result in the abatement of existing pollution, ameliorate the pollution problem that is the basis of the government's claim and involve an activity that could be ordered by a judge as equitable relief.

- The project should receive stronger consideration if undertaken at the facility where the violation took place.

- The company should agree that any publicity it disseminates regarding its funding of the project must include a statement that such funding is in settlement of a lawsuit brought by EPA or the State.

5/ This limitation does not apply to public awareness activities such as those employed for fuel switching and tampering violations under the Clean Air Act. The purpose of the limitation is to preserve the deterrent value of the settlement. But these violations are often the result of public misconceptions about the economic value of these violations. Consequently, the public awareness activities can be effective in preventing others from violating the law. Thus, the high general deterrent value of public awareness activities in these circumstances obviates the need for the one-to-one requirement on penalty credits.

Each alternative payment plan must entail an identified project to be completely performed by the defendant. Under the plan, EPA must not hold any funds which are to be spent at EPA's discretion unless the relevant statute specifically provides that authority. The final order, decree or judgment should state what financial penalty the violator is actually paying and describe as precisely as possible the credit project the violator is expected to perform.

III. Promoting Consistency

Treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment. This document has established several mechanisms to promote such consistency. Yet it still leaves enough flexibility for settlement and for tailoring the penalty to particular circumstances. Perhaps the most important mechanisms for achieving consistency are the systematic methods for calculating the benefit component and gravity component of the penalty. Together, they add up to the preliminary deterrence amount. The document also sets out guidance on uniform approaches for applying adjustment factors to arrive at an initial penalty target prior to beginning settlement negotiations or an adjusted penalty target after negotiations have begun.

Nevertheless, if the Agency is to promote consistency, it is essential that each case file contain a complete description of how each penalty was developed. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each others' experience and promote the fairness required by the Policy on Civil Penalties.

To facilitate the use of this information, Office of Legal and Enforcement Policy will pursue integration of penalty information from judicial enforcement actions into a computer system. Both Headquarters and all Regional offices will have access to the system through terminals. This would make it possible for the Regions to compare the handling of their cases with those of other Regions. It could potentially allow the Regions, as well as Headquarters, to learn from each others' experience and to identify problem areas where policy change or further guidance is needed.

Use of Penalty Figure in Settlement Discussions

The Policy and Framework do not seek to constrain negotiations. Their goal is to set settlement target figures for the internal use of Agency negotiators. Consequently, the penalty figures under negotiation do not necessarily have to be as low as the internal target figures. Nevertheless, the final settlement figures should go no lower than the internal target figures unless either: 1) the medium-specific penalty policy so provides or 2) the reasons for the deviation are properly documented.

EC-G-1993-1:

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

D

P5

December 15, 1995

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Guidance on Use of Penalty Policies in Administrative Litigation

FROM: Robert Van Heuvelen, Director
Office of Regulatory Enforcement

TO: Regional Counsels, Regions I - X
Director, Office of Environmental Stewardship, Region I
Director, Compliance Assurance & Enforcement Division, Region VI
Director, Office of Enforcement, Compliance & Environmental Justice, Region VIII
Regional Enforcement Coordinators, Regions I-X

A. Introduction

This document provides guidance on how penalty amounts should be pled and argued in administrative litigation and how penalty policies should be used in this process.

B. Background

On September 29, 1995, Chief Administrative Law Judge Lotis issued an Initial Decision in In Re: Employers Insurance of Wausau, ruling that EPA must present evidence other than the PCB Penalty Policy in order to support its proposed penalty. We think the decision in the Wausau case is inconsistent with decisions on the use of penalty policies by the Environmental Appeals Board, in particular DIC Americas, Inc., TSCA Appeal No. 94-2 (September 27, 1995). The Agency is appealing the Wausau decision to the Environmental Appeals Board. Accordingly, this document is being issued in response to the Wausau decision to provide guidance on our administrative penalty pleading practices and use of penalty policies. After we receive a decision from the Environmental Appeals Board on our appeal we may revise this guidance as appropriate.

TES 25 1993
ECDIC
000114

Recycled/Recyclable
Printed with Soy/Canola Ink on paper that contains at least 50% recycled fiber

C. Use of Penalty Policies in Administrative Litigation

1. Federal environmental statutes set forth various factors which EPA or a court must consider in establishing penalties. EPA's penalty policies are based on the statutory penalty factors. The policies provide EPA enforcement staff with a logical calculation methodology for determining appropriate penalties. The policies help EPA apply the statutory penalty factors in a consistent and equitable manner so that members of the regulated community are treated similarly for similar violations across the country. As policies, they are not substantive rules under the Administrative Procedure Act.[1]

2. The penalty amount sought in the administrative complaint is based on the relevant statutory factors. The penalty amount pled should be calculated pursuant to any applicable penalty policy and the specific facts of the case.[2] If there is no applicable policy, the penalty amount to be pled in the complaint should be based on the statutory factors governing penalty assessment, case law interpreting such factors, and the facts of the particular case.[3]

3. The administrative complaint should explain that the penalty requested is based on the statutory provisions governing penalty assessment and it was calculated using a policy that applies the statutory factors. Accordingly, the administrative complaint should contain a paragraph similar to this model:

> The proposed civil penalty has been determined in accordance with [cite to relevant statutory penalty provision]. For purposes of determining the amount of any penalty to be assessed, [section of the Act] requires EPA to take into

---

[1] The policies are a mix of legal interpretations, general policy, and procedural guidance in how EPA should allocate its enforcement resources and exercise its enforcement discretion. As such, they are exempt from the notice and comment rulemaking requirements of the Administrative Procedures Act, 5 U.S.C. § 553.

[2] Not all EPA programs have penalty policies that establish calculation methodologies for use in determining the penalty amount to plead in an administrative complaint. For example, the May 1995 *Interim Revised Clean Water Act Settlement Policy* and the May 1994 *Public Water System Supervision Settlement Penalty Policy* only establish how the Agency expects to calculate the minimum penalty for which it would be willing to settle a case; these policies are not to be used in pleading penalties, or in a hearing or at trial.

[3] The Region should not use the policy in a particular case if the penalty amount produced by the calculation methodology produces an amount that appears inconsistent with the statutory penalty factors or otherwise unreasonable. In such a case, the Region must consult with OECA prior to deviating from the policy. See *Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases*, memo issued by the Assistant Administrator, on July 11, 1994, especially page 3, and page 2 of the redelegation issued the same date, and subsequent program specific implementing guidances.

account [enumerate statutory penalty factors]. To develop the proposed penalty in this complaint, complainant has taken into account the particular facts and circumstances of this case with specific reference to EPA's [name of relevant penalty policy, if applicable], a copy of which is enclosed with this Complaint. This policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors enumerated above to particular cases.

4. As further support of the penalty proposed in the complaint, a case "record" file should document or reference all factual information on which EPA relied to develop the penalty amount pled in the complaint. If the Agency has an applicable penalty policy (other than an exclusive settlement policy), the file should contain a computation worksheet setting forth how the penalty was calculated in the specific case, along with a narrative description of the specific calculation. This narrative description need not be lengthy, but it should explain how any applicable penalty policy methodology was applied to the specific facts in the case.[4] If there was no applicable penalty policy, the record file should contain a narrative description of how the statutory penalty factors were applied to develop the amount pled in the complaint. In short, the record file should document the facts and rationale which formed the basis for the penalty amount pled in the administrative complaint. In the prehearing exchange, EPA counsel may provide the respondent with copies of relevant documents from the case record file.[5]

5. Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 CFR §22.24, the complainant (usually the Region), has the burden of presenting why the proposed penalty is appropriate. This burden of persuasion may be subdivided into three tasks or parts:

a) why any applicable penalty policy is a reasonable approach to use in the instant case;

b) proving the facts relevant to penalty assessment; and

c) why the particular facts merit the penalty proposed in the complaint.

Each of these three tasks is discussed below.

---

[4] See, e.g., the *RCRA Civil Penalty Policy*, October 1990, pages 6 to 8, 41 to 47.

[5] The case record file only should contain final documents, and not preliminary, draft, or confidential documents. For example, documents evaluating the appropriate enforcement action, planning legal strategy, or establishing a settlement penalty amount are not part of the record file and should not be released.

a. Presenting any applicable penalty policy as a reasonable approach. In the prehearing exchange or at the hearing, EPA counsel should briefly explain why the applicable penalty policy is a reasonable way to apply the statutory factors. This explanation is a legal and policy analysis, which can be presented primarily, if not entirely, in briefs based on the written policy. Administrative law judges, however, may prefer some parts of this analysis to be presented through testimony or affidavits. If the Presiding Officer or respondent challenges the rationale or the basis for the penalty policy, complainant should provide a detailed explanation of why the penalty policy is a fair and logical way to apply the statutory factors.[6] Since penalty policies are not binding rules, such challenges must be responded to on the merits. Counsel should explain how the penalty policy provides a consistent, fair and logical framework for quantifying the statutory penalty factors to the particular circumstances of the instant case. Of course, the Presiding Officer is free to adopt a different framework other than the penalty policy for applying the statutory factors and ultimately arriving at a penalty amount.

b. Proving the facts relevant to penalty assessment. In the prehearing exchange or hearing, the facts relevant to determining an appropriate penalty under the particular statute should be presented as evidence. The relevant facts will depend on the circumstances of the specific case and the statutory penalty factors. Such facts usually include the number, duration, and types of violations, any economic benefit resulting from the violations, the pollutants involved, and the environmental impact of the violations. Some of these facts may have been established in proving the violations.

c. Why the particular facts merit the penalty proposed in the complaint. This task requires the complainant to persuade the Presiding Officer why the penalty requested in the complaint is appropriate based on the statutory penalty factors and the facts in the case. If a penalty policy was used to calculate the penalty, an explanation of the calculation methodology should be presented. This task is primarily, if not exclusively, a legal and policy analysis and should be done through briefs or argument. If the Presiding Officer requires testimony regarding such analysis, the Region may identify a Regional enforcement person experienced in using and understanding the applicable penalty policy, and capable of discussing the nature and seriousness of the violations in the instant case. This expert should not be the counsel in the case.

If you have any questions regarding this guidance, you may call David Hindin at 202 564-6004, or Scott Garrison at 202 564-4047.

cc: Sylvia K. Lowrance; ORE Division Directors
ORE Branch Chiefs; Workgroup members

[6] Regions should consult with ORE on how to respond to such challenges.

EC-P-1995-15

[signed March 19, 1997]

MEMORANDUM

SUBJECT: Impact of Wausau on Use of Penalty Policies

FROM: Robert I. Van Heuvelen, Director
Office of Regulatory Enforcement

TO: Regional Counsels, Regions I - X
Director, Office of Environmental Stewardship, Region I
Director, Division of Enforcement and Compliance Assurance, Region II
Director, Compliance Assurance & Enforcement Division, Region VI
Director, Office of Enforcement, Compliance & Environmental Justice, Region VIII
Regional Enforcement Coordinators, Regions I-X

On February 11, 1997, the Environmental Appeals Board ("EAB") ruled on the Agency's appeal of In the Matter of Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6, of the September 29, 1995, Initial Decision of the former Chief Administrative Law Judge Jon Lotis. The EAB reversed those portions of the Initial Decision concerning the validity and use of penalty policies, endorsed the penalty policy concept, and validated the Agency's method of applying its penalty policies.

The EAB affirmed that the Agency's penalty policies are not rules, and that the Agency can use penalty policies without going through notice and comment rulemaking so long as Agency decisionmakers (i.e., the Presiding Officer and EAB) are under no obligation to adhere to a penalty policy in a particular instance. Slip op. at 36-38. The Board held that proof of adherence to the penalty policy can legitimately form a part of complainant's prima facie penalty case as evidence that the statutory penalty factors were taken into account, provided that the penalty policy addresses all applicable statutory penalty factors. Moreover, where a penalty policy is designed to enhance fairness and consistency of penalty assessments, proof of adherence to the penalty policy provides some evidence that the proposed penalty is appropriate. Id. at 35.

In order to establish the "appropriateness" of a recommended penalty, complainant must

ECDIC

000119

demonstrate how the statutory penalty factors relate to the particular facts of the violation. Id. at 30. The Consolidated Rules of Practice, 40 C.F.R. § 22.24, requires complainant to come forward with evidence to show (1) that it considered each statutory factor, and (2) that its recommended penalty is supported by its analysis of those factors. However, nothing in TSCA, the Consolidated Rules of Practice, or the Administrative Procedure Act requires that complainant provide evidence supporting the findings, assumptions and determinations underlying the penalty policy in order to make a prima facie case for the appropriateness of a proposed penalty. Id. at 34-35. Complainant need not offer such evidentiary support in the absence of a specific challenge by respondent or a specific request by the Presiding Officer.

After the Agency has made its prima facie case, the Presiding Officer must be prepared to re-examine the basic propositions upon which a penalty policy is based in any case where they are genuinely placed in issue. Id. at 36. Indeed, even where respondent does not contest the penalty, the Presiding Officer need not assess the proposed penalty and is not constrained by the complainant's penalty proposal. Id. at 31. The Presiding Officer must either (1) ensure that complainant properly took into account the statutory penalty factors and assess the proposed penalty, or (2) specify reasons for disagreeing with complainant's analysis and assess a different penalty that reasonably applies the statutory penalty factors to the facts of the violation. Id. at 32. The EAB noted that there is no evidence that EPA's Presiding Officers apply penalty policies so inflexibly as to belie the EAB's repeated assurances that the penalty policies do not bind the Presiding Officers in the manner of rules. Id. at 36-37.

The EAB ruled that where complainant gives clear notice in its prehearing exchange that it would rely on a penalty policy to support its penalty proposals, and where respondent does not challenge any of the factual propositions underlying the penalty policy, it is error for a Presiding Officer to reject a penalty proposal for complainant's failure to offer evidence beyond that sufficient to make its prima facie penalty case where the Presiding Officer did not demand such evidence during the hearing. Id. at 34-35. The Presiding Officer may demand additional argument or evidence to support its analysis of the statutory penalty factors, but it is error to articulate such a demand only after the hearing, when the demand could no longer be satisfied. Id at 38-39.

The EAB's decision removes the cloud cast over our administrative enforcement practice by the initial decision in Wausau. In the wake of that initial decision, ORE issued the attached memorandum, "Guidance on Use of Penalty Policies in Administrative Litigation", dated December 15, 1995, reiterating the proper application of penalty policies in administrative litigation. As the EAB has now confirmed its approval of the Agency's use of the penalty policies, there is no need to amend the December 15, 1995, guidance, which shall remain in effect until further notice.

If you have any questions regarding this memorandum, you may call Scott Garrison at 202 564-4047.

cc: Sylvia K. Lowrance
ORE Division Directors

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

MAY - 9 1997

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (Pursuant to the Debt Collection Improvement Act of 1996)

FROM: Steven A. Herman
Assistant Administrator

TO: Regional Administrators

The Environmental Protection Agency ("EPA") published a new rule in the Federal Register -- 40 CFR Part 19, Adjustment of Civil Penalties for Inflation -- implementing the Debt Collection Improvement Act of 1996 ("DCIA"), on December 31, 1996. At the same time, we also published minor conforming amendments to 40 CFR Part 27, Program Fraud Civil Remedies. The rule took effect thirty days later on January 30, 1997. This means all violations occurring on or after January 31, 1997, are subject to the new inflation-adjusted penalty amounts.[1] We have attached a copy of the published rule, and the March 20, 1997, correction, for your convenience.

[1] There are two sets of exceptions to the January 31, 1997, date for using adjusted penalty maximums. The first exceptions are for the four penalty provisions added or revised by the August 1996 amendments to the SDWA which have an effective date of August 6, 1996. Those penalty provisions were not subject to inflation adjustment. The applicable unadjusted maximums for those provisions are now included in the March 20, 1997, Table 1. These provisions are 42 U.S.C. 300g-3(g)(3)(B), 42 U.S.C. 300g-3(g)(3)(C), 42 U.S.C. 300i(b) and 42 U.S.C. 300j-6(b)(2). The second exception is for the recently identified amendment affecting TSCA, 15 U.S.C. 2615, through the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("Lead Paint Act"), 42 U.S.C. 4852d. This portion of the Lead Paint Act and the corresponding regulations in 40 CFR Part 745, which are enforced through TSCA 15 U.S.C. 2615, were omitted from the December 31, 1996 rule-making. EPA anticipates performing a rule-making to adjust 42 U.S.C. 4852d, Part 745, and indirectly 15 U.S.C. 2615, within the next few months. The effective date for these penalty provisions will be thirty days following their adjustment and publication in the Federal Register.

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on 100% Recycled Paper (40% Postconsumer)

This penalty policy memorandum modifies all of our existing civil penalty policies to conform to the DCIA and the new rule. This memorandum also provides guidance on how to plead penalties and how to determine the new maximum penalty amounts that may be sought in single administrative enforcement actions under the Clean Water Act ("CWA"), the Safe Drinking Water Act ("SDWA"), and the Clean Air Act ("CAA").

OVERVIEW

The primary purpose of the DCIA is to restore the deterrent effect of civil statutory penalty provisions which have been eroded by inflation. In particular, the DCIA directed each federal agency to review its respective civil monetary penalty ("CMP") provisions and to issue a regulation adjusting them for inflation. The DCIA also requires periodic review and adjustment of the CMP's at least once every four years.

This first penalty inflation adjustment was limited by the DCIA to 10% above the existing statutory provision's maximum amount. For EPA, this meant all the penalty provision maximums, with the exception of a few new penalty provisions added by the 1996 SDWA amendments (which did not require any adjustment), have been adjusted upward by 10%.

The statutory penalty provisions and the new maximum penalty amounts are found in the attached Table 1 of 40 CFR 19.4 (as corrected on March 20, 1997). These increases in the CMPs apply only to violations which occur after the date the increases take effect on January 30, 1997 - that is, violations which occur on or after January 31, 1997.[2] For example, CWA Section 309 previously authorized judicial penalties of up to $25,000 per day per violation; and now, since the new rule became effective, the new maximum penalty amount is $27,500. Therefore, if a violation subject to CWA section 309(d) started on January 1, 1997, and continued through February 2, 1997, the maximum statutory penalty liability would consist of 30 days of violations at $25,000 per day, plus 3 days of violation at $27,500.

PENALTY POLICY CALCULATION CHANGES

For the time being, we are not planning to amend the specific language, penalty matrices or formulas in any of our existing penalty policies based on the revised penalty maximums contained in 40 CFR Part 19. If a sufficient need to revise the particular provisions of one or more of the policies is identified, we will consider taking such action at a later time We are, however, by this Policy, modifying all of our existing penalty policies, to increase the initial gravity component of the penalty calculation by 10% for those violations subject to the new

---

[2] Supra note 1.

rule.[3] We believe this is consistent with the Congressional intent in passing the DCIA and is necessary to implement effectively the mandated penalty increases that we have set forth in 40 CFR Part 19. Accordingly, each penalty policy is now modified to apply the appropriate guidelines set forth below[4]. These new guidelines apply to all penalty policies, regardless of whether the policy is used for determining a specific amount to plead in a complaint or for determining a bottom-line settlement amount. (A complete list of all of our existing penalty policies is provided at the end of this memorandum.)[5]

A. If all of the violations in a particular case occurred before the effective date of the new rule, no changes in our penalty policies are necessary.

B. For those judicial and administrative cases in which some, but not all, of the violations occurred after the effective date of the new rule, the penalty policy calculations are modified by following these five steps:

1. Perform the economic benefit calculation for the entire period of the violation, going beyond the January 30, 1997, effective date of the new rule if appropriate.[6] Do not apply any mitigation or adjustment factors (such as, good faith, ability to pay, litigation considerations or supplemental environmental projects) at this point.

2. Apply the gravity component of the penalty policy in the standard way (without economic benefit which has been covered in step 1, above) for all violations to produce the gravity component value. Do not apply any mitigation or adjustment factors (such as good faith, self-audits, ability to pay, litigation considerations or supplemental environmental projects) at this point.

---

[3] This ten percent increase should be used in virtually all cases. However, in some cases the Region, after consulting with the applicable OECA Division, may increase the gravity amount by less than 10% --- e.g., only 5 % -- if it believes the gravity amount prior to the inflation is already sufficiently high to fully account for the severity of the violations. For example, if all of the violations that occurred after the effective date were extremely minor, the Region may elect to inflate the gravity component for these violations by less than 10%.

[4] Where no specific penalty policy currently applies, follow the general penalty policies, which are also modified by this penalty policy. Likewise, all new penalty policies being prepared should take the inflation adjustment of statutory maximums into account.

[5] Whenever a copy of a particular penalty policy is provided to someone, a copy of this modifying policy should be provided as well.

[6] The calculation of economic benefit is not affected by the new rule. If there is no identifiable economic benefit component in a penalty policy, then all of the penalty is considered gravity for purposes herein.

3. Determine the percentage of the resulting gravity component value which occurred after the effective date of the penalty inflation adjustment, January 30, 1997. Multiply the post-effective date percentage by 0.10. Next, add 1 to the resulting value, and this will provide the gravity adjustment factor. For example, if approximately 40% of the violations in a case occurred on or after January 31, 1997, the gravity adjustment factor would be calculated as follows: [0.10 x .40] + 1 = 1.040 (the resulting gravity adjustment factor).

4. Multiply the gravity component from step 2 by the gravity adjustment factor from step 3. This produces a gravity component that has been adjusted based on the penalty inflation rule.

5. Add the subtotals from steps 1 and 4, above. Adjust the total, as appropriate pursuant to the applicable policy, for good faith, self-audits, ability to pay, litigation considerations, supplemental environmental projects, or other applicable mitigation factors.

C. If all the violations in a particular case occurred on or after the effective date of the new rule, the penalty policy calculation is modified by following these three steps:

1. Following the existing guidance, calculate the economic benefit covering the entire period of the violations. Do not apply any mitigation or adjustment factors (such as good faith, ability to pay, litigation considerations or supplemental environmental projects) at this point.

2. Apply the penalty policy in the standard way to calculate the gravity component (essentially everything except economic benefit, covered in step1, above, is gravity). Do not apply any mitigation or adjustment factors (such as good faith, self-audits, ability to pay, litigation considerations or supplemental environmental projects) at this point. After this calculation has been completed, multiply it by 1.10. This produces a gravity amount increased by 10 % in accordance with the DCIA.

3. Add the adjusted gravity amount in step 2 to the economic benefit component. Adjust this sum, as appropriate, pursuant to the applicable policy for good faith, self-audits, ability to pay, litigation considerations, supplemental environmental projects or other applicable mitigation factors.

PENALTY PLEADING

If all of the violations in a particular case occurred before the effective date of the new rule, no changes in our pleading practices are necessary. If some of the violations in a particular

case occurred after the effective date, then in judicial cases using "notice pleading" -- that is pleading "up to the statutory maximum amount" (and in any administrative cases which use notice pleading), the penalty amount pled should use the newly adjusted maximum amounts. For example, in a civil judicial complaint alleging violations of section 301 of the Clean Water Act, the prayer for relief would be written as follows:

> Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and 40 CFR Part 19, assess civil penalties against [name] not to exceed $25,000 per day for each violation of Section 301(a) of the Act, 33 U.S.C. §1311(a), that occurred prior to January 31, 1997; and $27,500 per day for each violation of Section 301 of the Act, 33 U.S.C. § 1311, that occurred on or after January 31, 1997, up to the date of judgment herein.

If all of the violations in a particular case occurred after the effective date of the new rule, then in judicial cases using "notice pleading" (and in any administrative cases which use notice pleading) the penalty amount pled should use the newly adjusted maximum amounts. For example, in a civil judicial complaint alleging violations of section 301 of the Clean Water Act, the prayer for relief would be written as follows:

> Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and 40 CFR Part 19, assess civil penalties against [name] not to exceed $27,500 per day for each violation of Section 301 of the Act, 33 U.S.C. §1311, up to the date of judgment herein.

ADMINISTRATIVE PENALTY CAPS FOR CWA, SDWA, AND CAA

The DCIA and 40 CFR Part 19 raised the maximum penalty amounts that may be sought for individual violations in administrative enforcement actions, as well as the total amounts that may be sought in a single administrative enforcement action. This increase is particularly relevant for administrative enforcement actions under the CWA, SDWA, and CAA which are limited by penalty maximums that may be sought in a single action, (commonly called "caps"). For example, prior to the DCIA and 40 CFR Part 19, CWA Class II administrative penalties were authorized up to $10,000 per violation and not to exceed $125,000 in a single administrative action; since the effective date of the new rule, the new penalty maximums are now $11,000 and $137,500, respectively. Similarly, Part 19 also raised the total penalty amounts that may be sought in a single administrative enforcement action under the CAA from $200,000 to $220,000 (although higher amounts may still be pursued with the joint approval of the Administrator and Attorney General).

The new penalty maximums/caps may be used only in a single administrative enforcement action under the CWA, SDWA, and CAA, provided the individual penalties for the post-effective date violations equal or exceed the previous unadjusted maximums (caps). In

other words, the penalties assessed can only exceed the old maximums/caps, up to the new maximums/caps, based solely on penalties for the new violations. For example, in a CWA Class II administrative enforcement complaint, there must have been at least 12 violations occurring after January 30, 1997, in order to exceed the previous maximum penalty of $125,000 (12 violations X $11,000 = $132,000). If there are not at least 12 violations occurring after January 30, 1997, then the maximum amount which may be sought in a CWA Class II administrative enforcement action is still $125,000.

As another example, in a CAA administrative enforcement action for violations of Section 203(a)(1) of the CAA, there must be at least eight violations that occurred after January 30, 1997, for the new $220,000 maximum penalty cap to apply (8 violations X $27,500 = 220,000). If there are not at least eight violations after January 30, 1997, then the maximum amount that may be sought in such a CAA administrative enforcement action is still $200,000 (unless otherwise increased by joint agreement of the Administrator or Attorney General).

CHALLENGES IN THE COURSE OF ENFORCEMENT PROCEEDINGS

If a defendant should choose to challenge the validity of applying the adjusted penalty provisions on the grounds that EPA did not have the authority to promulgate the rule which adjusted the penalty maximums, please notify the Multimedia Enforcement Division of the challenge, so that OECA and the Region can coordinate our response before a response is filed. We expect our response to argue that the statutory penalties were raised by an Act of Congress, and, therefore, the Agency merely carried out a non-discretionary ministerial duty in publishing a rule identifying the specific provisions and applying the Congressional formula for the adjustment.

FURTHER INFORMATION

Any questions concerning the new rule and implementation can be directed to Steven Spiegel in the Multimedia Enforcement Division, our workgroup chair, via email, or to (703) 308-8507. Additionally, offices that identify penalty policies which may need individual modifications should send a memorandum via email to Steven Spiegel, specifying the policy and the suggested changes.

LIST OF EXISTING EPA CIVIL PENALTY POLICIES MODIFIED BY THIS MEMORANDUM

General

Policy on Civil Penalties (2/14/84)

A Framework for Statute-Specific Approaches to Penalty Assessments (2/14/84)
Guidance on Use of Penalty Policies in Administrative Litigation, (12/15/95)

Clean Air Act - Stationary Sources

Clean Air Act Stationary Source Civil Penalty Policy (10/25/91) (This is a generic policy for stationary sources.)
Clarifications to the October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy (1/17/92)

There are a series of appendices that address certain specific subprograms within the stationary source program.

Appendix I - Permit Requirements for the Construction or Modification of Major Stationary Sources of Air Pollution (Not Dated)
Appendix II - Vinyl Chloride Civil Penalty Policy (Not Dated)
Appendix III - Asbestos Demolition and Renovation Civil Penalty Policy (Revised 5/5/92)
Appendix IV - Volatile Organic Compounds Where Reformulation of Low Solvent Technology is the Applicable Method of Compliance (Not Dated)
Appendix V - Air Civil Penalty Worksheet
Appendix VI - Volatile Hazardous Air Pollutant Civil Penalty Policy (Revised 3/2/88)
Appendix VII - Residential Wood Heaters (Not Dated)
Appendix VIII - Manufacture or Import of Controlled Substances in Amounts Exceeding Allowances Properly Held Under Protection of Stratospheric Ozone (11/24/89)
Appendix IX - Clean Air Act Civil Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving the Refrigerant or Who Sell Small Containers of Refrigerant in Violation of 40 CFR Part 82, Protection of Stratospheric Ozone, Subpart B (Not Dated)
Appendix X - Clean Air Act Civil Penalty Policy for Violations of 40 CFR Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant (6/1/94)
Appendix XI - Clean Air Act Civil Penalty Policy for Violations of 40 CFR Part 82, Subpart C: Ban on Nonessential Products Containing Class I Substances and Ban on Nonessential Products Containing or Manufactured with Class II Substances (Not Dated)

Clean Air Act - Mobile Sources

Volatility Civil Penalty Policy (12/1/89)
Civil Penalty Policy for Administrative Hearings (1/14/93)
Manufacturers Programs Branch Interim Penalty Policy (3/31/93)
Interim Diesel Civil Penalty Policy (2/8/94)
Tampering and Defeat Device Civil Penalty Policy for Notices of Violation (2/28/94)
Draft Reformulated Gasoline and Anti-Dumping Settlement Policy (6/3/96)

TSCA

Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA (7/7/80) (Published in Federal Register of 9/10/80. Note that the first PCB penalty policy was published along with it, but the PCB policy is now obsolete.) This is a generic policy for TSCA sources. There are a series of policies that address certain specific subprograms within TSCA. They are as follows:

Record keeping and Reporting Rules TSCA Sections 8, 12, and 13 (8/5/96)
PCB Penalty Policy (4/9/90)
TSCA Section 5 Enforcement Response Policy (6/8/89), amended (7/1.93)
TSCA Good Laboratory Practices Regulations Enforcement Policy (4/9/85)
TSCA Section 4 Test Rules (5/28/86)
TSCA Title II - Asbestos Hazard Emergency Response Act (AHERA)
Interim Final ERP for the **Asbestos Hazard Emergency Response Act** (1/31/89)
ERP for Asbestos Abatement Projects; Worker Protection Rule (11/14/89)

Safe Drinking Water Act - UIC

Interim Final UIC Program Judicial and Administrative Order Settlement Penalty Policy - - Underground Injection Control Guidance No. 79 (9/27/93)

Safe Drinking Water Act - PWS

New Public Water System Supervision Program Settlement Penalty Policy (5/25/94)

EPCRA

Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of EPCRA and Section 103 of CERCLA (6/13/90)
Enforcement Response Policy for Section 313 of EPCRA and Section 6607 of the Pollution Prevention Act (8/10/92); Low Volume Alternate Threshold ERP Revisions (12/18/96)

Clean Water Act

Revised Interim Clean Water Act Settlement Penalty Policy, February 28, 1995
Clean Water Act Section 404 Civil Administrative Penalty Actions Guidance on Calculating Settlement Amounts

RCRA

RCRA Civil Penalty Policy (October 1990)

UST

U.S. EPA Penalty Guidance for Violations of UST Regulations (November 1990)
Guidance for Federal Field Citation Enforcement (OSWER Directive- No. 9610-16) (October 1993)

CERCLA

Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of EPCRA and Section 103 of CERCLA (6/13/90)

FIFRA

General FIFRA Enforcement Response Policy (7/2/90)
FIFRA Section 7(c) ERP (2/10/86)
Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act: Good Laboratory Practice (GLP) Regulations (9/30/91)

Attachments

cc: (w/attachments)
OECA Office Directors
ORE Division Directors
OSRE Division Directors
Regional Counsels, Regions I - X
Director, Office of Environmental Stewardship, Region I
Director, Division of Enforcement and Compliance Assurance, Region II
Director, Compliance Assurance & Enforcement Division, Region VI
Director, Office of Enforcement, Compliance & Environmental Justice, Region VIII
Regional Enforcement Coordinators, Regions I - X
Chief, EES, DOJ
Deputy and Assistant Chiefs, EES, DOJ
CMP Workgroup Members:
Mike Northridge, OSRE
Bob Ward, OGC-CCID
Susan Dax, OCFO/OC/FMD
Anthony Britten, OPPE
David Drelich, ORE, WED
Richard Ackerman, ORE-AED
Jocelyn Adair, ORE-AED
Charlie Garlow, ORE- AED
Robin Lancaster, ORE-TPED
Ann Pontius, OECA /OPPA
Cary Secrest, ORE-AED
Mary Andrews, ORE-RED

Nancy Ketcham-Colwill, OGC-ARD
Lorie Schmidt, OGC-CCID
Richard Witt, OGC-WD
Robert Friedrich, OGC-IGD
Lynn Johnson, OSWER/OPM/PARMS
David R .Williams, OPPTS
Edie Goldman, Region 1 ORC
Wilkey Sawyer, Region 2 ORC
Judith Katz, Region 3
Leif Palmer, Region 4 ORC
Will Waisner, Region 4
Evan L. Pearson, Region 6
Alma Eaves, Region 7
Kim Muratore, Region 9

federal register

Tuesday
December 31, 1996

Part V

Environmental Protection Agency

40 CFR Parts 19 and 27
Civil Monetary Penalty Inflation Adjustment Rule; Final Rule

000132

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 19 and 27

[FRL-5671-1]

Civil Monetary Penalty Inflation Adjustment Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency ("EPA") is issuing this final Civil Monetary Penalty Inflation Adjustment Rule as mandated by the Debt Collection Improvement Act of 1996 to adjust EPA's civil monetary penalties ("CMPs") for inflation on a periodic basis. Prior to this new law, EPA's penalties had never been adjusted for inflation. This rule will allow EPA's penalties to keep pace with inflation and thereby maintain the deterrent effect Congress intended when it originally specified penalties.

This first mandatory adjustment increases almost all of EPA's penalty provisions by ten percent (except for new penalty provisions enacted into law in 1996, which are not being increased). The Agency is required to review its penalties again at least once every four years thereafter and to adjust them as necessary for inflation according to a specified formula.

EFFECTIVE DATE: January 30, 1997.

FOR FURTHER INFORMATION CONTACT: Steven M. Spiegel, Office of Regulatory Enforcement, Multimedia Enforcement Division, Mail Code 2248W, 401 M Street, SW, Washington, D.C. 20460, or at (703) 308-8507. Further information may also be requested by electronic mail (e-mail) to: spiegel.steven@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Pub. L. 101-410, enacted October 5, 1990; 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3701 note; Public Law 104-134, enacted April 26, 1996; 110 Stat. 1321), ("DCIA"), each Federal agency is required to issue regulations adjusting for inflation the maximum civil monetary penalties that can be imposed pursuant to such agency's statutes. With the adoption of this rule implementing these statutes, all violations which take place after January 30, 1997 will be subject to the new statutory maximum civil penalty amounts.

With the exception of the new penalty provisions added by the 1996 amendments to the Safe Drinking Water Act, all of the statutory penalty provisions administered by EPA are being increased. All of these increases are for the maximum allowed, ten percent. The affected penalty provisions and their statutory maximum amounts are set out in Table 1 of the new 40 CFR 19.4.

Section 5 of the DCIA sets forth the formula for adjusting the penalties for inflation:

> The inflation adjustment described under section 4 shall be determined by increasing the maximum CMP or the range of minimum and maximum CMPs, as applicable, for each CMP by the cost-of-living adjustment. * * * The term "cost-of-living" adjustment is the percentage for each CMP by which the Consumer Price Index (CPI) for the month of June of the calendar year preceding the adjustment, exceeds the Consumer Price Index for the month of June of the calendar year in which the amount of such CMP was last set or adjusted pursuant to law. Any increase determined under this amendment shall be rounded * * *.

However, the DCIA also sets a ten percent cap on the first adjustment for inflation. Since EPA's penalties have never previously been adjusted for inflation, this first statutorily required adjustment will be limited to ten percent. Table A below sets forth each CMP provision which is being increased pursuant to the DCIA and the intermediate calculations performed to arrive at the adjusted final maximum penalty contained in the last column and in today's rule.

TABLE A.—SUMMARY OF CIVIL MONETARY PENALTY INFLATION ADJUSTMENT CALCULATIONS

U.S. Code citation	Civil monetary penalty description	Year penalty amount was last set by law	Maximum penalty amount set by law as of 10/23/96	Inflation factor calculation [1]	Maximum penalty increase amount after P.L. 101-410 rounding [2]	Maximum penalty amount after increase and P.L. 101-410 rounding	Maximum penalty amount after P.L. 101-410 rounding and 10% limit
7 U.S.C. 1361 (1)	FEDERAL INSECTICIDE, FUNGICIDE, & RODENTICIDE ACT CIVIL PENALTY—GENERAL—COMMERCIAL APPLICATORS, ETC.	1978	$5,000	456.7/195.3	$7,000	$12,000	$5,500
7 U.S.C. 1361 (2)	FEDERAL INSECTICIDE, FUNGICIDE, & RODENTICIDE ACT CIVIL PENALTY—PRIVATE APPLICATORS—1ST & SUBSEQUENT OFFENSES OR VIOLATIONS.	1978	500/1,000	456.7/195.3	700/1,000	1,200/2,000	550/1,100
15 U.S.C. 2615	TOXIC SUBSTANCES CONTROL ACT CIVIL PENALTY.	1976	25,000	456.7/170.1	40,000	65,000	27,500
15 U.S.C. 2647(a)	ASBESTOS HAZARD EMERGENCY RESPONSE ACT CIVIL PENALTY.	1986	5,000	456.7/327.9	2,000	7,000	5,500
31 U.S.C. 3802(a)(1).	PROGRAM FRAUD CIVIL REMEDIES ACT/VIOLATION INVOLVING FALSE CLAIM.	1986	5,000	456.7/327.9	2,000	7,000	5,500
31 U.S.C. 3802(a)(2).	PROGRAM FRAUD CIVIL REMEDIES ACT/VIOLATION INVOLVING FALSE STATEMENT.	1986	5,000	456.7/327.9	2,000	7,000	5,500
33 U.S.C. 1319(d)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY.	1987	25,000	456.7/340.1	10,000	35,000	27,500
33 U.S.C. 1319(g)(2)(A).	CLEAN WATER ACT VIOLATION/ADMINISTRATIVE PENALTY PER VIOLATION AND MAXIMUM.	1987	10,000/25,000	456.7/340.1	3,000/10,000	13,000/35,000	11,000/27,500

TABLE A.—SUMMARY OF CIVIL MONETARY PENALTY INFLATION ADJUSTMENT CALCULATIONS—Continued

U.S. Code citation	Civil monetary penalty description	Year penalty amount was last set by law	Maximum penalty amount set by law as of 10/23/96	Inflation factor calculation[1]	Maximum penalty increase amount after P.L. 101–410 rounding[2]	Maximum penalty amount after increase and P.L. 101–410 rounding	Maximum penalty amount after P.L. 101–410 rounding and 10% limit
33 U.S.C. 1319(g)(2)(B).	CLEAN WATER ACT VIOLATION/ ADMINISTRATIVE PENALTY PER VIOLATION AND MAXIMUM.	1987	10,000/125,000	456.7/340.1	3,000/40,000	13,000/165,000	11,000/137,500
33 U.S.C. 1321(b)(6)(B)(i).	CLEAN WATER ACT VIOLATION/ ADMIN PENALTY OF SEC 311(b)(3) & (j) PER VIOLATION AND MAXIMUM.	1990	10,000/25,000	456.7/389.1	2,000/5,000	12,000/30,000	11,000 /27,500
33 U.S.C. 1321(b)(6)(B)(ii).	CLEAN WATER ACT VIOLATION/ ADMIN PENALTY OF SEC 311(b)(3) & (j) PER VIOLATION AND MAXIMUM.	1990	10,000/125,000	456.7/389.1	2,000/20,000	12,000/145,000	11,000/137,500
33 U.S.C. 1321(b)(7)(A).	CLEAN WATER ACT VIOLATION/ CIVIL JUDICIAL PENALTY OF SEC 311(b)(3)—PER VIOLATION PER DAY OR PER BARREL OR UNIT.	1990	10,000 or 1,000 per b/u	456.7/389.1	5,000 or 200 per barrel/unit	15,000 or 1,200 per barrel/unit	11,000 or 1,100 per barrel or unit
33 U.S.C. 1321(b)(7)(B).	CLEAN WATER ACT VIOLATION/ CIVIL JUDICIAL PENALTY OF SEC 311 (c) & (e)(1)(B).	1990	25,000	456.7/389.1	5,000	30,000	27,500
33 U.S.C. 1321(b)(7) C).	CLEAN WATER ACT VIOLATION/ CIVIL JUDICIAL PENALTY OF SEC 311(j).	1990	25,000	456.7/389.1	5,000	30,000	27,500
33 U.S.C. 1321(b)(7)(D).	CLEAN WATER ACT VIOLATION/ MINIMUM CIVIL JUDICIAL PENALTY OF SEC 311(b)(3)—PER VIOLATION OR PER BARREL/UNIT.	1990	100,000 or 3,000 per b/u.	456.7/389.1	15,000 or 1,000 per b/u.	115,000 or 4,000 per barrel/unit.	11,000 or 3,300 per barrel/unit
33 U.S.C. 1414b(d)	MARINE PROTECTION, RESEARCH AND SANCTUARIES ACT VIOL SEC 104b(d).	1988	600	456.7/353.5	200	800	660
33 U.S.C. 1415(a)	MARINE PROTECTION, RESEARCH AND SANCTUARIES ACT VIOLATIONS—FIRST & SUBSEQUENT VIOLATIONS.	1988	50,000/125,000	456.7/353.5	15,000/40,000	65,000/165,000	55,000/137,500
42 U.S.C. 300g–3(b).	SAFE DRINKING WATER ACT/ CIVIL JUDICIAL PENALTY OF SEC 1414(b).	1986	25,000	456.7/327.9	10,000	35,000	27,500
42 U.S.C. 300g–3(c)	SAFE DRINKING WATER ACT/ CIVIL JUDICIAL PENALTY OF SEC 1414(c).	1986	25,000	456.7/327.9	10,000	35,000	27,500
42 U.S.C. 300g–3(g)(3)(A).	SAFE DRINKING WATER ACT/ CIVIL JUDICIAL PENALTY OF SEC. 1414(g)(3)(A).	1986	25,000	456.7/327.9	10,000	35,000	27,500
42 U.S.C. 300g–3(g)(3)(B).	SAFE DRINKING WATER ACT/ MAXIMUM ADMINISTRATIVE PENALTY PER SEC. 1414(g)(3)(B).	1986	5,000	456.7/327.9	2,000	7,000	5,500
42 U.S.C. 300h–2(b)(1).	CIVIL JUDICIAL PENALTY/VIOLATIONS OF REQS—UNDERGROUND INJECTION CONTROL.	1986	25,000	456.7/327.9	10,000	35,000	27,500
42 U.S.C. 300h–2(c)(1).	CIVIL ADMINISTRATIVE PENALTY—VIOLATIONS OF REQS—UNDERGROUND INJECTION CONTROL—PER VIOLATION AND MAXIMUM.	1986	10,000/125,000	456.7/327.9	4,000/50,000	14,000/175,000	11,000/137,500
42 U.S.C. 300h–2(c)(2).	CIVIL ADMINISTRATIVE PENALTY—VIOLATIONS OF REQS—UNDERGROUND INJECTION CONTROL PER VIOLATION & MAXIMUM.	1986	5,000/125,000	456.7/327.9	2,000/50,000	7,000/175,000	5,500/137,500
42 U.S.C. 300h–3(c)(1).	VIOLATION/OPERATION OF NEW UNDERGROUND INJECTION WELL.	1974	5,000	456.7/146.9	11,000	16,000	5,500
42 U.S.C. 300h–3(c)(2).	WILLFUL VIOLATION/OPERATION OF NEW UNDERGROUND INJECTION WELL.	1974	10,000	456.7/146.9	21,000	31,000	11,000
42 U.S.C. 300i–1(b)	ATTEMPTING TO OR TAMPERING WITH PUBLIC WATER SYSTEM/CIVIL JUDICIAL PENALTY.	1986	20,000/50,000	456.7/327.9	10,000/20,000	30,000/70,000	22,000/55,000
42 U.S.C. 300j(e)(2)	FAILURE TO COMPLY W/ORDER ISSUED UNDER SEC. 1'441(c)(1).	1974	2,500	456.7/146.9	5,000	7,500	2,750
42 U.S.C. 300j–4(c)	REFUSAL TO COMPLY WITH REQS OF SEC. 1445(a) OR (b).	1986	25,000	456.7/327.9	10,000	35,000	27,500

TABLE A.—SUMMARY OF CIVIL MONETARY PENALTY INFLATION ADJUSTMENT CALCULATIONS—Continued

U.S. Code citation	Civil monetary penalty description	Year penalty amount was last set by law	Maximum penalty amount set by law as of 10/23/96	Inflation factor calculation [1]	Maximum penalty increase amount after P.L. 101–410 rounding [2]	Maximum penalty amount after increase and P.L. 101–410 rounding	Maximum penalty amount after P.L. 101–410 rounding and 10% limit
42 U.S.C. 300j–23(d).	VIOLATIONS/SECTION 1463(b)—FIRST OFFENSE/REPEAT OFFENSE.	1988	5,000/50,000	456.7/353.5	1,000/15,000	6,000/65,000	5,500/55,000
42 U.S.C. 6928(a)(3).	RESOURCE CONSERVATION & RECOVERY ACT/VIOLATION SUBTITLE C ASSESSED PER ORDER.	1984	25,000	456.7/310.7	10,000	35,000	27,500
42 U.S.C. 6928(c)	RES. CONS. & REC. ACT/CONTINUED NONCOMPLIANCE OF COMPLIANCE ORDER.	1984	25,000	456.7/310.7	10,000	35,000	27,500
42 U.S.C. 6928(g)	RESOURCE CONSERVATION & RECOVERY ACT/VIOLATION SUBTITLE C.	1976	25,000	456.7/170.1	40,000	65,000	27,500
42 U.S.C. 6928(h)(2).	RES. CONS. & REC. ACT/NONCOMPLIANCE OF CORRECTIVE ACTION ORDER.	1984	25,000	456.7/310.7	10,000	35,000	27,500
42 U.S.C. 6934(e)	RES. CONS. & REC. ACT/NONCOMPLIANCE WITH SECTION 3013 ORDER.	1976	25,000	456.7/170.1	8,000	13,000	5,500
42 U.S.C. 6973(b)	RES. CONS. & REC. ACT/VIOLATIONS OF ADMINISTRATIVE ORDER.	1976	5,000	456.7/170.1	8,000	13,000	5,500
42 U.S.C. 6991e(a)(3).	RES. CONS. & REC. ACT/NONCOMPLIANCE WITH UST ADMIN. ORDER.	1984	25,000	456.7/310.7	10,000	35,000	27,500
42 U.S.C. 6991e(d)(1).	RES. CONS. & REC. ACT/FAILURE TO NOTIFY OR SUBMIT FALSE INFO.	1984	10,000	456.7/310.7	5,000	15,000	11,000
42 U.S.C. 6991e(d)(2).	VIOLATIONS OF SPECIFIED UST REGULATORY REQUIREMENTS.	1984	10,000	456.7/310.7	5,000	15,000	11,000
42 U.S.C. 6992(d)(2).	NONCOMPLIANCE W/MEDICAL WASTE TRACKING ACT ASSESSED THRU ADMIN ORDER.	1988	25,000	456.7/353.5	5,000	30,000	27,500
42 U.S.C. 6992d(a)(4).	NONCOMPLIANCE W/MEDICAL WASTE TRACKING ACT ADMIN ORDER.	1988	25,000	456.7/353.5	5,000	30,000	27,500
42 U.S.C. 6992d(d)	MEDICAL WASTE TRACKING ACT VIOLATIONS—JUDICIAL PENALTY.	1988	25,000	456.7/353.5	5,000	30,000	27,500
42 U.S.C. 7413(b)	CLEAN AIR ACT/VIOLATIONS/OWNERS & OPS OF STATIONARY AIR POLLUTION SOURCES—JUDICIAL PENALTIES.	1977	25,000	456.7/181.8	40,000	65,000	27,500
42 U.S.C. 7413(d)(1).	CLEAN AIR ACT/STATIONARY AIR POLLUTION SOURCES—ADMINISTRATIVE PENALTIES PER VIOLATION AND MAXIMUM.	1977	25,000/200,000	456.7/181.8	40,000/300,000	65,000/300,000	27,500/220,000
42 U.S.C. 7413(d)(3).	CLEAN AIR ACT/MINOR VIOLATIONS/ STATIONARY AIR POLLUTION SOURCES—FIELD CITATIONS.	1990	5,000	456.7/389.1	1,000	6,000	5,500
42 U.S.C. 7524(a)	TAMPERING OR MANUFACTURE/SALE OF DEFEAT DEVICES IN VIOLATION OF 7522(a)(3)(A) OR (a)(3)(B)—BY PERSONS.	1977	2,500	456.7/181.8	2,000	6,500	2,750
42 U.S.C. 7524(a)	VIOLATION OF 7522 (a)(3)(A) OR (a)(3)(B)—BY MANUFACTURERS OR DEALERS; ALL VIOLATIONS OF 7522(a) (1), (2), (4), & (5) BY ANYONE.	1990	25,000	456.7/389.1	5,000	30,000	27,500
42 U.S.C. 7524(c)	ADMINISTRATIVE PENALTIES AS SET IN 7524(a) & 7545(d) WITH A MAXIMUM ADMINISTRATIVE PENALTY.	1990	200,000	456.7/389.1	30,000	230,000	220,000
42 U.S.C. 7545(d)	VIOLATIONS OF FUELS REGULATIONS.	1990	25,000	456.7/389.1	5,000	30,000	27,500
42 U.S.C. 9604(e)(5)(B).	SUPERFUND AMEND. & REAUTHORIZATION ACT/NONCOMPLIANCE W/REQUEST FOR INFO OR ACCESS.	1986	25,000	456.7/389.1	10,000	35,000	27,500
42 U.S.C. 9606(b)	SUPERFUND/WORK NOT PERFORMED W/IMMINENT, SUBSTANTIAL ENDANGERMENT.	1986	25,000	456.7/389.1	10,000	35,000	27,500

TABLE A.—SUMMARY OF CIVIL MONETARY PENALTY INFLATION ADJUSTMENT CALCULATIONS—Continued

U.S. Code citation	Civil monetary penalty description	Year penalty amount was last set by law	Maximum penalty amount set by law as of 10/23/96	Inflation factor calculation[1]	Maximum penalty increase amount after P.L. 101–410 rounding[2]	Maximum penalty amount after increase and P.L. 101–410 rounding	Maximum penalty amount after P.L. 101–410 rounding and 10% limit
42 U.S.C. 9609(a) & (b).	SUPERFUND/ADMIN. PENALTY VIOLATIONS UNDER 42 U.S.C. SECT. 9603, 9608, OR 9622+.	1986	25,000	456.7/327.9	10,000	35,000	27,500
42 U.S.C. 9609(b)	SUPERFUND/ADMIN. PENALTY VIOLATIONS—SUBSEQUENT.	1986	75,000	456.7/327.9	30,000	105,000	82,500
42 U.S.C. 9609(c)	SUPERFUND/CIVIL JUDICIAL PENALTY/VIOLATIONS OF SECT. 9603, 9608, 9622.	1986	25,000	456.7/327.9	10,000	35,000	27,500
42 U.S.C. 9609(c)	SUPERFUND/CIVIL JUDICIAL PENALTY/SUBSEQUENT VIOLATIONS OF SECT. 9603, 9608, 9622.	1986	75,000	456.7/327.9	30,000	105,000	82,500
42 U.S.C. 11045(a) & (b) (1), (2) & (3).	EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT CLASS I & II ADMINISTRATIVE AND CIVIL PENALTIES.	1986	25,000	456.7/327.9	10,000	35,000	27,500
42 U.S.C. 11045(b) (2) & (3).	EPCRA CLASS I & II ADMINISTRATIVE AND CIVIL PENALTIES—SUBSEQUENT VIOLATIONS.	1986	75,000	456.7/327.9	30,000	105,000	82,500
42 U.S.C. 11045(c)(1).	EPCRA CIVIL AND ADMINISTRATIVE REPORTING PENALTIES FOR VIOLATIONS OF SECTIONS 11022 OR 11023.	1986	25,000	456.7/327.9	10,000	35,000	27,500
42 U.S.C. 11045(c)(2).	EPCRA CIVIL AND ADMINISTRATIVE REPORTING PENALTIES FOR VIOLATIONS OF SECTIONS 11021 OR 11043(b).	1986	10,000	456.7/327.9	4,000	14,000	11,000
42 U.S.C. 11045(d) (2) & (3).	EPCRA—FRIVOLOUS TRADE SECRET CLAIMS—CIVIL AND ADMINISTRATIVE PENALTIES.	1986	25,000	456.7/327.9	10,000	35,000	27,500

[1] The "inflation factor" is the result of dividing the June 1995 CPI by the CPI for June of the year the penalty was last set or adjusted.
[2] The penalties must be rounded after the inflation adjustment pursuant to Public Law 101–410 Sec. 5A.

Future adjustments also be made in accordance with the statutory formula. Since today's inflation adjustments are being made in December 1996, the next scheduled adjustment will cover inflation from June 1996 to June of the year in which the next adjustment is made. The DCIA requires that penalties be adjusted for inflation at least once every four years.

Procedural Requirements

I. Administrative Procedure Act

In accordance with 5 U.S.C. 553(b), the Administrative Procedure Act ("APA"), EPA generally publishes a rule in a proposed form and solicits public comment on it before issuing the rule in final. However, 5 U.S.C. 553(b)(3)(B), of the APA provides an exception to the public comment requirement if the agency finds good cause to omit advance notice and public participation. Good cause is shown when public comment is "impracticable, unnecessary, or contrary to the public interest".

Accordingly, EPA finds that providing an opportunity for public comment prior to publication of this rule is not necessary because EPA is carrying out a ministerial, non-discretionary duty specified in an Act of Congress. This rule incorporates requirements specifically set forth in the DCIA requiring EPA to issue a regulation implementing inflation adjustments for all its civil penalty provisions by October 23, 1996. The formula for the amount of the penalty adjustment is prescribed by Congress in the DCIA as well. Prior notice and opportunity to comment are therefore unnecessary in this case because these changes are not subject to the exercise of discretion by EPA. These technical changes, required by law, do not substantively alter the existing regulatory framework nor in any way affect the terms under which civil penalties are assessed by EPA.

II. Small Business Regulatory Enforcement Fairness Act

Under 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the United States prior to publication of the rule in today's Federal Register. This rule is a not a "major rule" as defined by 5 U.S.C. 804(a).

III. Executive Order 12866-Regulatory Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)), the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget ("OMB") review and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA has determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

IV. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 ("UMRA"), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments and the private sector. Under sections 201, 202 and 205 of the UMRA, EPA generally must assess effects and prepare a written statement of economic and regulatory alternatives analyses for proposed and final rules with Federal mandates, as defined by the UMRA, that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

UMRA Section 201 excepts agencies from assessing effects on State, local or tribal governments or the private sector of rules that incorporate requirements specifically set forth in law. Since this rule incorporates requirements specifically set forth in the DCIA, EPA is not required to assess its regulatory effects under Section 201. Further, the section 202 and 205 requirements do not apply to today's action because they apply only to rules for which a general notice of proposed rulemaking is published, and such notice was not published for this rule since it was not required based on the finding of good cause contained in Section I above. Additionally, today's action contains no Federal mandates for State, local or tribal governments or for the private sector because it does not impose any enforceable duties on these entities.

In addition, even if the assessment requirements of UMRA Title II otherwise applied to this rule, the requirements of section 203 of UMRA (requiring EPA to develop a small government agency plan before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments) would not apply here. This rule contains no regulatory requirements that might significantly or uniquely affect small governments because the prescribed inflation adjustments do not change a small government's regulatory obligations. Additionally, this rule will have a similar effect on all individuals and entities subject to civil monetary penalties.

V. Regulatory Flexibility Act

In accordance with 5 U.S.C. 603, the Agency has determined that the regulation being issued today is not subject to the Regulatory Flexibility Act ("RFA"), which generally requires an agency to conduct a regulatory flexibility analysis of any significant impact the rule will have on a substantial number of small entities. By its terms, the RFA applies only to rules subject to notice-and-comment rulemaking requirements under the APA or any other statute. Today's rule is not subject to notice and comment requirements under the APA or any other statute because it is exempted. As discussed in Section I, while the rule is subject to the APA, the Agency has invoked the "good cause" exemption from the APA notice and comment requirements.

The Agency nonetheless has assessed the potential of this rule to adversely impact small entities. This rule contains no regulatory requirements that might significantly or uniquely affect small entities because the prescribed inflation adjustments have similar effect on all entities subject to civil monetary penalties and does not substantively alter the existing regulatory framework.

VI. Paperwork Reduction Act

This action contains no reporting or record keeping requirements for any non-federal persons or entities and consequently is not subject to the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

List of Subjects

40 CFR Part 19

Environmental protection, Administrative practice and procedure, Penalties.

40 CFR Part 27

Administrative practice and procedure, Assessments, False claims, False statements, Penalties.

Dated: December 20, 1996.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended by adding a new part 19 as follows:

1. By adding a new part 19 to read as follows:

PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

Sec.

19.1 Applicability.
19.2 Effective Date.
19.3 [Reserved].
19.4 Penalty Adjustment and Table.

Authority: Pub. L. 101–410, 104 Stat. 890, 28 U.S.C. 2461 note; Pub. L. 104–134, 110 Stat. 1321, 31 U.S.C. 3701 note.

PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

§ 19.1 Applicability.

This part applies to each statutory provision under the laws administered by the Environmental Protection Agency concerning the maximum civil monetary penalty which may be assessed in either civil judicial or administrative proceedings.

§ 19.2 Effective Date.

The increased penalty amounts set forth in this rule apply to all violations under the applicable statutes and regulations which occur after January 30, 1997.

§ 19.3 [Reserved].

§ 19.4 Penalty Adjustment and Table.

The adjusted statutory penalty provisions and their maximum applicable amounts are set out in Table 1. The last column in the table provides the newly effective maximum penalty amounts.

TABLE 1 OF SECTION 19.4.—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code citation	Civil monetary penalty description	New maximum penalty amount
7 U.S.C. 136(1)	FEDERAL INSECTICIDE, FUNGICIDE, & RODENTICIDE ACT CIVIL PENALTY—GENERAL—COMMERCIAL APPLICATORS, ETC.	$5,500
7 U.S.C. 136(2)	FEDERAL INSECTICIDE, FUNGICIDE, & RODENTICIDE ACT CIVIL PENALTY—PRIVATE APPLICATORS—FIRST AND SUBSEQUENT OFFENSES OR VIOLATIONS.	550/1,000
15 U.S.C. 2615	TOXIC SUBSTANCES CONTROL ACT CIVIL PENALTY	27,500
15 U.S.C. 2647(a)	ASBESTOS HAZARD EMERGENCY RESPONSE ACT CIVIL PENALTY	5,500
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT/VIOLATION INVOLVING FALSE CLAIM	5,500

Use 3/20/97 Corrected Version

000137

TABLE 1 OF SECTION 19.4.—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code citation	Civil monetary penalty description	New maximum penalty amount
31 U.S.C. 3802(a)(2)	PROGRAM FRAUD CIVIL REMEDIES ACT/VIOLATION INVOLVING FALSE STATEMENT.	5,500
33 U.S.C. 1319(d)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY	27,500
33 U.S.C. 1319(g)(2)(A)	CLEAN WATER ACT VIOLATION/ADMINISTRATIVE PENALTY PER VIOLATION AND MAXIMUM.	11,000/27,500
33 U.S.C. 1319(g)(2)(B)	CLEAN WATER ACT VIOLATION/ADMINISTRATIVE PENALTY PER VIOLATION AND MAXIMUM.	11,000/137,500
33 U.S.C. 1321(b)(6)(B)(I)	CLEAN WATER ACT VIOLATION/ADMIN PENALTY OF SEC 311(B)(3)&(J) PER VIOLATION AND MAXIMUM.	11,000/27,500
33 U.S.C. 1321(b)(6)(B)(ii)	CLEAN WATER ACT VIOLATION/ADMIN PENALTY OF SEC 311(B)(3)&(J) PER VIOLATION AND MAXIMUM.	11,000/137,500
33 U.S.C. 1321(b)(7)(A)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY OF SEC 311(b)(3)—PER VIOLATION PER DAY OR PER BARREL OR UNIT.	11,000 or 1,100 per barrel or unit
33 U.S.C. 1321(b)(7)(B)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY OF SEC 311(c)&(e)(1)(B).	27,500
33 U.S.C. 1321(b)(7)(C)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY OF SEC 311(j)	27,500
33 U.S.C. 1321(b)(7)(D)	CLEAN WATER ACT VIOLATION/MINIMUM CIVIL JUDICIAL PENALTY OF SEC 311(b)(3)—PER VIOLATION OR PER BARREL/UNIT.	11,000 or 3,300 per barrel or unit
33 U.S.C. 1414b(d)	MARINE PROTECTION, RESEARCH & SANCTUARIES ACT VIOL SEC 104b(d)	660
33 U.S.C. 1415(a)	MARINE PROTECTION RESEARCH AND SANCTUARIES ACT VIOLATIONS—FIRST AND SUBSEQUENT VIOLATIONS.	55,000/137,500
42 U.S.C. 300g–3(b)	SAFE DRINKING WATER ACT/CIVIL JUDICIAL PENALTY OF SEC 1414(b)	27,500
42 U.S.C. 300g–3(c)	SAFE DRINKING WATER ACT/CIVIL JUDICIAL PENALTY OF SEC 1414(c)	27,500
42 U.S.C. 300g–3(g)(3)(A)	SAFE DRINKING WATER ACT/CIVIL JUDICIAL PENALTY OF SEC. 1414(g)(3)(a)	27,500
42 U.S.C. 300g–3(g)(3)(B)	SAFE DRINKING WATER ACT/MAXIMUM ADMINISTRATIVE PENALTY PER SEC. 1414(g)(3)(B).	5,500
42 U.S.C. 300h–2(b)(1)	CIVIL JUDICIAL PENALTY/VIOLATIONS OF REQS—UNDERGROUND INJECTION CONTROL (UIC).	27,500
42 U.S.C. 300h–2(c)(1)	CIVIL ADMIN PENALTY/VIOLATIONS OF UIC REQS—PER VIOLATION AND MAXIMUM.	11,000/137,500
42 U.S.C. 300h–2(c)(2)	CIVIL ADMIN PENALTY/VIOLATIONS OF UIC REQS—PER VIOLATION AND MAXIMUM.	11,000
42 U.S.C. 300h–3(c)(1)	VIOLATION/OPERATION OF NEW UNDERGROUND INJECTION WELL	5,500
42 U.S.C. 300h–3(c)(2)	WILLFUL VIOLATION/OPERATION OF NEW UNDERGROUND INJECTION WELL	11,000
42 U.S.C. 300i–1(b)	ATTEMPTING TO OR TAMPERING WITH PUBLIC WATER SYSTEM/CIVIL JUDICIAL PENALTY.	22,000/55,000
42 U.S.C. 300j(e)(2)	FAILURE TO COMPLY W/ORDER ISSUED UNDER SEC. 1441(b)(1)	2,750
42 U.S.C. 300j–4(c)	REFUSAL TO COMPLY WITH REQS. OF SEC. 1445(a) OR (b)	27,500
42 U.S.C. 300j–23(d)	VIOLATIONS/SECTION 1463(b)—FIRST OFFENSE/REPEAT OFFENSE	5,500/55,000
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION & RECOVERY ACT/VIOLATION SUBTITLE C ASSESSED PER-ORDER.	27,500
42 U.S.C. 6928(c)	RES. CONS. & REC. ACT/CONTINUED NONCOMPLIANCE OF COMPLIANCE ORDER.	27,500
42 U.S.C. 6928(g)	RESOURCE CONSERVATION & RECOVERY ACT/VIOLATION SUBTITLE C	27,500
42 U.S.C. 6928(h)(2)	RES. CONS. & REC. ACT/NONCOMPLIANCE OF CORRECTIVE ACTION ORDER	27,500
42 U.S.C. 6934(e)	RES. CONS. & REC. ACT/NONCOMPLIANCE WITH SECTION 3013 ORDER	5,500
42 U.S.C. 6973(b)	RES. CONS. & REC. ACT/VIOLATIONS OF ADMINISTRATIVE ORDER	5,500
42 U.S.C. 6991e(a)(3)	RES. CONS. & REC. ACT/NONCOMPLIANCE WITH UST ADMINISTRATIVE ORDER	27,500
42 U.S.C. 6991e(d)(1)	RES. CONS. & REC. ACT/FAILURE TO NOTIFY OR SUBMIT FALSE INFO	11,000
42 U.S.C. 6991e(d)(2)	VIOLATIONS OF SPECIFIED UST REGULATORY REQUIREMENTS	11,000
42 U.S.C. 6992d(a)(2)	NONCOMPLIANCE W/MEDICAL WASTE TRACKING ACT ASSESSED THRU ADMIN ORDER.	27,500
42 U.S.C. 6992d(a)(4)	NONCOMPLIANCE W/MEDICAL WASTE TRACKING ACT ADMINISTRATIVE ORDER.	27,500
42 U.S.C. 6992d(d)	VIOLATIONS OF MEDICAL WASTE TRACKING ACT—JUDICIAL PENALTIES	27,500
42 U.S.C. 7413(b)	CLEAN AIR ACT/VIOLATION/OWNERS & OPS OF STATIONARY AIR POLLUTION SOURCES—JUDICIAL PENALTIES.	27,500
42 U.S.C. 7413(d)(1)	CLEAN AIR ACT/VIOLATION/OWNERS & OPS OF STATIONARY AIR POLLUTION SOURCES—ADMINISTRATIVE PENALTIES PER VIOLATION & MAX.	27,500/220,000
42 U.S.C. 7413(d)(3)	CLEAN AIR ACT/MINOR VIOLATIONS/STATIONARY AIR POLLUTION SOURCES—FIELD CITATIONS.	5,500
42 U.S.C. 7524(a)	TAMPERING OR MANUFACTURE/SALE OF DEFEAT DEVICES IN VIOLATION OF 7522(a)(3)(A) OR (a)(3)(B)—BY PERSONS.	2,750
42 U.S.C. 7524(a)	VIOLATION OF 7522(a)(3)(A) OR (a)(3)(B)—BY MANUFACTURERS OR DEALERS; ALL VIOLATIONS OF 7522(a)(1), (2), (4), & (5) BY ANYONE.	27,500
42 U.S.C. 7524(c)	ADMINISTRATIVE PENALTIES AS SET IN 7524(a) & (7545(d) WITH A MAXIMUM ADMINISTRATIVE PENALTY.	220,000
42 U.S.C. 7545(d)	VIOLATIONS OF FUELS REGULATIONS	27,500
42 U.S.C. 9604(e)(5)(B)	SUPERFUND AMEND. & REAUTHORIZATION ACT/NONCOMPLIANCE W/REQUEST FOR INFO OR ACCESS.	27,500

use 3/20/97 Corrected Version

000138

TABLE 1 OF SECTION 19.4.—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code citation	Civil monetary penalty description	New maximum penalty amount
42 U.S.C. 9606(b)	SUPERFUND/WORK NOT PERFORMED W/IMMINENT, SUBSTANTIAL ENDANGERMENT.	27,500
42 U.S.C. 9609(a) & (b)	SUPERFUND/ADMIN. PENALTY VIOLATIONS UNDER 42 U.S.C. SECT. 9603, 9608, OR 9622.	27,500
42 U.S.C. 9609(b)	SUPERFUND/ADMIN. PENALTY VIOLATIONS—SUBSEQUENT	82,500
42 U.S.C. 9609(c)	SUPERFUND/CIVIL JUDICIAL PENALTY/VIOLATIONS OF SECT. 9603, 9608, 9622	27,500
42 U.S.C. 9609(c)	SUPERFUND/CIVIL JUDICIAL PENALTY/SUBSEQUENT VIOLATIONS OF SECT. 9603, 9608, 9622.	82,500
42 U.S.C. 11045(a) & (b)(1), (2) & (3).	EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT CLASS I & II ADMINISTRATIVE AND CIVIL PENALTIES.	27,500
42 U.S.C. 11045(b) & (2)(3)	EPCRA CLASS I & II ADMINISTRATIVE AND CIVIL PENALTIES—SUBSEQUENT VIOLATIONS.	82,500
42 U.S.C. 11045(c)(1)	EPCRA CIVIL AND ADMINISTRATIVE REPORTING PENALTIES FOR VIOLATIONS OF SECTIONS 11022 OR 11023.	27,500
42 U.S.C. 11045(c)(2)	EPCRA CIVIL AND ADMINISTRATIVE REPORTING PENALTIES FOR VIOLATIONS OF SECTIONS 11021 OR 11043(b).	11,000
42 U.S.C. 11045(d) & (2)(3)	EPCRA—FRIVOLOUS TRADE SECRET CLAIMS—CIVIL AND ADMINISTRATIVE PENALTIES.	27,500

PART 27—[AMENDED]

2. The authority citation for part 27 is revised to read as follows:

Authority: 31 U.S.C. 3801–3812; Pub. L. 101–410, 104 Stat. 890, 28 U.S.C. 2461 note; Pub. L. 104–134, 110 Stat. 1321, 31 U.S.C. 3701 note.

4. Section 27.3 is amended by revising paragraphs (a)(1) and (b)(1) to read as follows:

§ 27.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes, or is supported by, any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,500[1] for each such claim.

* * * * *

(b) *Statements.* (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, factitious, or fraudulent; or

(B) Is false, factitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement; and

(ii) Contains, or is accompanied by, an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,500[2] for each such statement.

* * * * *

[FR Doc. 96–32972 Filed 12–30–96; 8:45 am]

BILLING CODE 6560–50–P

[1] As adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321).

[2] As adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321).

federal register

Thursday
March 20, 1997

Part VIII

Environmental Protection Agency

40 CFR Parts 19 and 27
Civil Monetary Penalty Inflation Adjustment Rule; Final Rule

Corrections

000140

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 19 and 27

[FRL-5711-7]

Civil Monetary Penalty Inflation Adjustment Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Corrections To final rule.

SUMMARY: This document contains corrections to the Civil Monetary Penalty Inflation Adjustment Rule, final regulations (FRL-5671-1), which were published Tuesday, December 31, 1996, (61 FR 69359). The regulations adjusted the Environmental Protection Agency's ("EPA") civil monetary penalties ("CMPs") for inflation as mandated by the Debt Collection Improvement Act of 1996 ("DCIA"). A corrected version of Table 1, from 40 CFR 19.4, which now lists all but one of the EPA's civil monetary penalty authorities, appears near the end of this notice.

EFFECTIVE DATE: January 30, 1997.

FOR FURTHER INFORMATION CONTACT: For further information, contact Steven M. Spiegel, Office of Regulatory Enforcement, Multimedia Enforcement Division, Mail Code 2248W, 401 M Street, SW, Washington, D.C. 20460, or at (703) 308-8507. Further information may also be requested by electronic mail (e-mail) to: spiegel.steven@epamail.epa.gov. The December 31, 1996 Final Rule and this Correction are also available on the Office of Enforcement and Compliance Assurance's Web page at http//www.epa.gov/oeca.

SUPPLEMENTARY INFORMATION:

Need For Correction

As published, the preamble and final regulations contain errors which may prove misleading and are in need of clarification. The changes made through these corrections are all technical in nature and can be broken down into three categories. First, there were five instances in which the exact section of a statute was not cited correctly in the preamble (which errors were repeated in the rule). Second, there were two errors in the new maximum penalty figures. Third, there are other minor non-substantive changes, as well as the addition of explanatory information which does not affect the original rule, but provides a more complete and understandable document and rule to the public. The additions concern the August 1996 amendments to the Safe Drinking Water Act, which went into effect on August 6, 1996. For purposes of clarity and providing the public with one table that lists all of EPA's civil penalty authorities, the four new civil penalty provisions from the August 1996 amendments to the Safe Drinking Water Act have been added to Table 1 in Section 19.4 (even though these penalty provisions are not subject to adjustment for inflation pursuant to the DCIA at this time). These additions are identified below. Thus the revised Table 1 of Section 19.4 now provides a list of all but one of the applicable statutory provisions and maximum civil penalties. There is one statutory provision which has not yet been adjusted. EPA anticipates performing a rule-making to adjust 15 U.S.C. 2615, as amended by the Residential Lead-Based Paint Act of 1992, 42 U.S.C. 4852d, and the corresponding regulations in 40 CFR Part 745, which were omitted from the December 31, 1996 rule-making.

Effect of Correction

Since all of the corrections are technical in nature and do not affect the substance of the rule, the original effective date of January 30, 1997, applies to those corrected provisions, as well as to the other original provisions of the final rule which did not require correction. The identified corrections to Table A in the preamble correspond to the corrections and additions to Table 1 in Section 19.4. A corrected version of Table 1, 40 CFR 19.4, which now lists all but one of EPA's civil monetary penalty authorities, appears near the end of this notice.

Correction of Publication

Accordingly, the publication on December 31, 1996 of the preamble and final regulations (FRL-5671-1) which were the subject of F.R. Doc. 96-32972, are corrected and added to as follows:

Preamble [Corrected]

On page 69360, Table A.—Summary of Civil Monetary Penalty Inflation Adjustment Calculations, the first column, is corrected as follows:

7 USC 136l(1) is corrected to read 7 USC 1361.(a)(1)—(the number 136, is followed by the letter "l", not the number one).

7 USC 136l(2) is corrected to read 7 USC 1361.(a)(2)—(the number 136, is followed by the letter "l", not the number one).

15 USC 2615 is corrected to 15 USC 2615(a).

On page 69361, Table A, is corrected as follows:

33 U.S.C. 1321(b)(7)(A) in the first column is correct, but the fourth column figure of "10,000", is corrected to "25,000". The seventh column figure of 15,000, is corrected to 30,000. The eighth column figure of "11,000" is corrected to "27,500".

33 U.S.C. 1321(b)(7)(D) in the first column is correct, but the eighth column figure of "11,000" is corrected to "110,000".

42 U.S.C. 300i-1(b) is corrected to 42 U.S.C. 300i-1(c) .

On page 69362, for 42 U.S.C. 6934(e), the fourth column, the figure "25,000" is corrected to read "5,000".

On page 69363, 42 U.S.C. 11045(d)(2)(3) is corrected to 42 U.S.C. 11045(d) (1).

In the first column, first sentence, insert "will" so the sentence reads "Future adjustments also will be made in accordance with the statutory formula."

Preamble [Additions]

Supplementary Information. On page 69360, in the third column, in the first full sentence, add the phrase ", along with the new penalty amounts set by the 1996 amendments to the Safe Drinking Water Act," between the words "statutory maximum amounts" and "are set out in Table 1" * * *"

On page 69361, 42 U.S.C. 300g-3(g)(3)(B), in the first column is correct; for the second column, change the word "penalty" to "penalties"; third column, replace "1986" with "1996"; fourth column, replace "5,000" with "5,000/25,000"; replace the figures in the fifth, sixth and seventh columns with "N/A"; and in the eighth column, replace "5,500" with "5,000/25,000".

Following 42 U.S.C. 300g-3(g)(3)(B), add a new row starting with 42 U.S.C. 300g-3(g)(3)(C) in the first column; for the second column, insert SAFE DRINKING WATER ACT/ THRESHOLD REQUIRING CIVIL JUDICIAL ACTION PER SEC. 1414(g)(3)(B) & (C); third column, insert "1996"; fourth column, insert "25,000"; insert "N/A" for the figures in the fifth, sixth and seventh columns; and in the eighth column, "25,000".

Following 42 U.S.C. 300h-3(c)2, add a new row for 42 U.S.C. 300i(b); for the second column, insert SAFE DRINKING WATER ACT/ FAILURE TO COMPLY WITH IMMINENT AND SUBSTANTIAL ENDANGERMENT ADMIN. ORDER ; third column, insert "1996"; fourth column, insert "15,000"; insert "N/A" for the figures in the fifth, sixth and seventh columns; and in the eighth column, insert "15,000".

Following 42 U.S.C. 300j-4(c), add a new row for 42 U.S.C. 300j-6(b)(2); for the second column, insert SAFE DRINKING WATER ACT/ FAILURE TO COMPLY WITH ADMIN. ORDER

ISSUED TO FED. FACILITY ; third column, insert "1996"; fourth column, insert "25,000"; insert "N/A" for the figures in the fifth, sixth and seventh columns; and in the eighth column, insert "25,000".

Procedural Requirements

I. Small Business Regulatory Enforcement Fairness Act

In the December 31, 1996 notice, EPA found good cause, pursuant to 5 U.S.C. 553(b)(3)(B) of the Administrative Procedure Act ("APA"), that soliciting public comment prior to publication of the rule was not necessary because EPA is carrying out a ministerial, non-discretionary duty per direction of an Act of Congress. EPA finds that good cause continues to apply to this rule, and therefore the effective date provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), do not govern the effective date of today's action as well. Additionally, the fact that these changes are technical and do not affect the substance of the previously issued rule also meets the "good cause" exception to the effective date requirements of section 553(d) of the Administrative Procedure Act as well.

Under Executive Order 12866 (58 F.R. 51735, October 4, 1993), this action is not a "significant regulatory action" and, is therefore not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (PL. 104–4). Because this action is not subject to notice-and-comment requirements under the APA or any other statute, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Under 5 U.S.C. 801(a)(1)(A), as added by SBREFA, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the United States prior to publication of the rule in today's Federal Register. This rule is a not a "major rule" as defined by 5 U.S.C. 804(a).

PART 19 [CORRECTED WITH ADDITIONS]

Beginning on page 69364, Table 1 of Section 19.4—Civil Monetary Penalty Inflation Adjustments, is corrected to read as follows:

TABLE 1 OF SECTION 19.4.—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code citation	Civil monetary penalty description	New maximum penalty amount
7 U.S.C. 1361.(a)(1)	FEDERAL INSECTICIDE, FUNGICIDE, & RODENTICIDE ACT CIVIL PENALTY—GENERAL—COMMERCIAL APPLICATORS, ETC.	$5,500.
7 U.S.C. 1361.(a)(2)	FEDERAL INSECTICIDE, FUNGICIDE, & RODENTICIDE ACT CIVIL PENALTY—PRIVATE APPLICATORS—FIRST AND SUBSEQUENT OFFENSES OR VIOLATIONS.	$550/$1,000.
15 U.S.C. 2615(a)	TOXIC SUBSTANCES CONTROL ACT CIVIL PENALTY	$27,500.
15 U.S.C. 2647(a)	ASBESTOS HAZARD EMERGENCY RESPONSE ACT CIVIL PENALTY	$5,500.
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT/VIOLATION INVOLVING FALSE CLAIM.	$5,500.
31 U.S.C. 3802(a)(2)	PROGRAM FRAUD CIVIL REMEDIES ACT/VIOLATION INVOLVING FALSE STATEMENT.	$5,500.
33 U.S.C. 1319(d)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY	$27,500.
33 U.S.C. 1319(g)(2)(A)	CLEAN WATER ACT VIOLATION/ADMINISTRATIVE PENALTY PER VIOLATION AND MAXIMUM.	$11,000/$27,500.
33 U.S.C. 1319(g)(2)(B)	CLEAN WATER ACT VIOLATION/ADMINISTRATIVE PENALTY PER VIOLATION AND MAXIMUM.	$11,000/$137,500.
33 U.S.C. 1321(b)(6)(B)(I)	CLEAN WATER ACT VIOLATION/ADMIN PENALTY OF SEC 311(b)(3)&(j) PER VIOLATION AND MAXIMUM.	$11,000/$27,500.
33 U.S.C. 1321(b)(6)(B)(ii)	CLEAN WATER ACT VIOLATION/ADMIN PENALTY OF SEC 311(b)(3)&(j) PER VIOLATION AND MAXIMUM.	$11,000/$137,500.
33 U.S.C. 1321(b)(7)(A)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY OF SEC 311(b)(3)—PER VIOLATION PER DAY OR PER BARREL OR UNIT.	$27,500 or $1,100 per barrel or unit.
33 U.S.C. 1321(b)(7)(B)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY OF SEC 311(c)&(e)(1)(B).	$27,500.
33 U.S.C. 1321(b)(7)(C)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY OF SEC 311(j)	$27,500.
33 U.S.C. 1321(b)(7)(D)	CLEAN WATER ACT VIOLATION/MINIMUM CIVIL JUDICIAL PENALTY OF SEC 311(b)(3)—PER VIOLATION OR PER BARREL/UNIT.	$110,000 or $3,300 per barrel or unit.
33 U.S.C. 1414b(d)	MARINE PROTECTION, RESEARCH & SANCTUARIES ACT VIOL SEC 104b(d)	$660.
33 U.S.C. 1415(a)	MARINE PROTECTION RESEARCH AND SANCTUARIES ACT VIOLATIONS—FIRST & SUBSEQUENT VIOLATIONS.	$55,000/$137,500.
42 U.S.C. 300g–3(b)	SAFE DRINKING WATER ACT/CIVIL JUDICIAL PENALTY OF SEC 1414(b)	$27,500.
42 U.S.C. 300g–3(c)	SAFE DRINKING WATER ACT/CIVIL JUDICIAL PENALTY OF SEC 1414(c)	$27,500.
42 U.S.C. 300g–3(g)(3)(A)	SAFE DRINKING WATER ACT/CIVIL JUDICIAL PENALTY OF SEC 1414(g)(3)(a)	$27,500.
42 U.S.C. 300g–3(g)(3)(B)	SAFE DRINKING WATER ACT/MAXIMUM ADMINISTRATIVE PENALTIES PER SEC 1414(g)(3)(B).	$5,000/$25,000.
42 U.S.C. 300g–3(g)(3)(C)	SAFE DRINKING WATER ACT/THRESHOLD REQUIRING CIVIL JUDICIAL ACTION PER SEC 1414(g)(3)(C).	$25,000.
42 U.S.C. 300h–2(b)(1)	SDWA/CIVIL JUDICIAL PENALTY/VIOLATIONS OF REQS—UNDERGROUND INJECTION CONTROL (UIC).	$27,500.
42 U.S.C. 300h–2(c)(1)	SDWA/CIVIL ADMIN PENALTY/VIOLATIONS OF UIC REQS—PER VIOLATION AND MAXIMUM.	$11,000/$137,500.
42 U.S.C. 300h–2(c)(2)	SDWA/CIVIL ADMIN PENALTY/VIOLATIONS OF UIC REQS—PER VIOLATION AND MAXIMUM.	$5,500/$137,500.
42 U.S.C. 300h–3(c)(1)	SDWA/VIOLATION/OPERATION OF NEW UNDERGROUND INJECTION WELL	$5,500.
42 U.S.C. 300h–3(c)(2)	SDWA/WILLFUL VIOLATION/OPERATION OF NEW UNDERGROUND INJECTION WELL.	$11,000.

000142

TABLE 1 OF SECTION 19.4.—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code citation	Civil monetary penalty description	New maximum penalty amount
42 U.S.C. 300i(b)	SDWA/FAILURE TO COMPLY WITH IMMINENT AND SUBSTANTIAL ENDANGERMENT ORDER.	$15,000.
42 U.S.C. 300i–1(c)	SDWA/ATTEMPTING TO OR TAMPERING WITH PUBLIC WATER SYSTEM/CIVIL JUDICIAL PENALTY.	$22,000/$55,000.
42 U.S.C. 300j(e)(2)	SDWA/FAILURE TO COMPLY W/ORDER ISSUED UNDER SEC. 1441(c)(1)	$2,750.
42 U.S.C. 300j–4(c)	SDWA/REFUSAL TO COMPLY WITH REQS. OF SEC. 1445(a) OR (b)	$27,500.
42 U.S.C. 300j–6(b)(2)	SDWA/FAILURE TO COMPLY WITH ADMIN. ORDER ISSUED TO FEDERAL FACILITY.	$25,000.
42 U.S.C. 300j–23(d)	SDWA/VIOLATIONS/SECTION 1463(b)—FIRST OFFENSE/REPEAT OFFENSE	$5,500/$55,000.
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION & RECOVERY ACT/VIOLATION SUBTITLE C ASSESSED PER ORDER.	$27,500.
42 U.S.C. 6928(c)	RES. CONS. & REC. ACT/CONTINUED NONCOMPLIANCE OF COMPLIANCE ORDER.	$27,500.
42 U.S.C. 6928(g)	RESOURCE CONSERVATION & RECOVERY ACT/VIOLATION SUBTITLE C	$27,500.
42 U.S.C. 6928(h)(2)	RES. CONS. & REC. ACT/NONCOMPLIANCE OF CORRECTIVE ACTION ORDER	$27,500.
42 U.S.C. 6934(e)	RES. CONS. & REC. ACT/NONCOMPLIANCE WITH SECTION 3013 ORDER	$5,500.
42 U.S.C. 6973(b)	RES. CONS. & REC. ACT/VIOLATIONS OF ADMINISTRATIVE ORDER	$5,500.
42 U.S.C. 6991e(a)(3)	RES. CONS. & REC. ACT/NONCOMPLIANCE WITH UST ADMINISTRATIVE ORDER.	$27,500.
42 U.S.C. 6991e(d)(1)	RES. CONS. & REC. ACT/FAILURE TO NOTIFY OR FOR SUBMITTING FALSE INFORMATION.	$11,000.
42 U.S.C. 6991e(d)(2)	RCRA/VIOLATIONS OF SPECIFIED UST REGULATORY REQUIREMENTS	$11,000.
42 U.S.C. 6992d(a)(2)	RCRA/NONCOMPLIANCE W/MEDICAL WASTE TRACKING ACT ASSESSED THRU ADMIN ORDER.	$27,500.
42 U.S.C. 6992d(a)(4)	RCRA/NONCOMPLIANCE W/MEDICAL WASTE TRACKING ACT ADMINISTRATIVE ORDER.	$27,500.
42 U.S.C. 6992d(d)	RCRA/VIOLATIONS OF MEDICAL WASTE TRACKING ACT—JUDICIAL PENALTIES.	$27,500.
42 U.S.C. 7413(b)	CLEAN AIR ACT/VIOLATION/OWNERS & OPERATORS OF STATIONARY AIR POLLUTION SOURCES—JUDICIAL PENALTIES.	$27,500.
42 U.S.C. 7413(d)(1)	CLEAN AIR ACT/VIOLATION/OWNERS & OPERATORS OF STATIONARY AIR POLLUTION SOURCES-ADMINISTRATIVE PENALTIES PER VIOLATION & MAX.	$27,500/$220,000.
42 U.S.C. 7413(d)(3)	CLEAN AIR ACT/MINOR VIOLATIONS/STATIONARY AIR POLLUTION SOURCES—FIELD CITATIONS.	$5,500.
42 U.S.C. 7524(a)	TAMPERING OR MANUFACTURE/SALE OF DEFEAT DEVICES IN VIOLATION OF 7522(a)(3)(A) OR (a)(3)(B)—BY PERSONS.	$2,750.
42 U.S.C. 7524(a)	VIOLATION OF 7522(a)(3)(A) OR (a)(3)(B)—BY MANUFACTURERS OR DEALERS; ALL VIOLATIONS OF 7522(a)(1),(2), (4),&(5) BY ANYONE.	$27,500.
42 U.S.C. 7524(c)	ADMINISTRATIVE PENALTIES AS SET IN 7524(a) & 7545(d) WITH A MAXIMUM ADMINISTRATIVE PENALTY.	$220,000.
42 U.S.C. 7545(d)	VIOLATIONS OF FUELS REGULATIONS	$27,500.
42 U.S.C. 9604(e)(5)(B)	SUPERFUND AMEND. & REAUTHORIZATION ACT/NONCOMPLIANCE W/REQUEST FOR INFO OR ACCESS.	$27,500.
42 U.S.C. 9606(b)(1)	SUPERFUND/WORK NOT PERFORMED W/IMMINENT, SUBSTANTIAL ENDANGERMENT.	$27,500.
42 U.S.C. 9609 (a) & (b)	SUPERFUND/ADMIN. PENALTY VIOLATIONS UNDER 42 U.S.C. SECT. 9603, 9608, OR 9622.	$27,500.
42 U.S.C. 9609(b)	SUPERFUND/ADMIN. PENALTY VIOLATIONS—SUBSEQUENT	$82,500.
42 U.S.C. 9609(c)	SUPERFUND/CIVIL JUDICIAL PENALTY/VIOLATIONS OF SECT. 9603, 9608, 9622.	$27,500.
42 U.S.C. 9609(c)	SUPERFUND/CIVIL JUDICIAL PENALTY/SUBSEQUENT VIOLATIONS OF SECT. 9603, 9608, 9622.	$82,500.
42 U.S.C. 11045 (a) & (b) (1), (2) & (3).	EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT CLASS I & II ADMINISTRATIVE AND CIVIL PENALTIES.	$27,500.
42 U.S.C. 11045(b) (2) & (3).	EPCRA CLASS I & II ADMINISTRATIVE AND CIVIL PENALTIES—SUBSEQUENT VIOLATIONS.	$82,500.
42 U.S.C. 11045(c)(1)	EPCRA CIVIL AND ADMINISTRATIVE REPORTING PENALTIES FOR VIOLATIONS OF SECTIONS 11022 OR 11023.	$27,500.
42 U.S.C. 11045(c)(2)	EPCRA CIVIL AND ADMINISTRATIVE REPORTING PENALTIES FOR VIOLATIONS OF SECTIONS 11021 OR 11043(b).	$11,000.
42 U.S.C. 11045(d)(1)	EPCRA—FRIVOLOUS TRADE SECRET CLAIMS—CIVIL AND ADMINISTRATIVE PENALTIES.	$27,500.

PART 27—[CORRECTED]

On page 69366, in the first column, the amendatory instruction identified as number "4" is corrected to "3".

Michael M. Stahl.

Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance.

[FR Doc. 97-7069 Filed 3-19-97; 8:45 am]

BILLING CODE 6560-50-P

EC-P-1995-05

A. 14

FOR FURTHER INFORMATION CONTACT: Contact the following persons for more information about a permit listed in this notice:

For plants in New York, Gerry DeGaetano, (212) 264–6685, EPA Region 2.

For plants in Florida and Kentucky, Scott Davis, (404) 347–5014, EPA Region 4 (address above).

For plants in Missouri, Jon Knodel, (913) 551–7622, EPA Region 7.

SUPPLEMENTARY INFORMATION: Title IV of the Clean Air Act directs EPA to establish a program to reduce the adverse effects of acidic deposition by promulgating rules and issuing permits to emission sources subject to the program. On January 11, 1993, EPA promulgated final rules implementing the program. Subsequently, several parties filed petitions for review of the rules with the U.S. Court of Appeals for the District of Columbia Circuit. On November 18, 1993, EPA published a notice of proposed revisions to rules regarding Phase I substitution and reduced utilization plans [sections 404 (b) and (c) and 408(c)(1)(B) of the Act]. On May 4, 1994, EPA and other parties signed a settlement agreement addressing the substitution and reduced utilization issues.

In today's action, EPA is issuing permits that are consistent with the May 4, 1994 settlement. Except as noted below, EPA approves for 1995–1999 all compliance options for which EPA deferred action for 1996–1999 in the draft permits. In addition, except as noted below, the numbers of substitution and compensating unit allowances allocated to each unit for 1995–1999 are identical to the numbers of allowances allocated to each unit for 1995 in the draft permits. The additional allowances discussed below are a one-time only allocation pursuant to the settlement. Upon activation of conditionally-approved plans, substitution or compensating unit allowances are allocated for the remaining years the plan is in effect. EPA issues the following permits:

Northport in New York.

Port Jefferson in New York.

Big Bend in Florida.

F J Gannon in Florida: No change for unit GB01; 4,581 substitution allowances for each year and 9 additional allowances to unit GB02 upon activation of substitution plan; 7,003 substitution allowances for each year and 437 additional allowances to unit GB03 upon activation of substitution plan; 7,570 substitution allowances for each year and 450 additional allowances to unit GB04 upon activation of substitution plan; 10,295 substitution allowances for each year and 520 additional allowances to unit GB05 upon activation of substitution plan; 16,107 substitution allowances for each year and 377 additional allowances to unit GB06 upon activation of substitution plan.

Hookers Point in Florida: 0 substitution allowances for each year and 27 additional allowances to unit HB01 upon activation of substitution plan; 31 substitution allowances for each year and 3 additional allowances to unit HB02 upon activation of substitution plan; 92 substitution allowances for each year and 9 additional allowances to unit HB03 upon activation of substitution plan; 145 substitution allowances for each year and 15 additional allowances to unit HB04 upon activation of substitution plan; 124 substitution allowances for each year and 13 additional allowances to unit HB05 upon activation of substitution plan; 207 substitution allowances for each year and 13 additional allowances to unit HB06 upon activation of substitution plan.

Big Sandy in Kentucky.

Coleman in Kentucky.

Cooper in Kentucky.

Dale in Kentucky: 2,115 substitution allowances for each year and 226 additional allowances to unit 3 upon activation of substitution plan, and 226 additional allowances if the unit becomes affected for NO_x; 1,729 substitution allowances for each year and 166 additional allowances to unit 4 upon activation of substitution plan, and 166 additional allowances if the unit becomes affected for NO_x.

East Bend in Kentucky.

H L Spurlock in Kentucky: 14,206 substitution allowances for each year and 1,593 additional allowances to unit 2 upon activation of substitution plan, and 1,593 additional allowances if the unit becomes affected for NO_x.

R D Green in Kentucky: No change for unit G1; 5,827 substitution allowances for each year and 492 additional allowances to unit G2.

Sibley in Missouri: 2,782 substitution allowances for each year and 28 additional allowances to unit 1; 3,332 substitution allowances for each year and 130 additional allowances to unit 2.

Dated: July 14, 1994.

Brian J. McLean,

Director, Acid Rain Division, Office of Atmospheric Programs, Office of Air and Radiation.

[FR Doc. 94–18321 Filed 7–27–94; 8:45 am]

BILLING CODE 6560-50-P

[FRL–5021–5]

Restatement of Policies Related to Environmental Auditing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Environmental Auditing Policy Statement ("1986 Policy") was originally published in the Federal Register on July 9, 1986 (51 FR 25004). The 1986 Policy states that "(c)larification of EPA's position regarding auditing may help encourage regulated entities to establish audit programs or upgrade systems already in place." The goal of this notice is to clarify EPA's current policies on and approach to auditing. This notice summarizes salient points from the 1986 Policy, which remains in effect. In addition, this notice updates the Agency's activities with respect to auditing and auditing policy and references pertinent language from other relevant policy documents, in anticipation of the public meeting on auditing scheduled for July 27–28, 1994. This notice does not represent a new EPA policy or position on environmental auditing; all existing policies remain in effect.

I. Auditing Public Meeting: Change of Location

The response to EPA's announcement (59 FR 31914, June 20, 1994) to hold a public meeting on auditing on July 27–28, 1994 has been overwhelming. Due to the expected size of the audience, therefore, the Agency has changed the location of this event. The new location is the Stouffer Mayflower Hotel in Washington, DC, at 1127 Connecticut Avenue, NW, Phone (202) 347–3000.

II. The Auditing Policy Reassessment

In response to a request by Administrator Carol M. Browner, the Office of Enforcement and Compliance Assurance (OECA) is reassessing the Agency's current policy regarding environmental auditing and self-evaluation by the regulated community. EPA has committed to investigating the perceived problems relating to auditing, self-evaluation, and disclosure through an empirical, information-gathering effort. The Agency must develop an adequate information base to give serious consideration to any policy options and to ensure that any decision to either reinforce, change, or supplement existing policy is informed by fact.

EPA hopes to collect such relevant data through the implementation of four actions this summer. First, the Agency

000146 1993

ECDIC

will convene a public meeting on July 27–28, 1994, as an opportunity to obtain a wide variety of views and to sharpen the focus on these issues. The range of issues appropriate for discussion at the public meeting include: the implementation of the 1986 Policy; specific suggestions for auditing policy options; State audit privilege legislation; auditing in the context of criminal enforcement; and advances in the field of auditing since 1986. Interested parties are encouraged to read the Federal Register notice dated June 20, 1994 (59 FR 31914) for more details on the public meeting.

Second, EPA published in the June 21, 1994 Federal Register (59 FR 32062) a notice requesting proposals for Environmental Leadership Program (ELP) pilot projects. EPA expects that these pilot projects will generate useful data on auditing methodology and measures, and may also serve as vehicles for experimenting with policy-driven incentives.

Third, EPA will encourage the private sector to collect data and survey auditing practices in order to gauge the effect of enforcement policies on self-evaluation and disclosure in the regulated community. The Agency will also seek input on auditing and related issues from States, environmental and public interest groups, and trade and professional associations.

Finally, in this Federal Register notice, EPA is restating salient points from the 1986 Policy and reviewing its activities and other policies relating to environmental auditing. The goal of this notice is to clarify EPA's current policies on and approach to auditing, in order to ensure a well-informed policy debate.

III. Review of General EPA Policy on Environmental Auditing

A. *EPA Encourages the Use of Environmental Auditing*

EPA has actively encouraged and participated in the development of environmental auditing and improved environmental management practices since the mid-1980s. In fact, the 1986 Policy has served as the basis for defining the practice and profession of environmental auditing. The 1986 Policy clearly states EPA support for auditing:

> Effective environmental auditing can lead to higher levels of overall compliance and reduced risk to human health and the environment. EPA endorses the practice of environmental auditing and supports its [illegible] use by regulated entities to help meet the goals of Federal, state and local environmental requirements.
>
> . . . . .
>
> Auditing serves as a quality assurance check to help improve the effectiveness of basic environmental management by verifying that management practices are in place, functioning and adequate. Environmental audits evaluate, and are not a substitute for, direct compliance activities such as obtaining permits, installing controls, monitoring compliance, reporting violations, and keeping records. Environmental auditing may verify but does not include activities required by law, regulation, or permit (e.g., continuous emissions monitoring, composite correction plans at wastewater treatment plants, etc.). Audits do not in any way replace regulatory agency inspections. However, environmental audits can improve compliance by complementing conventional Federal, state and local oversight.
>
> . . . . .
>
> Environmental auditing has developed for sound business reasons, particularly as a means of helping regulated entities manage pollution control affirmatively over time instead of reacting to crises. Auditing can result in improved facility environmental performance, help communicate effective solutions to common environmental problems, focus facility managers' attention on current and upcoming regulatory requirements, and generate protocols and checklists which help facilities better manage themselves. Auditing also can result in better-integrated management of environmental hazards, since auditors frequently identify environmental liabilities which go beyond regulatory compliance.

The Agency clearly supports auditing to help ensure the adequacy of internal systems to achieve, maintain, and monitor compliance. By voluntarily implementing environmental management and auditing programs, regulated entities can identify, resolve, and avoid environmental problems.

> EPA does not intend to dictate or interfere with the environmental management practices of private or public organizations. Nor does EPA intend to mandate auditing (though in certain instances EPA may seek to include provisions for environmental auditing as part of settlement agreements, as noted below). Because environmental auditing systems have been widely adopted, on a voluntary basis in the past, and because audit quality depends to a large degree upon genuine management commitment to the program and its objectives, auditing should remain a voluntary activity.

Because senior managers of regulated entities are ultimately responsible for taking all necessary steps to ensure compliance with environmental requirements, EPA believes they have a strong incentive to use reasonable means, such as environmental auditing, to secure reliable information about facility compliance status.

B. *Definition of Environmental Auditing, Elements of Effective Environmental Auditing Programs*

The 1986 Policy also defines environmental auditing, and outlines what EPA considers to be the elements of an effective environmental auditing program. The 1986 Policy presents the following definition:

> Environmental auditing is a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements. Audits can be designed to accomplish any or all of the following: verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated materials and practices.

An organization's auditing program will evolve according to its unique structures and circumstances. The 1986 Policy acknowledges this fact, and also states EPA's belief that effective environmental auditing programs appear to have certain discernible elements in common with other kinds of audit programs. EPA generally considers these elements important to ensure program effectiveness. This general description of effective, mature audit programs can help those starting audit programs, especially Federal agencies and smaller businesses. Regulatory agencies may also use these elements in negotiating environmental auditing provisions for consent decrees. Finally, these elements can help guide states and localities considering auditing initiatives.

As stated in the 1986 Policy, an effective environmental auditing system will likely include the following general elements:

I. Explicit top management support for environmental auditing and commitment to follow-up on audit findings. Management support may be demonstrated by a written policy articulating upper management support for the auditing program, and for compliance with all pertinent requirements, including corporate policies and permit requirements as well as Federal, state and local statutes and regulations.

Management support for the auditing program also should be demonstrated by an explicit written commitment to follow-up on audit findings to correct identified problems and prevent their recurrence.

II. An environmental auditing function independent of audited activities. The status or organizational locus of environmental auditors should be sufficient to ensure objective and unobstructed inquiry, observation and testing. Auditor objectivity should not be impaired by personal relationships, financial or other conflicts of interest, interference with free inquiry or judgment, or fear of potential retribution.

000147

Adequate team staffing and auditor ...ing. Environmental auditors should ... or have ready access to the ...ge, skills, and disciplines needed to ...lish audit objectives. Each individual ... should comply with the company's ...sional standards of conduct. Auditors, ...er full-time or part-time, should ...ain their technical and analytical ...ence through continuing education ...ining.

Explicit audit program objectives, ..., resources and frequency. At a ...mum, audit objectives should include ...ing compliance with applicable ... ...onmental laws and evaluating the ...acy of internal compliance policies, ...dures, and personnel training programs ...ure continued compliance.

...dits should be based on a process which ...des auditors: all corporate policies, ...ds, and Federal, state, and local ...tions pertinent to the facility; and ...klists or protocols addressing specific ...ues that should be evaluated by auditors. ...olicit written audit procedures generally ...ld be used for planning audits, ...blishing audit scope, establishing audit ..., examining and evaluating audit ...ings, communicating audit results, and ...owing-up.

A process that collects analyzes ...prets and documents information ...ficient to achieve audit objectives. ...mation should be collected before and ...ng an on-site visit regarding ...ironmental compliance (1) environmental ...gement effectiveness (2) and other ... 3) related to audit objectives and ...pe. This information should be sufficient, ...able, relevant and useful to provide a ...nd basis for audit finds and ...mmendations.

Sufficient information is factual, ...quate and convincing so that a prudent, ...rmed person would be likely to reach the ...e conclusions as the auditor.

Reliable information is the best ...inable through use of appropriate audit ...niques.

Relevant information supports audit ...dings and recommendations and is ...istent with the objectives for the audit.

Useful information helps the ...nization meet its goals.

The audit process should include a ...odic review of the reliability and ...grity of this information and the means ...d to identify, measure, classify and report ...udit procedures, including the testing ... sampling techniques employed, should ...elected in advance, to the extent ...tical, and expanded or altered if ...umstances warrant. The process of ...ecting, analyzing, interpreting and ...umenting information should provide ...onable assurance that audit objectivity is ...ntained and audit goals are met.

A process that includes specific ...edures to promptly prepare candid clear ...appropriate written reports on audit ...s corrective actions and schedules for ...lementation. Procedures should be in ... ...nsure that such information is ...municated to managers, including ...ity and corporate management, who can evaluate the information and ensure correction of identified problems. Procedures also should be in place for determining what internal findings are reportable to state or Federal agencies.

VII. A process that includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits. Quality assurance may be accomplished through supervision, independent internal reviews, external reviews, or a combination of these approaches.

C. EPA Activities Related to Auditing Standards

EPA is currently participating in two major non-regulatory efforts to develop voluntary standards for auditing and environmental management systems. First, the International Organization of Standards (ISO), based in Geneva, Switzerland, established in 1993 a Technical Committee for Environmental Management Standards (ISO–TC–207). Subcommittee Two of TC–207 is in the process of developing environmental auditing standards. The standards fall into three groups: Auditing Principles, Auditing Procedures, and Auditor Qualifications. Second, in the U.S., the National Sanitation Foundation (NSF) in Ann Arbor, Michigan, is developing environmental auditing standards that are intended to be compatible with and augment the ISO standards. Work is proceeding rapidly within ISO and NSF, with draft standards expected by the end of the year.

The proposed NSF and ISO auditing standards are being developed within the framework of overall environmental management systems standards. Neither ISO nor NSF intends to establish specific environmental standards; instead both are seeking to provide management tools that include auditing schemes and standards. The EPA 1986 Policy has been a central reference document for both the ISO and NSF work. As these new documents develop, issues of auditor qualifications and explicit management commitment to audit follow-up will be of particular interest to EPA.

IV. Review of EPA Policy on Specific Environmental Auditing Issues

A. Agency Requests for Audit Reports

EPA's 1986 Policy clearly states that:

> . . . EPA believes routine Agency requests for audit reports could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted. Therefore, as a matter of policy EPA will not routinely request environmental audit reports.

The 1986 policy also acknowledges regulated entities' need to self-evaluate environmental performance with some measure of privacy. However, audit reports may not shield monitoring, compliance or other information that would otherwise be reportable and/or accessible to EPA even if there is no explicit requirement to generate that data. Thus, the 1986 Policy does not alter regulated entities' existing or future obligations to monitor, record or report information required under environmental statutes, regulations or permits, or to allow EPA access to that information. Nor does the 1986 Policy alter EPA's authority to request and receive any relevant information—including that contained in audit reports—under various environmental statutes or in other administrative or judicial proceedings.

EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting, or other data otherwise available to the Agency. Examples would likely include situations where: audits are conducted under consent decrees or other settlement agreements; a company has placed its management practices at issue by raising them as a defense; or state of mind or intent are a relevant element of inquiry, such as during a criminal investigation. This list is illustrative rather than exhaustive, since there doubtless will be other situations, not subject to prediction, in which audit reports rather than information may be required.

B. EPA Response to Environmental Auditing

1. General Policy

The 1986 Policy states 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." EPA is required by law to independently assess compliance status of facilities, and cannot eliminate inspections for particular firms or classes of firms. Certain statutes (e.g. RCRA) and Agency policies establish minimum facility inspection frequencies to which EPA will adhere. Environmental audits are in no way a substitute for regulatory oversight.

As explained in the 1986 Policy, however, EPA will take into account a facility's efforts to audit in setting inspection priorities and in fashioning enforcement responses to violations:

> . . . EPA will continue to address environmental problems on a priority basis

000148

and will consequently inspect facilities with poor environmental records and practices more frequently. Since effective environmental auditing helps management identify and promptly correct actual or potential problems, audited facilities' environmental performance should improve. Thus, while EPA inspections of self-audited facilities will continue, to the extent that compliance performance is considered in setting inspection priorities, facilities with a good compliance history may be subject to fewer inspections.

In fashioning enforcement responses 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 violations and underlying environmental problems. When regulated entities take reasonable precautions to avoid noncompliance, expeditiously correct underlying environmental problems discovered through audits or other means, and implement measures to prevent their recurrence, EPA may exercise its discretion to consider such actions as honest and genuine efforts to assure compliance. Such consideration applies particularly when a regulated entity promptly reports violations or compliance data that otherwise were not required to be recorded or reported to EPA.

These principles have been incorporated into the Agency's enforcement response and civil penalty policies.

2. Audit Provisions as Remedies in Enforcement Settlements

The 1986 Policy includes the following language on audit provisions as remedies in enforcement settlements:

EPA may propose environmental auditing provisions in consent decrees and in other settlement negotiations where auditing could provide a remedy for identified problems and reduce the likelihood of similar problems recurring in the future. Environmental auditing provisions are most likely to be proposed in settlement negotiations when:

- 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 of 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.

EPA's enforcement office issued further guidance on this issue in 1986 in a document entitled "EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements." This guidance has been consistently applied in enforcement actions as appropriate, and has formed the basis for the inclusion of audit agreements or provisions in numerous consent decrees. Selected text from this document, also still in effect, is included here:

In recent years, Agency negotiators have achieved numerous settlements that require regulated entities to audit their operations. These innovative settlements have been highly successful in enabling the Agency to accomplish more effectively its primary mission, namely, to secure environmental compliance. Indeed, auditing provisions in enforcement settlements have provided several important benefits to the Agency by enhancing its ability to:

- Address compliance at an entire facility or at all facilities owned or operated by a party, rather than just the violations discovered during inspections; and identify and correct violations that may have gone undetected (and uncorrected) otherwise;
- Focus the attention of a regulated party's top-level management on environmental compliance; produce corporate policies and procedures that enable a party to achieve and maintain compliance; and help a party to manage pollution control affirmatively over time instead of reacting to crises;
- Provide a quality assurance check by verifying that existing environmental management practices are in place, functioning and adequate.

* * * * *

It is the policy of EPA to settle its judicial and administrative enforcement cases only where violators can assure the Agency that their noncompliance will be (or has been) corrected. EPA . . . considers auditing an appropriate part of a settlement where heightened management attention could lower the potential for noncompliance to recur.

* * * * *

In most cases, either (or both) of the following two types of environmental audits should be considered [in enforcement settlements]:

1. *Compliance Audit:* An independent assessment of the current status of a party's compliance with applicable statutory and regulatory requirements. This approach always entails a requirement that effective measures be taken to remedy uncovered compliance problems, and is most effective when coupled with a requirement that the root causes of noncompliance also be remedied.

2. *Management Audit:* 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.

Whether to seek a compliance audit, a management audit, or both will depend upon the unique circumstances of each case. A compliance audit usually will be appropriate where the violations uncovered by Agency inspections raise the likelihood that environmental noncompliance exists elsewhere within a party's operations. A management audit should be sought where it appears that a major contributing factor to noncompliance is inadequate (or nonexistent) managerial attention to environmental policies, procedures or staffing. Both types of audits should be sought where both current noncompliance and shortcomings in a party's environmental management practices need to be addressed.

C. Environmental Auditing and Criminal Enforcement Policy

Following EPA's 1986 Policy, three significant developments mark the evolution and implementation of criminal enforcement policy governing the use of self-audits and the voluntary disclosure of environmental violations.

First, on July 1, 1991, the Department of Justice issued a guidance entitled: "Factors In Decisions On Criminal Prosecutions For Environmental Violations In The Context Of Significant Voluntary Compliance Or Disclosure Efforts By The Violator." The guidance sets the general DOJ policy on auditing:

It is the policy of the Department of Justice to encourage self-auditing, self-policing, and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal enforcement discretion.

The guidance and the examples contained therein provide a framework for the determination of whether a particular case presents the type of circumstances in which lenience would be appropriate. The factors to be considered in exercising the Department's prosecutorial discretion, in cases where the law and evidence are otherwise sufficient for prosecution, include: voluntary disclosure; cooperation; preventive measures and compliance programs; pervasiveness of noncompliance; internal disciplinary action; and subsequent compliance efforts.

Second, on November 11, 1993, the Final Draft Environmental Sentencing Guidelines provided for the mitigation of sentences where a court finds that the following factors for environmental compliance are satisfied: line management attention to compliance; integration of environmental policies, standards, and procedures; auditing, monitoring, reporting and tracking systems; regulatory expertise, training and evaluation; incentives for compliance; disciplinary procedures; continuing evaluation and improvement.

Finally, on January 12, 1994, EPA's Director of Criminal Enforcement issued a guidance entitled: "The Exercise of Investigative Discretion," that sets forth

000149

specific factors that distinguish cases meriting criminal investigation. With respect to corporations conducting environmental audits, the guidance notes:

Corporate culpability may be indicated when a company performs an environmental compliance or management audit, and then knowingly fails to promptly remedy the non-compliance and correct any harm done. On the other hand, EPA policy strongly encourages self-monitoring, self-disclosure, and self-correction. When self-auditing has been conducted (followed up by prompt remediation of the non-compliance and any resulting harm) and full, complete disclosure has occurred, the company's constructive activities should be considered as mitigating factors in EPA's exercise of investigative discretion. Therefore, a violation that is voluntarily revealed and fully and promptly remediated as part of a corporation's systematic and comprehensive self-evaluation program generally will not be a candidate for the expenditure of scarce criminal resources.

D. Audit Privilege Legislation

Four States (Colorado, Indiana, Kentucky, and Oregon) have recently enacted legislation which, with some variations, creates a "self-evaluative" privilege for audit reports. EPA has consistently opposed this approach, principally because of the risk of weakening State enforcement programs, imposition of unnecessary transaction costs and delays in enforcement actions, and the potential increase in the number of situations requiring the expenditure of scarce Agency resources, including the "overfiling" of State enforcement actions. EPA urges States that are considering a privilege-oriented approach to actively participate in the comprehensive process described in the June 20, 1994 Federal Register notice (59 FR 31914) before pursuing any legislative action. The Agency also encourages States that have passed such legislation to present documentary justification for this approach either at the public meeting on July 27–28, 1994, or in written comments.

E. Environmental Auditing at Federal Facilities

The 1986 Policy also encourages all Federal agencies subject to environmental laws and regulations to institute environmental auditing, to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Such Federal facility environmental audit programs should be structured to promptly identify environmental problems and expeditiously develop schedules for remedial action.

Where appropriate, EPA will enter into agreements with other agencies to clarify the respective roles, responsibilities and commitments of each agency in conducting and responding to Federal facility environmental audits. Also, to the extent feasible, EPA will provide technical assistance to help Federal agencies design and initiate audit programs. Currently, the EPA Federal Facility Enforcement Office (FFEO) is co-chairing an inter-Agency work group to revise auditing guidelines and protocols for Federal agencies. In addition, FFEO is developing the Federal Government Environmental Challenge Program required by Executive Order 12856, which calls for the establishment of a Code of Environmental Principles and a Model Installation Program for Federal facilities. This program is likely to include environmental auditing components.

The 1986 Policy states that:

With respect to inspections of self-audited facilities and requests for audit reports, EPA generally will respond to environmental audits by Federal facilities in the same manner as it does for other regulated entities.

* * * * *

Federal agencies should, however, be aware that the Freedom of Information Act will govern any disclosure of audit reports or audit-generated information requested from Federal agencies by the public.

When Federal agencies discover significant violations through an audit, EPA encourages them to voluntarily submit the related findings and corrective action plans to the appropriate EPA Regional office and State agencies, even when not specifically required to do so. EPA will review the audit findings and action plans, and negotiate either a consent agreement or a Federal Facilities Compliance Agreement, pursuant to its enforcement authorities under the various environmental statutes. In any event, Federal agencies are expected to report to EPA pollution abatement and prevention projects involving costs necessary to correct compliance problems discovered through the audit, in accordance with OMB Circular A-106. Upon request, and in appropriate circumstances, EPA may assist affected Federal agencies through coordination of any public release of voluntarily submitted audit findings with approved action plans once agreement has been reached and/or appropriate enforcement actions have been taken.

V. Review of Relationship to State or Local Regulatory Agencies

Effective Federal/state partnerships are critical to accomplishing the mutual goal of achieving and maintaining high levels of compliance with environmental laws and regulations. The greater the consistency between state and local policies and the Federal response to environmental auditing, the greater the degree to which sound auditing practices might be adopted and compliance levels improved. State and local regulatory agencies, of course, have independent jurisdiction over regulated entities. EPA encourages them to adopt these or similar policies on environmental auditing, in order to advance the use of effective environmental auditing in a consistent manner.

The 1986 Policy emphasizes this point further:

EPA recognizes that some states have already undertaken environmental auditing initiatives that differ somewhat from this policy. Other states also may want to develop auditing policies that accommodate their particular needs or circumstances. Nothing in this policy statement is intended to preempt or preclude states from developing other approaches to environmental auditing. EPA encourages state and local authorities to consider the basic principles that guided the Agency in developing this policy:

- Regulated entities must continue to report or record compliance information required under existing statutes or regulations, regardless of whether such information is generated by an environmental audit or contained in an audit report. Required information cannot be withheld merely because it is generated by an audit rather than by some other means.
- Regulatory agencies cannot make promises to forgo or limit enforcement action against a particular facility or class of facilities in exchange for the use of environmental auditing systems. However, such agencies may use their discretion to adjust enforcement actions on a case-by-case basis in response to honest and genuine efforts by regulated entities to assure environmental compliance.
- When setting inspection priorities, regulatory agencies should focus to the extent possible on compliance performance and environmental results.
- Regulatory agencies must continue to meet minimum program requirements (e.g., minimum inspection requirements, etc).
- Regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs.

VI. Conclusion

All of the policies referenced in this notice remain in effect. The Agency intends, however, to re-examine these policies comprehensively and remains open to suggestions for changes and

000150

improvements regarding all aspects of existing auditing policy. The information presented here is intended for the convenience of interested parties, in preparation for the July 27–28, 1994 public meeting. The Agency hopes that this information will clarify EPA's current activities and policies related to environmental auditing.

The Office of Compliance will respond to written requests for copies of the documents referenced in this notice. Send all requests to: U.S. EPA, Office of Compliance, Attn: Ira R. Feldman, Special Counsel, 401 M Street, NW (2503), Washington, DC 20460.

Steven A. Herman,

Assistant Administrator, Office of Enforcement and Compliance Assurance.

[FR Doc. 94–18327 Filed 7–27–94; 8:45 am]

BILLING CODE [illegible]

[FRL–5021–2]

Effluent Guidelines Task Force Open Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: The Effluent Guidelines Task Force, an EPA advisory committee, will hold a meeting to discuss improvements to the Agency's Effluent Guidelines Program. The meeting is open to the public.

DATES: The meeting will be held on Tuesday, August 16, from 8:30 am to 5:00 pm, and Wednesday, August 17, 1994, from 8:30 am to 3:00 pm.

ADDRESSES: The meeting will take place at the Dupont Plaza Hotel, 1500 New Hampshire Avenue NW, Washington, D.C. Comments may be sent to Eric Strassler, Effluent Guidelines Task Force, Office of Water (4303), EPA, 401 M Street, S.W., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Eric Strassler at 202–260–7150, fax 202–260–7185.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (Pub. L. 92–463), the Environmental Protection Agency gives notice of a meeting of the Effluent Guidelines Task Force (ECTF). The ECTF is a subcommittee of the National Advisory Council for Environmental Policy and Technology (NACEPT), the external policy advisory board to the Administrator of EPA.

The ECTF was established in July of 1992 to advise EPA on the Effluent Guidelines Program, which develops regulations for dischargers of industrial wastewater pursuant to Title III of the Clean Water Act (33 U.S.C. 1251 et seq.). The Task Force consists of members appointed by EPA from industry, citizen groups, state and local government, the academic and scientific communities, and EPA regional offices. The Task Force was created to offer advice to the Administrator on the long-term strategy for the effluent guidelines program, and particularly to provide recommendations on a process for expediting the promulgation of effluent guidelines. The Task Force generally does not discuss specific effluent guideline regulations currently under development.

The meeting agenda will include discussions on draft recommendations for improving the project management and data collection processes for effluent guidelines. There will also be discussions on the methodology for conducting preliminary industry studies, and a planning session for future task force activities.

The meeting is open to the public. Limited seating for the public is available on a first-come, first-served basis. The public may submit written comments to the Task Force regarding improvements to the Effluent Guidelines program. Comments should be sent to EPA at the above address. Comments submitted by August 8 will be considered by the Task Force at or subsequent to the meeting.

Dated: July 14, 1994.

Eric Strassler,

Designated Federal Official, Effluent Guidelines Task Force.

[FR Doc. 94–18330 Filed 7–27–94; 8:45 am]

BILLING CODE [illegible]

[FRL–5022–1]

Improving EPA's Indian Program Operations

AGENCY: U.S. Environmental protection Agency.

ACTION: Soliciting public comments on the agency's efforts to enhance Indian program operations.

SUMMARY: The Environmental Protection Agency (EPA) is soliciting comments from the public on the following potential approaches for improving the Agency's Tribal operations, including the establishment of a new national Indian Program Office. To obtain Tribal input into this process, as well as input on future Tribal matters, the EPA Administrator convened the Tribal Operations Committee (TOC) comprised of Tribal representatives and EPA Senior Managers. EPA is now seeking broader input on these approaches, and will consider comments received during the public comment period to ensure that the strongest options have been identified.

PUBLIC COMMENT PERIOD: Comments must be received by September 12, 1994.

ADDRESSES: Comments should be sent to Caren Rothstein, Tribal Operations Team, US EPA, Mail Code 1198, 401 M Street SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Caren Rothstein at 202–260–7519.

SUPPLEMENTARY INFORMATION: The Environmental Protection Agency has made continual progress in building its Tribal program since issuance of the Agency's 1984 Indian Policy. In Fiscal Year 1993, approximately $35 million and 165 work years were utilized to implement EPA Indian programs, either through direct grants to Tribes or through Federal implementation and technical assistance to Tribes.

Regulations and guidance specific to Tribes have been developed under many of EPA's programs establishing the process for Tribes to apply for grants and program authorization. Over [illegible] Treatment in the Same Manner as a State determinations, formerly referred to as Treatment as a State, have been made under various water programs. Numerous Tribes have submitted water quality standards for authorization by EPA, and three have already been approved. Many more Tribal applications are expected in the future for a broad array of EPA programs.

The growth of EPA's Indian program has led to an increased understanding of the seriousness of environmental threats to human health and the environments within Indian Country by EPA and the Tribes. To promote improved communications and partnerships with Tribes to address these concerns, the EPA Administrator convened a Tribal Operations Committee (TOC) to meet with her and other EPA Senior Management as co-regulators, on a regular basis, and to provide Tribal input into Agency decision making that may affect Tribes.

The TOC is comprised of 18 Tribal representatives, who are either Tribal Leaders or Tribal environmental officials selected by Tribes within EPA regions. There are Tribal representatives from each of EPA's regions except Region III, which has no Federally recognized Tribes.

On February 17, 1994, at the first official TOC meeting, the Administrator committed to strengthening the Agency's Tribal operations and reaffirmed the Agency's 1984 Indian Policy. As one of the first actions for the Tribal representatives to the TOC and in

000151

Notices

Federal Register / Vol. 60, No. 63 / Monday, April 3, 1995 / Notices Page 16875

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ENVIRONMENTAL PROTECTION AGENCY.

[FRL-5184-4]

Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim policy statement and request for comment.

SUMMARY: The Environmental Protection Agency (EPA) announces and requests comment on an interim policy to provide incentives for regulated entities that conduct voluntary compliance evaluations and also disclose and correct violations. These incentives include eliminating or substantially reducing the gravity component of civil penalties and not referring cases for criminal prosecution where specified conditions are met. The policy also states that EPA will not request voluntary audit reports to trigger enforcement investigations. This interim policy was developed in close consultation with EPA's regional offices and the Department of Justice, and will be applied uniformly by the Agency's enforcement programs.

DATES: This interim policy statement is effective as interim guidance 15 days after publication, in order to give the Agency time to coordinate implementation of the policy throughout EPA Headquarters and the Regions. EPA urges interested parties to comment on this interim policy in writing. Comments must be received by EPA at the address below by June 2, 1995.

ADDRESSES: Submit three copies of comments to the U.S. EPA Air Docket, Mail Code 6102, 401 M Street, SW, Washington, D.C. 20460, attention: Docket #C-94-01.

FOR FURTHER INFORMATION CONTACT: Additional documentation relating to the development of this interim policy is contained in the environmental auditing public docket. Documents from the docket may be requested by calling (202) 260-7548, requesting an index to docket #C-94-01, and faxing document requests to (202) 260-4400. Hours of operation are 8 a.m. to 5:30 p.m., Monday through Friday, except legal holidays. Additional contacts are Geoff Garver or Brian Riedel, at (202) 564-4187.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

One of the Environmental Protection Agency's most important responsibilities is obtaining compliance with federal laws that protect public health and safeguard the environment. That goal can be achieved only with the voluntary cooperation of thousands of businesses and other regulated entities subject to these requirements. Today, EPA is announcing incentives for those who take responsibility for voluntarily evaluating, disclosing and correcting violations. These incentives, developed after nine months of public meetings and empirical analysis, are set forth in detail below and take effect in 15 days. At the same time, EPA expects to continue a dialogue with stakeholders and consider further refinements to this interim policy. The incentives that EPA is offering fall into three distinct categories.

First, the Agency will completely eliminate gravity-based (or "punitive") penalties for companies or public agencies that voluntarily identify, disclose and correct violations according to the conditions outlined in this policy. EPA will also reduce punitive penalties by up to 75% for companies that meet most, but not all, of these conditions. Second, EPA will not recommend to the Department of Justice that criminal charges be brought against a company acting in good faith to identify, disclose, and correct violations, so long as no serious actual harm has occurred. Finally, the Agency will not request voluntary environmental audits to trigger enforcement investigations.

The incentives offered in this policy have been structured above all to protect human health and the environment. For example, even where the conditions for mitigated enforcement are met, EPA will reserve the right to collect full civil penalties for criminal conduct, violations that present an imminent and substantial endangerment or result in serious actual harm, or repeat violations. Sources will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. Nor will EPA hesitate to bring a criminal action against individuals responsible for criminal conduct.

EPA is considering additional incentives for voluntary compliance beyond the benefits offered in the policy today. On April 7, 1995, the Agency will announce 12 Environmental Leadership Program (ELP) pilot projects with companies and public agencies to test criteria for auditing and certification of voluntary compliance programs. If successful, standards developed through Environmental Leadership could lead to reduced inspections and public recognition for companies or agencies with state-of-the-art compliance programs. In keeping with the President's announcement on March 16, 1995, EPA also will shortly be announcing additional compliance incentives for small businesses.

The Agency is especially interested in comments relating to whether this interim policy appropriately defines the criteria for determining whether a self-audit, self-evaluation or disclosure is voluntary; whether the interim policy adequately preserves the Agency's authority to assess a gravity penalty component in appropriate cases; and whether, and according to what criteria, the Agency should consider giving credit against the economic benefit component of a penalty for state-of-the-art environmental management systems.

B. Public Process

In May 1994, the Administrator asked the Office of Enforcement and Compliance Assurance to determine whether additional incentives are needed to encourage voluntary disclosure and correction of violations uncovered during environmental audits and self-evaluations.

In developing this interim policy, the Agency held a major two-day public meeting in July 1994 announced in the Federal Register on June 20, 1994 (59 FR 31914); published a Restatement of Policies Related to Environmental Auditing in the Federal Register on July 28, 1994 (59 FR 38455); considered over 80 written comments submitted to the environmental auditing policy docket; held a focus group meeting in San Francisco on January 19, 1995 with key stakeholders from industry, trade groups, State environmental commissions, State attorneys general offices, district attorneys' offices, environmental and public interest groups, and professional environmental auditing groups; and held a public comment session in San Francisco on January 20, 1995.

In addition to considering opinion from stakeholders, EPA conducted its own analysis of relevant facts. For example, the Agency considered EPA and other Federal policies relating to environmental auditing, self-disclosure, and correction, as well as incentives suggested by State and local policies and legislation, and by applications submitted for the ELP pilot program. The Agency also considered relevant surveys on auditing practices and incentives.

C. Purpose

This interim policy is intended to promote environmental compliance by providing greater certainty as to EPA's enforcement response to voluntary self-evaluations, and voluntary disclosure and prompt correction of violations. The policy further provides guidance for States and local authorities in encouraging this behavior among regulated entities.

Federal laws and regulations set minimum standards for protecting human health and achieving environmental protection goals such as clean air and clean water. EPA will continue to uphold these laws through vigorous enforcement actions that appropriately penalize violators. Penalties help ensure a level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary investment in compliance. Penalties also promote protection of the environment and public health by encouraging adoption of pollution prevention and recycling practices that limit exposure to liability for pollutant discharges and deterring future violations by the violator and others.

At the same time, the Agency recognizes that we cannot achieve maximum compliance without the cooperation of a regulated community willing to act responsibly by detecting, disclosing, and correcting violations. Already, regulated entities have many compelling incentives to implement environmental management/auditing systems, as noted in EPA's 1986 auditing policy. Indeed, recent surveys show that the vast majority of large companies engage in environmental auditing and/or have environmental management systems in place. Nonetheless, EPA has concluded that the additional incentives in this interim policy will further promote the regulated community's commitment to adopting systems for maximizing compliance.

D. Principles for Voluntary Compliance

The interim policy that EPA is announcing today is based on seven principles:

1. Self-policing by regulated entities can play a crucial role in finding, fixing and preventing violations.

2. Violations discovered through self-policing should be disclosed and promptly corrected.

3. Regulated entities that self-police and that voluntarily disclose and self-correct violations in accordance with this policy should be assessed penalties that are consistently and predictably lower than penalties for those who do not.

4. Regulated entities that self-police and voluntarily disclose and self-correct violations in accordance with this policy should also not be recommended for criminal prosecution.

5. Providing predictable incentives for voluntary disclosure and correction of violations identified through self-policing offers a positive alternative to across-the-board privileges and immunities that could be used to shield criminal misconduct, drive up litigation costs and create an atmosphere of distrust between regulators, industry and local communities.

6. EPA should not seek voluntary environmental audit information to trigger an investigation of a civil or criminal violation of environmental laws.

7. To preserve a level playing field, EPA should recover any economic benefit realized from violations of environmental law.

E. Relationship to Emerging Standards

EPA also recognizes the development of and growing reliance on international voluntary environmental management standards in the U.S. and other countries. These standards, if properly crafted and implemented, can provide a powerful tool for organizations to improve their overall compliance with environmental requirements and move beyond compliance through innovative approaches to pollution prevention. In addition to issuing this interim policy, EPA will continue to pursue a dialogue with interested parties and to pilot policy approaches through programs such as the ELP to determine how EPA can make use of and encourage these standards.

II. Interim Policy

A. Definitions

For purposes of this interim policy, the following definitions apply:

"Environmental auditing" has the definition given to it in EPA's 1986 policy on environmental auditing, i.e. "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."

"Environmental audit report": means all documentation of information relating to an environmental audit, but not including the factual information underlying or testimonial evidence relating to such information.

"Regulated entity" means any entity, including a federal, state, and municipal facility, regulated under the federal environmental laws that EPA administers.

"Self-evaluation" means an assessment; not necessarily meeting all the criteria of a full environmental audit, by a regulated entity of its compliance with one or more environmental requirements.

"Voluntary" means not required by statute, regulation, permit, order, or agreement.

B. Conditions

The conditions for reducing civil penalties and not making criminal referrals in accordance with Sections II.C. and II.D. of this interim policy are as follows:

1. *Voluntary self-policing.* The regulated entity discovers a violation through a voluntary environmental audit or voluntary self-evaluation appropriate to the size and nature of the regulated entity; and

2. *Voluntary disclosure.* The regulated entity fully and voluntarily discloses the violation in writing to all appropriate federal, state and local agencies as soon as it is discovered (including a reasonable time to determine that a violation exists), and prior to (1) the commencement of a federal, state or local agency inspection, investigation or information request; (2) notice of a citizen suit; (3) legal complaint by a third party; or (4) the regulated entity's knowledge that the discovery of the violation by a regulatory agency or third party was imminent; and

3. *Prompt correction.* The regulated entity corrects the violation either within 60 days of discovering the violation or, if more time is needed, as expeditiously as practicable; and

4. *Remediation of imminent and substantial endangerment.* The regulated entity expeditiously remedies any condition that has created or is about to create an imminent and substantial endangerment to human health or the environment; and

5. *Remediation of harm and prevention of repeat violations.* The regulated entity implements appropriate measures to remedy any environmental harm due to the violation and to prevent a recurrence of the violation; and

6. *No lack of appropriate preventive measures.* The violation does not indicate that the regulated entity has failed to take appropriate steps to avoid repeat or recurring violations; and

7. *Cooperation.* The regulated entity cooperates as required by EPA and provides such information as is reasonably necessary and required by EPA to determine applicability of this policy. Cooperation may include providing all requested documents and access to employees and assistance in any further investigations into the violation.

Where appropriate, EPA may require that to satisfy any of these conditions, a regulated entity must enter into a written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required.

C. Reduce Civil Penalties for Voluntarily Disclosed and Promptly Corrected Violations.

1. Incentive

Regulated entities will be eligible for the following reductions in civil penalties:

a. EPA will eliminate all of the gravity component of the penalty for violations by regulated entities that meet conditions 1 through 7 outlined in Section II.B., except for violations involving (i) criminal conduct by the regulated entity or any of its employees, or (ii) an imminent and substantial endangerment, or serious actual harm, to human health or the environment.

b. EPA may mitigate up to 75% of the unadjusted gravity component of the penalty, taking into account any of conditions 1–7 in Section II.B. that are met, in the following cases:

(i) cases in which most but not all of the conditions in Section II.B. are met; or

(ii) cases involving an imminent and substantial endangerment, but not serious actual harm, in which all the conditions in Section II.B. are met; or

(iii) cases involving the disclosure of criminal conduct in which all the conditions in Section II.B. are met.

c. EPA will retain its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage through noncompliance. However, EPA may forgive the entire penalty for violations which meet conditions 1 through 7 outlined in Section II.B. and, in EPA's discretion, do not merit any penalty due to the insignificant amount of any economic benefit.

2. Discussion

a. Providing a clear and significant reduction in civil penalties for companies that assume responsibility for finding, disclosing and correcting violations will create a strong incentive for regulated entities to prevent or fix violations before EPA expends enforcement resources. The policy states clearly the conditions under which EPA will forgive all or part of the gravity component of a penalty for voluntary disclosure and correction;

b. The policy appropriately preserves the concept of recovering economic benefit, except where it is insignificant, as recommended by a broad spectrum of commenters, including industry commenters;

c. Retaining EPA's discretion to collect the gravity component of the penalty in appropriate cases, such as where a violation involves criminal conduct, or imminent and substantial endangerment, will help to deter the most egregious environmental violations. At the same time, by preserving flexibility to reduce the gravity element by up to 75% for good faith efforts to disclose and promptly comply even in those cases, the policy will retain an appropriate compliance incentive.

D. Limit Criminal Referrals for Voluntary Disclosure and Correction of Violations

1. Incentive

EPA will not recommend to the Department of Justice that criminal charges be brought against a regulated entity where EPA determines that conditions 1–7 in Section II.B. above for reduction of civil penalties are met, and the violation does not demonstrate or involve (1) a prevalent corporate management philosophy or practice that concealed or condoned environmental violations; (2) high-level corporate officials' or managers' conscious involvement in or willful blindness to the violation; or (3) serious actual harm to human health or the environment. This policy does not apply to criminal acts of individual managers or employees. Where EPA determines pursuant to this Section that a criminal referral to the Department of Justice is unwarranted, EPA may nonetheless proceed with civil enforcement in accordance with Section II.C. of this policy or other applicable enforcement response and penalty policies.

2. Discussion

The policy will promote candid and thorough self-policing by providing greater certainty as to how EPA will exercise its criminal investigative discretion to encourage voluntary disclosure and prompt correction by regulated entities.

E. Eliminate Routine Requests for Audit Reports in Pre-Enforcement Proceedings

1. Incentive

EPA will not request a voluntary environmental audit report to trigger a civil or criminal investigation. For example, EPA will not request an audit in routine inspections. Once the Agency has reason to believe a violation has been committed, EPA may seek through an investigation or enforcement action any information relevant to identifying violations or determining liability or extent of harm.

2. Discussion

a. This policy makes clear that EPA will not routinely request audit reports. At the same time, the policy in no way limits the right of regulated entities to claim common law privileges (e.g., attorney-client and work product) as appropriate. EPA believes that this clarification, along with the other incentives in this interim policy, should greatly reduce any perception that environmental audits may be used unfairly in environmental enforcement.

b. With respect to federal facilities, although federal facility environmental audit reports may be accessible to the public under the Freedom of Information Act (FOIA) in certain circumstances, EPA cannot utilize FOIA to request information from other federal agencies. Thus, EPA will apply this policy on requests for audit reports to federal (and state and municipal) facilities the same as it does for other regulated entities.

F. Applicability

This interim policy applies to violations under all of the federal environmental statutes that EPA administers and supersedes (unless otherwise noted) any conflicting or inconsistent provisions in the media-specific penalty or enforcement response policies and EPA's 1986 Environmental Auditing Policy Statement. Existing enforcement policies will continue to apply in conjunction with this interim policy, except where inconsistent with this policy. In addition, where appropriate, EPA's Supplemental Environmental Project Policy may at EPA's discretion be applied in conjunction with this policy.

III. Favor These Incentives Over Broad Privileges and Immunities

This interim policy offers a positive alternative to across-the-board privileges and immunities that could be used to shield criminal misconduct, drive up litigation costs and create an atmosphere of distrust between regulators, industry and local communities.

A. Discussion

1. Penalty immunity provisions for voluntary disclosures of violations can give lawbreakers an economic advantage over their law-abiding competitors. It makes sense to give substantial penalty reductions for those who come forward with their violations and promptly correct them, but to maintain a level playing field, the federal and state governments must be able to recoup the economic benefit of violations.

2. A principal rationale for environmental audit privileges and penalty immunities for voluntary disclosures is to reduce the exposure of regulated entities that conduct self-evaluations *and act on the findings by immediately correcting violations*. EPA has addressed this concern with the incentives for disclosure and correction outlined above.

3. Privilege runs counter to efforts to open up environmental decisionmaking and encourage public participation in matters that affect people's homes, workplaces and communities.

4. An environmental audit privilege could be misused to shield bad actors or to frustrate access to crucial factual information.

5. Environmental audit privileges and penalty immunities could encourage increased litigation as opposing lawyers battle over what is privileged or immune from penalties and what is not. Litigation over the scope of the privileges and immunities could burden our already taxed judicial system, drain government and private resources, and in some cases prevent quick action to address environmental emergencies.

6. The Supreme Court has noted, "privileges are not lightly created nor expansively construed for they are in derogation of the search for the truth." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). Moreover, the self-evaluation privilege has regularly and uniformly been rejected by the courts in cases where documents were sought by a governmental agency.

IV. Consequences for States

EPA recognizes that states are important partners in federal enforcement, and that it is desirable to create a climate in which states can be innovative. At the same time, EPA is required to establish a certain minimum consistency in federal enforcement, so that

the sanctions a business faces for violating federal law do not depend on where the business is located.

Accordingly, to maintain national consistency:

A. EPA will scrutinize enforcement more closely in states with audit privilege and/or penalty immunity laws and may find it necessary to increase federal enforcement where environmental self-evaluation privileges or penalty immunities prevent a state from obtaining:

1. information needed to establish criminal liability;

2. facts needed to establish the nature and extent of a violation;

3. appropriate penalties for imminent and substantial endangerment or serious harm to human health or the environment, or from recovering economic benefit;

4. appropriate sanctions or penalties for criminal conduct and repeat violations; or

5. prompt correction of violations, and expeditious remediation of those that involve imminent and substantial endangerment to human health or the environment.

B. EPA will bring to the state's attention any provisions of state audit privilege and/or penalty immunity statutes that raise any of the concerns outlined above, and will work with the state to address those concerns and ensure that federal requirements are satisfied.

V. Limitations on Applicability of This Policy

This interim policy sets forth internal guidelines which amend EPA's penalty policies in situations involving voluntary self-policing, disclosure and correction. In conjunction with the applicable penalty policy, these guidelines will aid EPA personnel in proposing appropriate penalties or negotiating settlements in administrative and judicial enforcement actions. The interim policy also serves to structure the Agency's enforcement authority and states the Agency's view as to the proper allocation of its enforcement resources. Deviations from these guidelines, where merited, are authorized so long as the reasons for the deviations are documented.

This interim policy is not final agency action, but is intended solely as guidance. It is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this interim policy or to act at variance with the guidance based on analysis of case-specific facts and circumstances. Application of this policy to the facts of any individual case is at the sole discretion of EPA and is not subject to review by any court. In addition, the policy has no effect on the calculation of any cleanup costs, remedial costs, natural resources damages or emergency response costs associated with a violation. EPA reserves the right to change this interim policy at any time without public notice.

Dated: March 30, 1995.

Steven A. Herman,

Assistant Administrator for Enforcement and Compliance Assurance.

[FR Doc. 95-8218 Filed 3-31-95; 8:45 am]

BILLING CODE 6560-50-P

000156

A. 96

ENVIRONMENTAL PROTECTION AGENCY

[FRL-5400-1]

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Policy Statement.

SUMMARY: The Environmental Protection Agency (EPA) today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, and disclose and correct violations of environmental requirements. Incentives include eliminating or substantially reducing the gravity component of civil penalties and not recommending cases for criminal prosecution where specified conditions are met, to those who voluntarily self-disclose and promptly correct violations. The policy also restates EPA's long-standing practice of not requesting voluntary audit reports to trigger enforcement investigations. This policy was developed in close consultation with the U.S. Department of Justice, states, public interest groups and the regulated community, and will be applied uniformly by the Agency's enforcement programs.

DATES: This policy is effective January 22, 1996.

FOR FURTHER INFORMATION CONTACT: Additional documentation relating to the development of this policy is contained in the environmental auditing public docket. Documents from the docket may be obtained by calling (202) 260-7548, requesting an index to docket #C-94-01, and faxing document requests to (202) 260-4400. Hours of operation are 8 a.m. to 5:30 p.m., Monday through Friday, except legal holidays. Additional contacts are Robert Fentress or Brian Riedel, at (202) 564-4187.

SUPPLEMENTARY INFORMATION:

I. Explanation of Policy

A. Introduction

The Environmental Protection Agency today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to discover voluntarily, disclose, correct and prevent violations of federal environmental law. Effective 30 days from today, where violations are found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence, and are promptly disclosed and expeditiously corrected, EPA will not seek gravity-based (i.e., non-economic benefit) penalties and will generally not recommend criminal prosecution against the regulated entity. EPA will reduce gravity-based penalties by 75% for violations that are voluntarily discovered, and are promptly disclosed and corrected, even if not found through a formal audit or due diligence. Finally, the policy restates EPA's long-held policy and practice to refrain from routine requests for environmental audit reports.

The policy includes important safeguards to deter irresponsible behavior and protect the public and environment. For example, in addition to prompt disclosure and expeditious correction, the policy requires companies to act to prevent recurrence of the violation and to remedy any environmental harm which may have occurred. Repeated violations or those which result in actual harm or may present imminent and substantial endangerment are not eligible for relief under this policy, and companies will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. Corporations remain criminally liable for violations that result from conscious disregard of their obligations under the law, and individuals are liable for criminal misconduct.

The issuance of this policy concludes EPA's eighteen-month public evaluation of the optimum way to encourage voluntary self-policing while preserving fair and effective enforcement. The incentives, conditions and exceptions announced today reflect thoughtful suggestions from the Department of Justice, state attorneys general and local prosecutors, state environmental agencies, the regulated community, and public interest organizations. EPA believes that it has found a balanced and responsible approach, and will conduct a study within three years to determine the effectiveness of this policy.

B. Public Process

One of the Environmental Protection Agency's most important responsibilities is ensuring compliance with federal laws that protect public health and safeguard the environment. Effective deterrence requires inspecting, bringing penalty actions and securing compliance and remediation of harm. But EPA realizes that achieving compliance also requires the cooperation of thousands of businesses and other regulated entities subject to these requirements. Accordingly, in May of 1994, the Administrator asked the Office of Enforcement and Compliance Assurance (OECA) to determine whether additional incentives were needed to encourage voluntary disclosure and correction of violations uncovered during environmental audits.

EPA began its evaluation with a two-day public meeting in July of 1994, in Washington, D.C., followed by a two-day meeting in San Francisco on January 19, 1995 with stakeholders from industry, trade groups, state environmental commissioners and attorneys general, district attorneys, public interest organizations and professional environmental auditors. The Agency also established and maintained a public docket of testimony presented at these meetings and all comment and correspondence submitted to EPA by outside parties on this issue.

In addition to considering opinion and information from stakeholders, the Agency examined other federal and state policies related to self-policing, self-disclosure and correction. The Agency also considered relevant surveys on auditing practices in the private sector. EPA completed the first stage of this effort with the announcement of an interim policy on April 3 of this year, which defined conditions under which EPA would reduce civil penalties and not recommend criminal prosecution for companies that audited, disclosed, and corrected violations.

Interested parties were asked to submit comment on the interim policy by June 30 of this year (60 FR 16875), and EPA received over 300 responses from a wide variety of private and public organizations. (Comments on the interim audit policy are contained in the Auditing Policy Docket, hereinafter, "Docket".) Further, the American Bar Association SONREEL Subcommittee hosted five days of dialogue with representatives from the regulated industry, states and public interest organizations in June and September of this year, which identified options for strengthening the interim policy. The changes to the interim policy announced today reflect insight gained through comments submitted to EPA, the ABA dialogue, and the Agency's practical experience implementing the interim policy.

C. Purpose

This policy is designed to encourage greater compliance with laws and regulations that protect human health and the environment. It promotes a higher standard of self-policing by waiving gravity-based penalties for

000158 EDIC

violations that are promptly disclosed and corrected, and which were discovered through voluntary audits or compliance management systems that demonstrate due diligence. To further promote compliance, the policy reduces gravity-based penalties by 75% for any violation voluntarily discovered and promptly disclosed and corrected, even if not found through an audit or compliance management system.

EPA's enforcement program provides a strong incentive for responsible behavior by imposing stiff sanctions for noncompliance. Enforcement has contributed to the dramatic expansion of environmental auditing measured in numerous recent surveys. For example, more than 90% of the corporate respondents to a 1995 Price-Waterhouse survey who conduct audits said that one of the reasons they did so was to find and correct violations before they were found by government inspectors. (A copy of the Price-Waterhouse survey is contained in the Docket as document VIII–A–76.)

At the same time, because government resources are limited, maximum compliance cannot be achieved without active efforts by the regulated community to police themselves. More than half of the respondents to the same 1995 Price-Waterhouse survey said that they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected. While many companies already audit or have compliance management programs, EPA believes that the incentives offered in this policy will improve the frequency and quality of these self-monitoring efforts.

D. Incentives for Self-Policing

Section C of EPA's policy identifies the major incentives that EPA will provide to encourage self-policing, self-disclosure, and prompt self-correction. These include not seeking gravity-based civil penalties or reducing them by 75%, declining to recommend criminal prosecution for regulated entities that self-police, and refraining from routine requests for audits. (As noted in Section C of the policy, EPA has refrained from making routine requests for audit reports since issuance of its 1986 policy on environmental auditing.)

1. Eliminating Gravity-Based Penalties

Under Section C(1) of the policy, EPA will not seek gravity-based penalties for violations found through auditing that are promptly disclosed and corrected. Gravity-based penalties will also be waived for violations found through any documented procedure for self-policing, where the company can show that it has a compliance management program that meets the criteria for due diligence in Section B of the policy.

Gravity-based penalties (defined in Section B of the policy) generally reflect the seriousness of the violator's behavior. EPA has elected to waive such penalties for violations discovered through due diligence or environmental audits, recognizing that these voluntary efforts play a critical role in protecting human health and the environment by identifying, correcting and ultimately preventing violations. All of the conditions set forth in Section D, which include prompt disclosure and expeditious correction, must be satisfied for gravity-based penalties to be waived.

As in the interim policy, EPA reserves the right to collect any economic benefit that may have been realized as a result of noncompliance, even where companies meet all other conditions of the policy. Economic benefit may be waived, however, where the Agency determines that it is insignificant.

After considering public comment, EPA has decided to retain the discretion to recover economic benefit for two reasons. First, it provides an incentive to comply on time. Taxpayers expect to pay interest or a penalty fee if their tax payments are late; the same principle should apply to corporations that have delayed their investment in compliance. Second, it is fair because it protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field. The concept of recovering economic benefit was supported in public comments by many stakeholders, including industry representatives (see, e.g., Docket, II–F–39, II–F–28, and II–F–18).

2. 75% Reduction of Gravity

The policy appropriately limits the complete waiver of gravity-based civil penalties to companies that meet the higher standard of environmental auditing or systematic compliance management. However, to provide additional encouragement for the kind of self-policing that benefits the public, gravity-based penalties will be reduced by 75% for a violation that is voluntarily discovered, promptly disclosed and expeditiously corrected, even if it was not found through an environmental audit and the company cannot document due diligence. EPA expects that this will encourage companies to come forward and work with the Agency to resolve environmental problems and begin to develop an effective compliance management program.

Gravity-based penalties will be reduced 75% only where the company meets all conditions in Sections D(2) through D(9). EPA has eliminated language from the interim policy indicating that penalties may be reduced "up to" 75% where "most" conditions are met, because the Agency believes that all of the conditions in D(2) through D(9) are reasonable and essential to achieving compliance. This change also responds to requests for greater clarity and predictability.

3. No Recommendations for Criminal Prosecution

EPA has never recommended criminal prosecution of a regulated entity based on voluntary disclosure of violations discovered through audits and disclosed to the government before an investigation was already under way. Thus, EPA will not recommend criminal prosecution for a regulated entity that uncovers violations through environmental audits or due diligence, promptly discloses and expeditiously corrects those violations, and meets all other conditions of Section D of the policy.

This policy is limited to good actors, and therefore has important limitations. It will not apply, for example, where corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance. Since the regulated entity must satisfy all of the conditions of Section D of the policy, violations that caused serious harm or which may pose imminent and substantial endangerment to human health or the environment are not covered by this policy. Finally, EPA reserves the right to recommend prosecution for the criminal conduct of any culpable individual.

Even where all of the conditions of this policy are not met, however, it is important to remember that EPA may decline to recommend prosecution of a company or individual for many other reasons under other Agency enforcement policies. For example, the Agency may decline to recommend prosecution where there is no significant harm or culpability and the individual or corporate defendant has cooperated fully.

Where a company has met the conditions for avoiding a recommendation for criminal prosecution under this policy, it will not face any civil liability for gravity-based penalties. That is because the same conditions for discovery, disclosure, and correction apply in both cases. This represents a clarification of the interim policy, not a substantive change.

4. No Routine Requests for Audits

EPA is reaffirming its policy, in effect since 1986, to refrain from routine requests for audits. Eighteen months of public testimony and debate have produced no evidence that the Agency has deviated, or should deviate, from this policy.

If the Agency has independent evidence of a violation, it may seek information needed to establish the extent and nature of the problem and the degree of culpability. In general, however, an audit which results in prompt correction clearly will reduce liability, not expand it. Furthermore, a review of the criminal docket did not reveal a single criminal prosecution for violations discovered as a result of an audit self-disclosed to the government.

E. Conditions

Section D describes the nine conditions that a regulated entity must meet in order for the Agency not to seek (or to reduce) gravity-based penalties under the policy. As explained in the Summary above, regulated entities that meet all nine conditions will not face gravity-based civil penalties, and will generally not have to fear criminal prosecution. Where the regulated entity meets all of the conditions except the first (D(1)), EPA will reduce gravity-based penalties by 75%.

1. Discovery of the Violation Through an Environmental Audit or Due Diligence

Under Section D(1), the violation must have been discovered through either (a) an environmental audit that is systematic, objective, and periodic as defined in the 1986 audit policy, or (b) a documented, systematic procedure or practice which reflects the regulated entity's due diligence in preventing, detecting, and correcting violations. The interim policy provided full credit for any violation found through "voluntary self-evaluation," even if the evaluation did not constitute an audit. In order to receive full credit under the final policy, any self-evaluation that is not an audit must be part of a "due diligence" program. Both "environmental audit" and "due diligence" are defined in Section B of the policy.

Where the violation is discovered through a "systematic procedure or practice" which is not an audit, the regulated entity will be asked to document how its program reflects the criteria for due diligence as defined in Section B of the policy. These criteria, which are adapted from existing codes of practice such as the 1991 Criminal Sentencing Guidelines, were fully discussed during the ABA dialogue. The criteria are flexible enough to accommodate different types and sizes of businesses. The Agency recognizes that a variety of compliance management programs may develop under the due diligence criteria, and will use its review under this policy to determine whether basic criteria have been met.

Compliance management programs which train and motivate production staff to prevent, detect and correct violations on a daily basis are a valuable complement to periodic auditing. The policy is responsive to recommendations received during public comment and from the ABA dialogue to give compliance management efforts which meet the criteria for due diligence the same penalty reduction offered for environmental audits. (See, *e.g.*, II–F–39, II–E–18, and II–G–18 in the Docket.)

EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available. The Agency added this provision in response to suggestions from environmental groups, and believes that the availability of such information will allow the public to judge the adequacy of compliance management systems, lead to enhanced compliance, and foster greater public trust in the integrity of compliance management systems.

2. Voluntary Discovery and Prompt Disclosure

Under Section D(2) of the final policy, the violation must have been identified voluntarily, and not through a monitoring, sampling, or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or consent agreement. Section D(4) requires that disclosure of the violation be prompt and in writing. To avoid confusion and respond to state requests for greater clarity, disclosures under this policy should be made to EPA. The Agency will work closely with states in implementing the policy.

The requirement that discovery of the violation be voluntary is consistent with proposed federal and state bills which would reward those discoveries that the regulated entity can legitimately attribute to its own voluntary efforts.

The policy gives three specific examples of discovery that would not be voluntary, and therefore would not be eligible for penalty mitigation: emissions violations detected through a required continuous emissions monitor, violations of NPDES discharge limits found through prescribed monitoring, and violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

The final policy generally applies to any violation that is voluntarily discovered, regardless of whether the violation is required to be reported. This definition responds to comments pointing out that reporting requirements are extensive, and that excluding them from the policy's scope would severely limit the incentive for self-policing (see, *e.g.*, II–C–48 in the Docket).

The Agency wishes to emphasize that the integrity of federal environmental law depends upon timely and accurate reporting. The public relies on timely and accurate reports from the regulated community, not only to measure compliance but to evaluate health or environmental risk and gauge progress in reducing pollutant loadings. EPA expects the policy to encourage the kind of vigorous self-policing that will serve these objectives, and not to provide an excuse for delayed reporting. Where violations of reporting requirements are voluntarily discovered, they must be promptly reported (as discussed below). Where a failure to report results in imminent and substantial endangerment or serious harm, that violation is not covered under this policy (see Condition D(8)). The policy also requires the regulated entity to prevent recurrence of the violation, to ensure that noncompliance with reporting requirements is not repeated. EPA will closely scrutinize the effect of the policy in furthering the public interest in timely and accurate reports from the regulated community.

Under Section D(4), disclosure of the violation should be made within 10 days of its discovery, and in writing to EPA. Where a statute or regulation requires reporting be made in less than 10 days, disclosure should be made within the time limit established by law. Where reporting within ten days is not practical because the violation is complex and compliance cannot be determined within that period, the Agency may accept later disclosures if the circumstances do not present a serious threat and the regulated entity meets its burden of showing that the additional time was needed to determine compliance status.

This condition recognizes that it is critical for EPA to get timely reporting of violations in order that it might have clear notice of the violations and the opportunity to respond if necessary, as well as an accurate picture of a given facility's compliance record. Prompt disclosure is also evidence of the regulated entity's good faith in wanting

to achieve or return to compliance as soon as possible.

In the final policy, the Agency has added the words, "or may have occurred," to the sentence, "The regulated entity fully discloses that a specific violation has occurred, or may have occurred * * *." This change, which was made in response to comments received, clarifies that where an entity has some doubt about the existence of a violation, the recommended course is for it to disclose and allow the regulatory authorities to make a definitive determination.

In general, the Freedom of Information Act will govern the Agency's release of disclosures made pursuant to this policy. EPA will, independently of FOIA, make publicly available any compliance agreements reached under the policy (see Section H of the policy), as well as descriptions of due diligence programs submitted under Section D.1 of the Policy. Any material claimed to be Confidential Business Information will be treated in accordance with EPA regulations at 40 C.F.R. Part 2.

3. Discovery and Disclosure Independent of Government or Third Party Plaintiff

Under Section D(3), in order to be "voluntary", the violation must be identified and disclosed by the regulated entity prior to: the commencement of a federal state or local agency inspection, investigation, or information request; notice of a citizen suit; legal complaint by a third party; the reporting of the violation to EPA by a "whistleblower" employee; and imminent discovery of the violation by a regulatory agency.

This condition means that regulated entities must have taken the initiative to find violations and promptly report them, rather than reacting to knowledge of a pending enforcement action or third-party complaint. This concept was reflected in the interim policy and in federal and state penalty immunity laws and did not prove controversial in the public comment process.

4. Correction and Remediation

Section D(5) ensures that, in order to receive the penalty mitigation benefits available under the policy, the regulated entity not only voluntarily discovers and promptly discloses a violation, but expeditiously corrects it, remedies any harm caused by that violation (including responding to any spill and carrying out any removal or remedial action required by law), and expeditiously certifies in writing to appropriate state, local and EPA authorities that violations have been corrected. It also enables EPA to ensure that the regulated entity will be publicly accountable for its commitments through binding written agreements, orders or consent decrees where necessary.

The final policy requires the violation to be corrected within 60 days, or that the regulated entity provide written notice where violations may take longer to correct. EPA recognizes that some violations can and should be corrected immediately, while others (e.g., where capital expenditures are involved), may take longer than 60 days to correct. In all cases, the regulated entity will be expected to do its utmost to achieve or return to compliance as expeditiously as possible.

Where correction of the violation depends upon issuance of a permit which has been applied for but not issued by federal or state authorities, the Agency will, where appropriate, make reasonable efforts to secure timely review of the permit.

5. Prevent Recurrence

Under Section D(6), the regulated entity must agree to take steps to prevent a recurrence of the violation, including but not limited to improvements to its environmental auditing or due diligence efforts. The final policy makes clear that the preventive steps may include improvements to a regulated entity's environmental auditing or due diligence efforts to prevent recurrence of the violation.

In the interim policy, the Agency required that the entity implement appropriate measures to prevent a recurrence of the violation, a requirement that operates prospectively. However, a separate condition in the interim policy also required that the violation not indicate "a failure to take appropriate steps to avoid repeat or recurring violations"—a requirement that operates retrospectively. In the interest of both clarity and fairness, the Agency has decided for purposes of this condition to keep the focus prospective and thus to require only that steps be taken to prevent recurrence of the violation after it has been disclosed.

6. No Repeat Violations

In response to requests from commenters (*see, e.g.*, II–F–39 and II–G–18 in the Docket), EPA has established "bright lines" to determine when previous violations will bar a regulated entity from obtaining relief under this policy. These will help protect the public and responsible companies by ensuring that penalties are not waived for repeat offenders. Under condition D(7), the same or closely-related violation must not have occurred previously within the past three years at the same facility, or be part of a pattern of violations on the regulated entity's part over the past five years. This provides companies with a continuing incentive to prevent violations, without being unfair to regulated entities responsible for managing hundreds of facilities. It would be unreasonable to provide unlimited amnesty for repeated violations of the same requirement.

The term "violation" includes any violation subject to a federal or state civil judicial or administrative order, consent agreement, conviction or plea agreement. Recognizing that minor violations are sometimes settled without a formal action in court, the term also covers any act or omission for which the regulated entity has received a penalty reduction in the past. Together, these conditions identify situations in which the regulated community has had clear notice of its noncompliance and an opportunity to correct.

7. Other Violations Excluded

Section D(8) makes clear that penalty reductions are not available under this policy for violations that resulted in serious actual harm or which may have presented an imminent and substantial endangerment to public health or the environment. Such events indicate a serious failure (or absence) of a self-policing program, which should be designed to prevent such risks, and it would seriously undermine deterrence to waive penalties for such violations. These exceptions are responsive to suggestions from public interest organizations, as well as other commenters. (See, *e.g.*, II–F–39 and II–G–18 in the Docket.)

The final policy also excludes penalty reductions for violations of the specific terms of any order, consent agreement, or plea agreement. (See, II–E–60 in the Docket.) Once a consent agreement has been negotiated, there is little incentive to comply if there are no sanctions for violating its specific requirements. The exclusion in this section applies to violations of the terms of any response, removal or remedial action covered by a written agreement.

8. Cooperation

Under Section D(9), the regulated entity must cooperate as required by EPA and provide information necessary to determine the applicability of the policy. This condition is largely unchanged from the interim policy. In the final policy, however, the Agency has added that "cooperation" includes

assistance in determining the facts of any related violations suggested by the disclosure, as well as of the disclosed violation itself. This was added to allow the agency to obtain information about any violations indicated by the disclosure, even where the violation is not initially identified by the regulated entity.

F. Opposition to Privilege

The Agency remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits for the following reasons:

1. Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. American law reflects the high value that the public places on fair access to the facts. The Supreme Court, for example, has said of privileges that, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683 (1974). Federal courts have unanimously refused to recognize a privilege for environmental audits in the context of government investigations. See, *e.g.*, *United States* v. *Dexter*, 132 F.R.D. 8, 9–10 (D.Conn. 1990) (application of a privilege "would effectively impede [EPA's] ability to enforce the Clean Water Act, and would be contrary to stated public policy.")

2. Eighteen months have failed to produce any evidence that a privilege is needed. Public testimony on the interim policy confirmed that EPA rarely uses audit reports as evidence. Furthermore, surveys demonstrate that environmental auditing has expanded rapidly over the past decade without the stimulus of a privilege. Most recently, the 1995 Price Waterhouse survey found that those few large or mid-sized companies that do not audit generally do not perceive any need to; concern about confidentiality ranked as one of the least important factors in their decisions.

3. A privilege would invite defendants to claim as "audit" material almost any evidence the government needed to establish a violation or determine who was responsible. For example, most audit privilege bills under consideration in federal and state legislatures would arguably protect factual information—such as health studies or contaminated sediment data—and not just the conclusions of the auditors. While the government might have access to required monitoring data under the law, as some industry commenters have suggested, a privilege of that nature would cloak underlying facts needed to determine whether such data were accurate.

4. An audit privilege would breed litigation, as both parties struggled to determine what material fell within its scope. The problem is compounded by the lack of any clear national standard for audits. The "*in camera*" (i.e., non-public) proceedings used to resolve these disputes under some statutory schemes would result in a series of time-consuming, expensive mini-trials.

5. The Agency's policy eliminates the need for any privilege as against the government, by reducing civil penalties and criminal liability for those companies that audit, disclose and correct violations. The 1995 Price Waterhouse survey indicated that companies would expand their auditing programs in exchange for the kind of incentives that EPA provides in its policy.

6. Finally, audit privileges are strongly opposed by the law enforcement community, including the National District Attorneys Association, as well as by public interest groups. (See, *e.g.*, Docket, II–C–21, II–C–28, II–C–52, IV–G–10, II–C–25, II–C–33, II–C–52, II–C–48, and II–G–13 through II–G–24.)

G. Effect on States

The final policy reflects EPA's desire to develop fair and effective incentives for self-policing that will have practical value to states that share responsibility for enforcing federal environmental laws. To that end, the Agency has consulted closely with state officials in developing this policy, through a series of special meetings and conference calls in addition to the extensive opportunity for public comment. As a result, EPA believes its final policy is grounded in common-sense principles that should prove useful in the development of state programs and policies.

As always, states are encouraged to experiment with different approaches that do not jeopardize the fundamental national interest in assuring that violations of federal law do not threaten the public health or the environment, or make it profitable not to comply. The Agency remains opposed to state legislation that does not include these basic protections, and reserves its right to bring independent action against regulated entities for violations of federal law that threaten human health or the environment, reflect criminal conduct or repeated noncompliance, or allow one company to make a substantial profit at the expense of its law-abiding competitors. Where a state has obtained appropriate sanctions needed to deter such misconduct, there is no need for EPA action.

H. Scope of Policy

EPA has developed this document as a policy to guide settlement actions. EPA employees will be expected to follow this policy, and the Agency will take steps to assure national consistency in application. For example, the Agency will make public any compliance agreements reached under this policy, in order to provide the regulated community with fair notice of decisions and greater accountability to affected communities. Many in the regulated community recommended that the Agency convert the policy into a regulation because they felt it might ensure greater consistency and predictability. While EPA is taking steps to ensure consistency and predictability and believes that it will be successful, the Agency will consider this issue and will provide notice if it determines that a rulemaking is appropriate.

II. Statement of Policy: Incentives for Self-Policing

Discovery, Disclosure, Correction and Prevention

A. Purpose

This policy is designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of federal environmental requirements.

B. Definitions

For purposes of this policy, the following definitions apply:

"Environmental Audit" has the definition given to it in EPA's 1986 audit policy on environmental auditing, i.e., "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."

"Due Diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

(a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;

(b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;

(c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

(d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

(e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and

(f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

"Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit.

"Gravity-based penalties" are that portion of a penalty over and above the economic benefit, i.e., the punitive portion of the penalty, rather than that portion representing a defendant's economic gain from non-compliance. (For further discussion of this concept, see "A Framework for Statute-Specific Approaches to Penalty Assessments", #GM-22, 1980, U.S. EPA General Enforcement Policy Compendium).

"Regulated entity" means any entity, including a federal, state or municipal agency or facility, regulated under federal environmental laws.

C. Incentives for Self-Policing

1. No Gravity-Based Penalties

Where the regulated entity establishes that it satisfies all of the conditions of Section D of the policy, EPA will not seek gravity-based penalties for violations of federal environmental requirements.

2. Reduction of Gravity-Based Penalties by 75%

EPA will reduce gravity-based penalties for violations of federal environmental requirements by 75% so long as the regulated entity satisfies all of the conditions of Section D(2) through D(9) below.

3. No Criminal Recommendations

(a) EPA will not recommend to the Department of Justice or other prosecuting authority that criminal charges be brought against a regulated entity where EPA determines that all of the conditions in Section D are satisfied, so long as the violation does not demonstrate or involve:

(i) a prevalent management philosophy or practice that concealed or condoned environmental violations; or

(ii) high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violations.

(b) Whether or not EPA refers the regulated entity for criminal prosecution under this section, the Agency reserves the right to recommend prosecution for the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion.

4. No Routine Request for Audits

EPA will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity. For example, EPA will not request an environmental audit report in routine inspections. If the Agency has independent reason to believe that a violation has occurred, however, EPA may seek any information relevant to identifying violations or determining liability or extent of harm.

D. Conditions

1. Systematic Discovery

The violation was discovered through:

(a) an environmental audit; or

(b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how it exercises due diligence to prevent, detect and correct violations according to the criteria for due diligence outlined in Section B. EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available.

2. Voluntary Discovery

The violation was identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the policy does not apply to:

(a) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

(b) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;

(c) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

3. Prompt Disclosure

The regulated entity fully discloses a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA;

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

The violation must also be identified and disclosed by the regulated entity prior to:

(a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;

(b) notice of a citizen suit;

(c) the filing of a complaint by a third party;

(d) the reporting of the violation to EPA (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or

(e) imminent discovery of the violation by a regulatory agency;

5. Correction and Remediation

The regulated entity corrects the violation within 60 days, certifies in writing that violations have been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. If more than 60 days will be needed to correct the violation(s), the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, EPA may require that to satisfy conditions 5 and 6, a regulated entity enter into a publicly available written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required;

6. Prevent Recurrence

The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts;

000163

7. No Repeat Violations

The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purposes of this section, a violation is:

(a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or

(b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency.

8. Other Violations Excluded

The violation is not one which (i) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to, human health or the environment, or (ii) violates the specific terms of any judicial or administrative order, or consent agreement.

9. Cooperation

The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.

E. Economic Benefit

EPA will retain its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage over regulated entities that do comply. EPA may forgive the entire penalty for violations which meet conditions 1 through 9 in section D and, in the Agency's opinion, do not merit any penalty due to the insignificant amount of any economic benefit.

F. Effect on State Law, Regulation or Policy

EPA will work closely with states to encourage their adoption of policies that reflect the incentives and conditions outlined in this policy. EPA remains firmly opposed to statutory environmental audit privileges that shield evidence of environmental violations and undermine the public's right to know, as well as to blanket immunities for violations that reflect criminal conduct, present serious threats or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect a repeated failure to comply with federal law. EPA will work with states to address any provisions of state audit privilege or immunity laws that are inconsistent with this policy, and which may prevent a timely and appropriate response to significant environmental violations. The Agency reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of federal law.

G. Applicability

(1) This policy applies to the assessment of penalties for any violations under all of the federal environmental statutes that EPA administers, and supersedes any inconsistent provisions in media-specific penalty or enforcement policies and EPA's 1986 Environmental Auditing Policy Statement.

(2) To the extent that existing EPA enforcement policies are not inconsistent, they will continue to apply in conjunction with this policy. However, a regulated entity that has received penalty mitigation for satisfying specific conditions under this policy may not receive additional penalty mitigation for satisfying the same or similar conditions under other policies for the same violation(s), nor will this policy apply to violations which have received penalty mitigation under other policies.

(3) This policy sets forth factors for consideration that will guide the Agency in the exercise of its prosecutorial discretion. It states the Agency's views as to the proper allocation of its enforcement resources. The policy is not final agency action, and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

(4) This policy should be used whenever applicable in settlement negotiations for both administrative and civil judicial enforcement actions. It is not intended for use in pleading, at hearing or at trial. The policy may be applied at EPA's discretion to the settlement of administrative and judicial enforcement actions instituted prior to, but not yet resolved, as of the effective date of this policy.

H. Public Accountability

(1) Within 3 years of the effective date of this policy, EPA will complete a study of the effectiveness of the policy in encouraging:

(a) changes in compliance behavior within the regulated community, including improved compliance rates;

(b) prompt disclosure and correction of violations, including timely and accurate compliance with reporting requirements;

(c) corporate compliance programs that are successful in preventing violations, improving environmental performance, and promoting public disclosure;

(d) consistency among state programs that provide incentives for voluntary compliance.

EPA will make the study available to the public.

(2) EPA will make publicly available the terms and conditions of any compliance agreement reached under this policy, including the nature of the violation, the remedy, and the schedule for returning to compliance.

I. Effective Date

This policy is effective January 22, 1996.

Dated: December 18, 1995.

Steven A. Herman,

Assistant Administrator for Enforcement and Compliance Assurance.

[FR Doc. 95-31146 Filed 12-21-95; 8:45 am]

BILLING CODE 6560-60-P

Audit Policy Interpretive Guidance

January 1997

Office of Regulatory Enforcement
U.S. Environmental Protection Agency
Washington, D.C.

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

JAN 151997

OFFICE OF
ENFORCEMENT AND
COMPLIANCEASSURANCE

MEMORANDUM

SUBJECT: Issuance of Audit Policy Interpretive Guidance

FROM: Steven A. Herman
Assistant Administrator

TO: Regional Administrators
Assistant Attorney General, Environment and Natural Resources Division

Attached is the "Audit Policy Interpretive Guidance" that the ORE-led "Quick Response Team" (QRT) has developed since issuance of the Audit Policy, formerly known as the policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," 60 Fed. Reg. 66706 (December 22, 1995).

As you may recall, we established the QRT to make expeditious, fair, and nationally consistent recommendations concerning the applicabile of the policy to specific enforcement cases. This Interpretive Guidance builds upon the July 1994 "Redelegations" effort, which focused Headquarters' involvement on case-specific matters raising issues of national significance e.g., novel interpretations of the Audit Policy). The attached guidance is based upon nationally significant issues that have confronted the QRT in consulting with Regions on more than two dozen cases over the past several months. During the process of evaluating these cases, the QRT has identified numerous interpretive issues that could benefit from further guidance.

This Interpretive Guidance document - presented as a series of generic Questions and Answers -- is intended to aid both the government and the regulated community in implementing the Audit Policy. Within the next two weeks, we anticipate that it will be publicly available via the Internet, at http://es.inel. gov/oeca/epapolguid. html, and through the Audit Policy Docket at Waterside Mall in Washington D.C. (202-260-7548). The QRT welcomes comment on this Interpretive Guidance and suggestions for additional interpretive issues that may be appropriate for resolution in future guidance. As new issues warranting guidance arise, ORE will issue addenda to this Guidance and will place any such updates in these two locations. We also are working to make all of these items-easily accessible on the Agency's Local Area Network (LAN) system and we will apprise you of our progress in that regard.

Recycled/Recyclable
Printed with Soy/Canola Ink on paper that contains at least 70% recycled fiber

I very much appreciate the efforts of the Audit Policy QRT in developing this guidance, and I encourage you to take advantage of the QRT's extensive experience and expertise in dealing with Audit Policy issues. As you will note from the membership list attached to the end of the Interpretive Guidance, the QRT is led by the Office of Regulatory Enforcement and is comprised of senior staff and managers from all civil enforcement media. the criminal enforcemenprogram, the federal facilities program, the OECA compliance and policy offices, two Regions, and the Department of Justice. The broad participation on the QRT. its senior level of involvement, and its intensive effort to resolve these issues swiftly in the attached guidance, all demonstrate the strong commitment of OECA and the Clinton Administration to ensuring that implementation of the Audit Policy continues to be an even greater success in the months ahead and beyond.

I encourage you to contact me, or to have your staff contact Gary A. Jonesi (Audit QRT Chair) at 202-564-4002, if you have any questions regarding this Interpretive Guidance.

Attachment

cc: OECA Office Directors
ORE Division Directors
Regional Counsel
Regional Enforcement Coordinators
Chief Environmental Enforcement Section, Department of Justice
Deputy & Assistant Chiefs, Environmental Enforcement Section, Department of Justice
Audit Policy Quick Response Team

Explanatory Note

This document was prepared by EPA's Audit Policy "Quick Response Team" (QRT). The QRT is chaired by the Office of Regulatory Enforcement, and it is charged with making expeditious, fair, and nationally consistent recommendations concerning the applicability of the December 22, 1995 policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" (referred to in this document as the final Audit Policy) to specific enforcement cases. A copy of the final Audit Policy is provided as Attachment 1 to this document.

As of the date of this document, the QRT has evaluated more tan two dozen cases for potential Audit Policy application, most of which have resulted in significant gravity-based penalty reductions. Attachments 2 and 3 summarize some of those cases in the "Audit Policy Update" newsletters. During the process of evaluating these cases, the QRT has identified several interpretive issues that could benefit from further guidance. This interpretive guidance document, presented as a series of Questions and Answers (Qs and As), is intended to aid in implementation of the Audit Policy. It includes discussion of many of the most significant issues raised to the QRT's attention. The QRT welcomes comment on this document, and on additional interpretive issues that may be appropriate for resolution in future guidance. A list of QRT members is presented in Attachment 4.

This document sets forth guidance for the Agency's use in exercising its enforcement discretion. It is not final agency action and it does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

This document can be found on the Internet at http://es.inel.gov/oeca/epapolguid.html, and in EPA's Audit Policy Docket located at the EPA Headquarters Air Docket, at Waterside Mall in Washington, D.C. (202-260-7548). Revisions or additions to this guidance also will be made publicly available at these two locations.

000169

Audit Policy Interpretive Guidance

TABLE OF CONTENTS

Summary of Questions and Answers iv

Interpretive Issues:

Voluntary Discovery (Section D.2. of Audit Policy)

Discovery of Violations During Audits Required By Settlements 1

Discovery of Violations Under Clean Air Act Title V Permit Applications 2

Prompt Disclosure (Section D.3. of Audit Policy)

Consolidation of Similar Disclosures..... 3

Submitting Information Without Disclosing Specific Violations 4

Requirement For Disclosures To Be In Writing and to EPA 5

Definition Of When A Violation "May Have Been Discovered" 6

Disclosure Before Violations Occur 7

Repeat Violations (Section D.7. of Audit Policy)

Determining Whether Repeat Violations Bar Penalty Mitigation 8

Informal Enforcement Responses and Repeat Violations 9

Applicability (Section G. of Audit Policy)

Further Penalty Reductions Beyond The Audit Policy 10

Inconsistencies Between Audit Policy and Statute-Specific Penalty Policies 11

Applicability of Audit Policy in Litigation 12

000170

Degree of Conformance to The Audit Policy's Conditions 13

Miscellaneous

EPA Inspections While Audits Are Being Performed 14

Impact Of Prior Owner or Operator's Pattern of Violations On Subsequent Owner/Operator's Eligibility Under The Audit Policy 15

Resolving Audit Policy Determinations Through Informal Or Formal Means 16

Background Information:

Policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," 60 Fed. Reg. 66706 (December 22, 1995) ..... Attachment 1

Audit Policy Update, Vol. 1, No. 1 (April 1996): lists disclosures and settlements under the Audit Policy, EPA contacts for making disclosures, etc. ..... Attachment 2

Audit Policy Update (January 1997): lists disclosures and settlements under the Audit Policy, EPA contacts for making disclosures, etc. ..... Attachment 3

List of Audit Policy "Quick Response Team" (QRT) Members ..... Attachment 4

000171

Summary of Questions and Answers

Below is a summary of key points raised in the Interpretive Guidance's Questions and Answers. Not every rationale, supporting reference, and subtlety associated with these issues are included in this summary. Readers are advised to see the full text of the Qs and As immediately following this summary.

1. Can a violator be deemed to have voluntarily discovered its violations where the violations are discovered during the conduct of a compliance audit that is required as part of a binding settlement?

   Where a violator – without any legal obligation to do so – already has committed to conducting a compliance audit *prior to* any formal or informal enforcement response (e.g., complaint filing or other circumstance described in Section II.D.4. of the policy), an obligation to conduct such an audit with the same material scope and purpose can be incorporated into a binding settlement with EPA without automatically disqualifying violations discovered under the audit from obtaining penalty mitigation under the Audit Policy. (See Question #1 on page 1 for more detailed explanation.)

2. Can violations identified in a required compliance certification accompanying an initial application for a Clean Air Act Title V operating permit be eligible for penalty mitigation under the final Audit Policy?

   Generally no, because discovery of violations in these circumstances is not considered voluntary in light of the comprehensive Title V requirements to inquire, analyze, and certify as to compliance when applying for a permit. Where an applicant can demonstrate that its inquiry exceeded its obligations under 40 C.F.R. § 70.5, however, EPA may on a case-by-case basis consider the discovery of violations during such an inquiry to be voluntary and potentially eligible for penalty mitigation under the policy. Where permit application requirements under other environmental statutes do not impose a similarly comprehensive duty to inquire about, analyze, and report violations, violations discovered pursuant to such permit application requirements may qualify as voluntary discovery and, thus, are potentially eligible for Audit Policy penalty mitigation. (See Question #2 on page 2 for more detailed explanation.)

3. In order to comply with the prompt disclosure requirement, must an entity planning to perform an audit of numerous similar facilities send a separate notification to EPA within 10 days of discovering each violation, or can the violator consolidate its disclosures and submit them to EPA later?

   A violator may consolidate its submission of certain information to EPA, but the disclosure of potential violations still must be made to EPA within 10 days of discovering a violation. Thus, where a violator discovers a violation at one facility but there is reason to believe that similar violations may have occurred at other facilities, the potential violations at all facilities must be disclosed to EPA within 10 days of the initial discovery. At a minimum, such disclosures in these circumstances must contain the identity and location of all facilities that may raise similar compliance concerns, and a description of the potential violations. The violator may supplement such disclosures by sending to EPA more detailed consolidated information after the audit of all facilities has been completed, as long as the audit is concluded within a reasonably expeditious time. (See Question #3 on page 3 for more detailed explanation.)

4. Do submissions of information required by law (e.g., late submittal of an EPCRA reporting form, late submittal of a Clean Water Act discharge monitoring report) meet the requirements for disclosure under the final Audit Policy where such submissions are unaccompanied by a written disclosure that a violation has or may have occurred?

   No. Late submission of information required to be submitted by itself is not eligible for penalty mitigation under the policy. The disclosure must also notify EPA that a violation exists or may exist. (See Question #4 on page 4 for more detailed explanation.)

5. Why must disclosures be in writing and to EPA?

This protects both EPA and the submitter by eliminating any uncertainty about the timing and content of the disclosure, and it expedites EPA's process of evaluating claims for penalty mitigation. (See Question #5 on page 5 for more detailed explanation.)

6. At what point does an entity have to disclose to EPA that a violation "may have occurred?"

The regulated entity must disclose violations when there is an objectively reasonable factual basis for concluding that violations may have occurred. Where the facts underlying the violation are clear but the existence of a violation is in doubt due to the possibility of differing interpretations of the law, the regulated entity should disclose the potential violations. (See Question #6 on page 6 for more detailed explanation.)

7. If potential violations are disclosed before they occur, are they eligible for penalty reductions under the ıal Audit Policy?

Yes, provided the regulated entity uses all best efforts to avoid the violations. The policy is designed to encourage disclosure as expeditiously as possible. This can be as late as 10 days after discovery that a violation occurred or may have occurred, or as early as when a compliance problem is identified. Once the violation actually occurs, EPA may then mitigate any potential penalty. (See Question #7 on page 7 for more detailed explanation.)

8. How does EPA determine if disclosed violations are repeated within the 3-year time frame specified in the final Audit Policy's repeat violations provision?

The 3-year period begins to run when the government or third party has given the violator notice of a specific violation (e.g., through a complaint, consent order, notice of violation, receipt of an inspection report, citizen suit, receipt of penalty mitigation through a compliance assistance project). If the same type of violations or closely related violations occur at the same facility within three years of such notice, they are repeat violations and are ineligible for penalty mitigation under the final Audit Policy. (See Question #8 on page 8 for more detailed explanation.)

9. Do non-penalty enforcement responses such as notices of violation or warning letters constitute a previous violation for purposes of the policy's repeat violations provision?

Generally yes, as long as the notification identifies specific violations and the allegations are not later withdrawn or defeated. (See Question #9 on page 9 for more detailed explanation.)

10. In cases where a 75% gravity-based penalty reduction is appropriate under the Audit Policy, can the penalty be further reduced in consideration of supplemental environmental projects (SEPs), good faith, or other factors as justice may require?

Yes, as long as such further penalty mitigation is for activities that go beyond the conditions outlined in the final Audit Policy, and provided that economic benefit of noncompliance is recovered as required by existing Agency policies. (See Question #10 on page 10 for more detailed explanation.)

11. Where statute-specific penalty policies provide for different penalty reductions in cases of self-policing or voluntary disclosure, which policy takes precedence?

The final Audit Policy takes precedence over any other policies that offer penalty reductions for satisfying the same conditions (e.g., the voluntary discovery, disclosure, and correction of violations). In most circumstances, the Audit Policy will offer more generous incentives. (See Question #11 on page 11 for more detailed explanation.)

000173

12. Why is use of the final Audit Policy limited to settlement proceedings rather than being applicable also to adjudicatory proceedings?

The policy is intended to create incentives for self-policing, prompt disclosure, and expeditious correction in a manner that most effectively allocates scarce Agency resources. Limiting use of the policy to settlement also reduces transaction costs for the regulated community. Making it the object of adversarial litigation is inconsistent with this carefully considered approach to streamlining the enforcement process. (See Question #12 on page 12 for more detailed explanation.)

13. Must the specific conditions of the final Audit Policy be met in order to qualify for penalty reductions, or is consistency with the general thrust of the policy sufficient (e.g., where disclosure of violations occurs within 30 days but not within the 10-day period specified in the policy)?

The specific conditions must be met. If they are not met, EPA instead will utilize the flexibility provided under its statute-specific penalty policies to recognize good faith efforts and determine the extent to which penalty reductions are appropriate. (See Question #13 on page 13 for more detailed explanation.)

14. Should the government agree to no inspections, fewer inspections or other limits on enforcement authorities during the time periods in which an audit is being performed?

Although not explicitly addressed in the final Audit Policy, EPA's longstanding policy is not to agree to limit its non-penalty enforcement authorities as a provision of settlement or otherwise. While EPA may consider such a facility to be a lower inspection priority than a facility that is not known to be auditing, whether and when to conduct an inspection does, and should, remain a matter of Agency discretion. (See Question #14 on page 14 for more detailed explanation.)

15. If an owner or operator discovers at its facility a violation that began when the facility was owned and/or operated by a previous entity, can the subsequent owner/operator receive penalty mitigation under the final Audit Policy? Can the previous owner/operator also obtain such mitigation?

In both cases, the regulated entity must meet all conditions in the final Audit Policy, including the requirement for prompt disclosure. If there has been an arm's length transaction between the entities and they are considered separate, there may be situations where a subsequent owner/operator can receive penalty mitigation while the previous owner/operator cannot (e.g., where the subsequent owner discloses violations promptly to EPA and the previous owner had not disclosed such violations). Separate entities are considered independently, and applicability of the policy is based on the merits of each individual entity's actions. (See Question #15 on page 15 for more detailed explanation.)

16. Must all penalty mitigation based upon application of the final Audit Policy be effectuated through one uniform type of document such as a formal settlement agreement or is there flexibility to use other mechanisms such as informal letters?

Existing Agency policies determine whether a formal enforcement document such as a consent order is needed, or whether an informal letter will suffice. Generally, enforceable orders are used unless there is no pending enforcement action, no penalty, and no outstanding compliance obligations. (See Question #16 on page 16 for more detailed explanation.)

#1: Discovery of Violations During Audits Required By Settlements

Q: Can a violator be deemed to have "voluntarily" discovered its violations, and thus potentially be eligible for penalty mitigation under the final Audit Policy, where the violations are discovered during the conduct of a compliance audit that is required as part of a binding settlement (e.g., in a consent decree or consent agreement)?

A: Yes, but only under certain circumstances. The final Audit Policy requires discovery of violations to be voluntary in order to obtain *any* penalty mitigation, and it defines such voluntariness so as to exclude situations where the violations are "discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement." 60 Fed. Reg. 66706, 66708 (Dec. 22, 1995). This language, however, should not be read in isolation, because doing so would unduly preclude penalty mitigation under the policy and create a significant disincentive for future settling parties to bind themselves in settlement documents to doing compliance audits. In the same section of the final policy, two key goals are expressed: (1) to encourage the conduct of audits; and (2) to "reward those discoveries that the regulated entity can legitimately attribute to its own voluntary efforts." Id. at 66708.

Where a violator -- without any legal obligation to do so -- already has committed to conducting a compliance audit *prior to* any formal or informal enforcement response (e.g., complaint filing or other circumstance described in Section II.D.4. of the policy), an obligation to conduct such an audit with the same material scope and purpose can be incorporated into a binding settlement with EPA without automatically disqualifying violations discovered under the audit from obtaining penalty mitigation under the Audit Policy.[1] In such cases, EPA should describe the voluntary nature of the audit in the settlement document, so that it is distinguishable from other provisions that are not eligible for penalty mitigation under the policy. By allowing audit provisions in settlements to be potentially eligible for penalty mitigation in these limited circumstances, EPA is able to shape the content and timing of audits, ensure their performance through enforceable terms, and more effectively achieve the goals of the final policy.

---

[1] Where there is any indication that the audit is less than completely voluntary (e.g., the violator committed to doing an audit after some sort of enforcement response as noted above, where the violator is a small business and received penalty credit under EPA's May 1995 Supplemental Environmental Project (SEP) policy, etc.), the violations discovered as a result of the audit are not voluntary and are not eligible for penalty mitigation under this policy.

#2: Discovery of Violations Under Clean Air Act Title V Permit Applications

Q: Can violations or potential violations that are identified in a required compliance certification accompanying an initial application for a Clean Air Act (CAA) Title V operating permit be eligible for penalty mitigation under the final Audit policy?

A: Generally no, because the manner in which such violations are discovered normally will not satisfy the policy's requirement of "voluntary discovery." Under the final Audit Policy, the violation must be "identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement." 60 Fed. Reg. at 66711. The regulations implementing Title V of the CAA require applicants to analyze comprehensively and describe completely the source's compliance status, 40 C.F.R. § 70.5(c)(8), and to include in the required compliance certification a statement that the certification is "based on information and belief formed after reasonable *inquiry*." [Emphasis added] 40 C.F.R. § 70.5(d). The comprehensive nature of the compliance analysis, together with the specific mandate to conduct an "inquiry" and submit a compliance certification, imposes an affirmative duty for Title V permit applicants to review the CAA requirements to which the source is subject, and to determine the source's compliance with each requirement. To do so, applicants must find and analyze any information needed to determine compliance status, including data generated by existing monitoring and sampling methods. Since an applicant for a Title V air operating permit cannot certify to compliance or noncompliance without first evaluating all available relevant information to determine whether violations exist, a CAA Title V permit applicant generally cannot claim that the discovery of violations or potential violations was voluntary. [2]

This does not foreclose the possibility that an entity might be able to demonstrate that its inquiry exceeded its obligations under § 70.5, but any such claim would have to be reviewed on a case-by-case basis. Moreover, if disclosures of noncompliance occur outside the context of the Title V permit application process, discovery of such violations may be considered voluntary and eligible for penalty mitigation under the final Audit Policy (e.g., where both the discovery and disclosure occur well in advance of, and are not prompted by, the application process). Similarly, disclosures occurring after the permit application process (e.g., prior to a permit decision, or after permit issuance or denial) potentially could involve voluntary discovery, such as where new or previously unforeseeable violations are discovered and disclosed. Such determinations, however, would be made on a case-by-case basis.

---

[2] EPA emphasizes that this approach is based on the unique language of the Title V permit application regulations. Where other statutory permit application programs (e.g., the RCRA hazardous waste permit program, the Clean Water Act NPDES permit program, the Clean Air Act Acid Rain permit program, the Safe Drinking Water Act Underground Injection Control program) do not impose a similarly comprehensive duty to inquire about, analyze, and report violations at the permit application stage, violations discovered pursuant to such permit application requirements may qualify as voluntary discovery and, thus, are potentially eligible for Audit Policy penalty mitigation.

#3: Consolidation of Similar Disclosures

Q: In order to comply with the prompt disclosure requirement under the final Audit Policy, must an entity planning to perform an audit of numerous similar facilities send a separate notification to EPA within 10 days of discovering each violation, or can the violator consolidate its disclosures and submit them to EPA later?

A: Consolidation of disclosures is acceptable in certain circumstances, provided the Audit Policy's "prompt disclosure" requirement is met. This provision recognizes EPA's need to have clear and timely notice of violations, so that the Agency can respond quickly and appropriately to potential health or environmental risks and can accurately evaluate a company's compliance status. 60 Fed. Reg. at 66708. Prompt disclosure is also evidence of the regulated entity's good faith in wanting to achieve or return to compliance as soon as possible. 60 Fed. Reg. at 66708-66709. The policy requires that disclosure be made within 10 days of discovery that a violation has occurred or may have occurred, except where an applicable statute or regulation requires reporting in a shorter time frame. The Agency has the flexibility to accept later disclosures in situations where "reporting within 10 days is not practical because the violation is complex and compliance cannot be determined within that period," as long as "the circumstances do not present a serious threat and the regulated entity meets its burden of showing that the additional time was needed to determine compliance status." 60 Fed. Reg. at 66708.

EPA encourages the conduct of intensive company-wide or multi-facility audits, and a consolidated reporting framework may be appropriate in certain circumstances. Specifically, although a consolidated reporting arrangement may take many forms depending on the duration and scope of the proposed audit, the audit must be completed expeditiously and the reporting arrangement must ensure that EPA receives sufficient specific information up front to allow it to respond to any health or environmental risks that may stem from the violations. At a minimum, this must include the identity and location of all facilities that may raise similar compliance concerns and a description of the potential violations. (EPA recognizes that the description of potential violations may be generic in nature where the numerous facilities being audited conduct similar operations.) Providing this minimal information within 10 days should not be an undue hardship, and it will be a significant help to EPA in its efforts to process requests for Audit Policy penalty mitigation in an expeditious manner.

As long as the initial disclosure contains this minimum information and complies with the time period set out in the final Audit Policy, the Agency recognizes that the prompt disclosure requirement can allow for such disclosures to be supplemented at a later time (e.g., the audit results concerning the suspected violations can be consolidated into a subsequent submission to EPA). In such cases, EPA would consider the prompt disclosure requirement to have been met because the timeliness of disclosure would be based upon the initial submission of information. The Agency notes, however, that it will consider disclosures to be untimely where factual inferences can be drawn about other probable violations (e.g., where the violator's operations and practices are homogeneous in nature) if the above-mentioned minimum information regarding such violations are not disclosed within the 10-day period specified in the final Audit Policy.

#4: Submitting Information Without Disclosing Specific Violations

Q: **Do submissions of information required by law (e.g., late submittal of an EPCRA reporting form, late submittal of a Clean Water Act discharge monitoring report) meet the requirements for disclosure under the final Audit Policy where such submissions are unaccompanied by a written disclosure that a violation has or may have occurred?**

A: No. Under the final Audit Policy, an entity must *fully* disclose that *specific violations* occurred or may have occurred, and such disclosure must be made promptly within the specified time period in order to be eligible for penalty mitigation. 60 Fed. Reg. at 66711. The conditions of the policy are not fulfilled by the mere disclosure of facts or other information. The policy's explicit reference to "specific violations" is meant to require clear notice to EPA that a compliance problem has occurred or exists, and protects the regulated entity by eliminating any doubt as to whether a disclosure has been made. Late submission of required information without any accompanying disclosure concerning the existence of possible violations does not constitute "full disclosure of a specific violation" under the Audit Policy. Full disclosure of potential violations is necessary for EPA to get "clear notice of the violations and the opportunity to respond if necessary, as well as an accurate picture of a given facility's compliance record." 60 Fed. Reg. at 66708. Without a specific reference to the fact that the information is being submitted late and that it constitutes or may constitute a violation, EPA will not have clear notice of the potential violations and its ability to respond to potential threats may be hampered.

000178

#5: Requirement For Disclosures To Be In Writing and to EPA

Q: Why must disclosures under the final Audit Policy be in writing and to EPA?

A: Disclosures under the Audit Policy must be "in writing to EPA," 60 Fed. Reg. at 66711, because prompt written disclosure to EPA gives it "clear notice of the violations and the opportunity to respond if necessary, as well as an accurate picture of a given facility's compliance record." 60 Fed. Reg. at 66708. Also, the policy recognizes that government resources are limited. It serves the interests of both the disclosing entity and the government to be absolutely clear about the full character and extent of the disclosure. Otherwise, unnecessary energy is expended in determining whether an oral disclosure occurred. Also, requiring disclosures to be in writing and to EPA has the effect of expediting EPA's process of evaluating claims for penalty mitigation under the final Audit Policy. Where EPA receives oral notice of violation from those who would like Audit Policy penalty mitigation, Agency staff are encouraged to advise the disclosing entity as to the importance of putting the disclosure in writing.

.000179

#6: Definition Of When A Violation "May Have Occurred"

Q: At what point does a party have to disclose to EPA that a violation "may have occurred" in order to qualify for penalty mitigation under the final Audit Policy?

A: The final Audit Policy requires that a regulated entity fully disclose "a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, *or may have occurred*, in writing to EPA." 60 Fed. Reg. at 66711 [emphasis added]. The policy explains that the Agency added the phrase "or may have occurred" to respond to comments received on the Interim Audit Policy, and to clarify that where an entity has some doubt about the existence of a violation, the recommended course is for it to disclose and allow the regulatory authorities to make a definitive determination about whether the violation occurred. 60 Fed. Reg. at 66709.

The regulated entity should report possible violations to the Agency when there is a reasonable basis for concluding that the violations have occurred. Two components go into this analysis: (1) an evaluation of known facts; and (2) application of legal requirements to such facts. Absolute factual and legal certainty is not necessary in order to require disclosure under the policy. This is particularly true where there is a reasonable certainty as to the facts underlying potential violations. For example, if a company discovers a release violation due to inadequate design of equipment used at one facility and this same equipment is used at other facilities it owns throughout the country, an inference can be drawn that other violations may have occurred and the company should disclose these other possible violations to the Agency at the same time it discloses the initial violation. Although additional data concerning the other facilities may be disclosed to EPA more than 10 days later, the initial disclosure should include information as to the identity, location, and nature of the suspected violations at such other facilities (see Question and Answer #3 above). In this situation, the company should investigate its other facilities to verify whether the violations actually occurred, perform any necessary corrective measures or remediation, and comply with the other criteria articulated in the Audit Policy in order to receive penalty mitigation for these other violations.

Even where the facts underlying a possible violation are clearly known, there may be some doubt as to whether such facts give rise to a violation as a matter of law (e.g., due to differing legal interpretations). As long as there is an objectively reasonable factual b · is upon which to base a possible violation, disclosure should occur and EPA will make a definitive determination concerning whether such facts actually present a violation of law.

#7: Disclosure Before Violations Occur

Q: If potential violations are disclosed before they occur, are they eligible for penalty reductions under the final Audit Policy?

A: Generally yes. For example, if the violations cannot be avoided despite the regulated entity's best efforts to comply (e.g., where an upcoming requirement to retrofit a tank cannot be met due to unforeseeable technological barriers), EPA may mitigate the gravity-based penalty once the violation actually occurs.

The policy requires violators to disclose violations fully and promptly, and it defines such prompt disclosure generally to require disclosure "within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred." 60 Fed. Reg. at 66711. The use of the past tense in this phrase reflects EPA's recognition of the most common types of disclosure that occur, i.e., involving past violations (as opposed to possible future violations). Nevertheless, the essence of this requirement in the policy is on prompt self-disclosure of compliance deficiencies. The language requiring disclosure generally "within 10 days" should not be read to preclude disclosure as early as possible, including before the violation actually has occurred. Once the violation actually occurs, these violations may be eligible for Audit Policy penalty mitigation where a violator can establish to EPA's satisfaction based on objective evidence that it has employed all best efforts to avoid the violations. By allowing for disclosure as soon as possible, the policy may even encourage potential violators to work with EPA in a way that can minimize or eliminate the compliance concern before it actually occurs.

#8: Determining Whether Repeat Violations Bar Penalty Mitigation

Q: How does EPA determine if disclosed violations fall within the 3-year time period specified in the final Audit Policy's repeat violations provision?

A: Violations are considered to be repeat violations that are not eligible for penalty mitigation when the subsequently discovered and disclosed violations are: (1) the same or closely related to the original violations and have occurred at the same facility within the past three years; or (2) part of a pattern of federal, State, or local violations by the company's parent organization, if any, within the past five years. 60 Fed. Reg. at 66712. The purpose of the repeat violations provision in the policy is to "deter irresponsible behavior and protect the public and environment." 60 Fed. Reg. at 66706. It also "provides companies with a continuing incentive to prevent violations, without being unfair to regulated entities responsible for managing hundreds of facilities." 60 Fed. Reg. at 66706.

Two questions must be answered in order to determine whether the violations are repeat violations ineligible for penalty mitigation under the final Audit Policy: (1) when the 3-year period begins; and (2) whether the violations which are disclosed, and for which the violator seeks penalty mitigation, fall within the subsequent 3-year period. As to the first question, the 3-year period begins to run when the violator first receives notice of the original violations. [3] Such notice can take several forms, including notification by EPA or a State or local agency through receipt of a judicial or administrative order, consent agreement or order, complaint, conviction or plea agreement, notice of violation such as a letter or inspection report, notice during an inspection, or even through a third party complaint (e.g., in a citizen suit). A violator also may be put on notice of particular environmental violations when it obtains penalty mitigation for such violations from EPA, a State, or a local agency (e.g., under EPA's Small Business Compliance Incentives policy). As noted in the final Audit Policy, these circumstances collectively "identify situations in which the regulated community has had clear notice of its noncompliance and an opportunity to correct." 60 Fed. Reg. at 66709. Where a government or third party has given such notice of noncompliance, the same or closely related violations cannot be repeated within the subsequent 3-year period following such notice. Thus, the 3-year period begins to run when such clear notice of noncompliance is received, [4] *without regard to when the original violations cited in that notice actually occurred.*

As to the second question, EPA looks to whether the disclosed violations actually *occurred* within the 3-year period following the original notice/mitigation. If the violations occurred within this period, they would be considered repeat violations and would not be eligible for penalty mitigation under the policy because corrective measures should have prevented such a recurrence. If, however, those violations occurred either before the original notice of noncompliance was received by the violator or after the 3-year period running from the original notice, they would not be considered repeat violations under the final Audit Policy. Thus, repeat violations are determined by the date that such subsequent violations occur, *without regard to when notice of such subsequent violations is given to the violator.*

---

[3] Typically, the Agency will provide written notice of violations because it recognizes the significant benefits to providing such notice in writing, including the minimization of uncertainty concerning when such notice was received and its contents.

[4] In determining whether a "pattern of violations" has occurred within the past five years, notice of earlier violations is less relevant. The inquiry into whether a pattern exists more appropriately focuses on the dates that all violations actually occurred.

#9: Informal Enforcement Responses and Repeat Violations

Q: Do non-penalty enforcement responses such as notices of violation or warning letters constitute a previous violation for purposes of the policy's repeat violations provision?

A: Generally yes. The repeat violations provision defines such violations to encompass formal and informal enforcement responses, and nonenforcement responses that result in penalty mitigation. 60 Fed. Reg. at 66712 (specifically including a reference to any violation identified in a " . . . notice of violation.") The common theme is that a government entity has notified the violator that it believes a violation has occurred, and, as a result, the government reasonably can expect the regulated entity to take whatever steps are necessary to prevent similar violations.

Notices of violation (NOVs) and warning letters may be worded in many different ways (e.g., sometimes alleging particular violations and sometimes speaking only generally in terms of an upcoming need to comply with a new requirement). The title or caption on such documents is not necessarily dispositive for purposes of the repeat violations provision. The substance of the NOV, warning letter, or other correspondence -- usually found in the text of such documents -- determines whether it provides notice of an alleged violation. If such documents give the regulated entity notice of allegations of specific deficiencies in compliance and those allegations are not later withdrawn or defeated, any subsequent violations would be considered repeat violations if they occurred within the time periods outlined in the final Audit Policy. If, however, the substance of the document merely provides a prospective statement of new requirements not yet violated (e.g., in a compliance assistance guide), the notice or letter would not be considered an enforcement response for purposes of the repeat violations provision.

#10: Further Penalty Reductions Beyond The Audit Policy

Q: In cases where a 75% gravity-based penalty reduction is appropriate under the final Audit Policy, may the penalty be further reduced in consideration of supplemental environmental projects (SEPs), good faith, or "other factors as justice may require" as long as any economic benefit of noncompliance (EBN) is recovered?

A: Where a 75% gravity-based penalty reduction is appropriate under the final Audit Policy, further penalty reductions may be obtained for activities that go beyond the specific conditions required under the final Audit Policy. For example, further reductions generally may be warranted where a violator agrees to undertake a supplemental environmental project (SEP) and the project meets the criteria established for SEPs in the Agency's SEP Policy. The Audit Policy, however, precludes "additional penalty mitigation for satisfying the same or similar conditions." 60 Fed. Reg. at 66712. Thus, if the particular project that the violator proposes to undertake as a SEP must be carried out in order to receive a penalty reduction under the audit policy, additional credit may not be given under the SEP Policy. For example, where EPA determines that an audit must be carried out at a large complex facility in order to prevent a recurrence of violations, SEP credit may not be provided for conducting this audit. Note, however, that SEP credit could be provided if EPA determined that such an audit was not necessary to prevent a recurrence of violations.

Similarly, additional penalty reductions for good faith and "other factors as justice may require" may be provided only where the specific activities justifying those reductions are not required in order to receive a 75% penalty reduction under the Audit Policy. Thus, the prompt disclosure of a violation ordinarily would not qualify a company for additional good faith penalty reductions since the disclosure clearly is required by the Audit Policy. On the other hand, a violator that takes steps to correct and remediate a violation in a manner that is above and beyond the steps normally expected in order to qualify for mitigation under the Audit Policy (e.g., quicker or more extensive correction) may qualify for a good faith reduction.

As to economic benefit of noncompliance (EBN), the Audit Policy restates the Agency's longstanding position that recovery of any significant EBN is important in order to preserve a level playing field for the regulated community. The Audit Policy does not revise or modify any other Agency policies (e.g., the SEP Policy) concerning recovery of EBN.

#11: Inconsistencies Between Audit Policy and Statute-Specific Penalty Policies

Q: Where statute-specific penalty policies provide for different penalty reductions in cases of self-policing or voluntary disclosure, which policy takes precedence?

A: The final Audit Policy states clearly that it "supersedes any *inconsistent* provisions in media-specific penalty or enforcement policies" but that such policies continue to apply where they are not inconsistent. [Emphasis added] 60 Fed. Reg. at 66712. (If not inconsistent, the Audit Policy states that such existing EPA enforcement policies continue to apply in conjunction with the Audit Policy provided that the regulated entity has not already received penalty mitigation for similar self-policing or voluntary disclosure activities. 60 Fed. Reg. at 66712.) In most circumstances, the final Audit Policy will result in a greater penalty mitigation than under any media-specific penalty or enforcement policy. In such cases, the Audit Policy's greater penalty reductions take precedence.

In some circumstances, however, the Audit Policy may provide for less penalty mitigation (e.g., 75% penalty reductions where the violations are not discovered through a systematic discovery, as opposed to potential 80% or greater reductions for such cases under another penalty policy). Here too, the Audit Policy takes precedence. This is because the Audit Policy is a more recent and more detailed statement as to the precise national strategy for providing incentives for self-policing, prompt disclosure, and expeditious correction and remediation. Therefore, in order to qualify for 75% penalty reductions or greater for activities related to voluntary discovery, disclosure, and remediation/correction, the Audit Policy provides a minimum standard of behavior that must be met.[5] As long as the criteria in the Audit Policy are met, the certainty and national consistency provided by the penalty reductions in the Audit Policy would apply.

---

[5] For activities unrelated to voluntary discovery, disclosure, and remediation/correction, additional penalty mitigation is available as described in Question and Answer #10.

#12: Applicability of Audit Policy in Litigation

Q: Why is use of the final Audit Policy limited to settlement proceedings rather than being applicable also to adjudicatory proceedings?

A: The final Audit Policy expressly limits its applicability to settlement contexts, and states that "[i]t is not intended for use in pleading, at hearing, or trial," 60 Fed. Reg. at 66712, because the Agency wanted to create these incentives for self-policing, prompt disclosure, and expeditious correction in a manner that most effectively allocates scarce Agency resources and reduces transaction costs for the regulated community. Subjecting the policy to litigation and judicial review is inconsistent with this carefully considered approach to streamlining the enforcement process. As noted in the final Audit Policy, EPA intends to apply the policy uniformly in settlements across all of the Agency's enforcement programs. However, where enforcement matters are not resolved through settlement, but instead proceed to litigation, the Audit Policy is not applicable, and any attempt to apply the policy in such contexts is inappropriate.

000186

#13: Degree of Conformance to The Audit Policy's Conditions

Q: Must the specific conditions of the final Audit Policy be met in order to qualify for penalty reductions, or is consistency with the general thrust of the policy sufficient (e.g., where disclosure of violations occurs within 30 days but not within the 10-day period specified in the policy)?

A: The specific conditions must be met. Although the final Audit Policy is intended as guidance, the Summary section states EPA's intent to apply the policy uniformly across the Agency's enforcement programs. 60 Fed. Reg. at 66706. Those who disclose violations after the policy's January 22, 1996 effective date have been put on notice as to the behavior that is expected in order to get penalty reductions. EPA also has the discretion to apply the policy to disclosures occurring prior to the policy's effective date. In such cases, however, if the policy's conditions have not been met, EPA instead will utilize the flexibility provided under its statute-specific penalty policies to recognize good faith efforts and determine the extent to which penalty reductions are appropriate.

#14: EPA Inspections While Audits Are Being Performed

Q: Should the government agree to no inspections, fewer inspections, or other limits on its enforcement authorities during the time periods in which an audit is being performed?

A: Although not explicitly addressed in the final Audit Policy, EPA's longstanding policy is not to agree to limit its non-penalty enforcement authorities as a provision of settlement or otherwise. While EPA may consider such a facility to be a lower inspection priority than a facility that is not known to be auditing, whether and when to conduct an inspection does, and should, remain a matter of Agency discretion. If the Agency's inspection or other enforcement authorities were limited, this could compromise the Agency's ability to respond to citizen complaints or site conditions posing a potentially serious threat to human health or the environment, or its ability to assure the public as to the compliance status of a given facility.

#15: Impact Of Prior Owner or Operator's Pattern of Violations On Subsequent Owner/Operator's Eligibility Under The Audit Policy

Q: If an owner or operator ("owner/operator") discovers at its facility a violation that began when the facility was owned and/or operated by a previous entity, may the subsequent owner/operator receive penalty mitigation under the final Audit Policy? May the previous owner/operator also obtain such mitigation?

A: The subsequent owner/operator may obtain penalty mitigation if it meets all of the policy's conditions, including prompt disclosure to EPA as soon as it discovers the violation. For purposes of the final Audit Policy, the previous owner/operator's actions will not be imputed to the successor, except where the relationship between the companies makes imputing such actions appropriate (e.g., where the subsequent owner/operator is a wholly owned subsidiary of, and controlled by, the previous owner operator). For example, if there has been an arm's length transaction between the entities and they are considered separate (e.g., where the subsequent owner/operator is not considered merely a continuing enterprise), there may be situations where a subsequent owner/operator may receive penalty mitigation while the previous owner/operator cannot. One such situation would be where the previous owner/operator had discovered a violation during the time that it owned the facility but did not disclose such a violation to EPA. In such a case, the previous owner would fail to meet the policy's prompt disclosure condition and it would be ineligible for penalty mitigation under the final Audit Policy. If the subsequent owner/operator disclosed the violation to EPA promptly after it discovered the violation, it still could be eligible for penalty mitigation under the Audit Policy. Thus, separate entities are considered independently, and applicability of the policy is based on the merits of each individual entity's actions.

#16: Resolving Audit Policy Determinations Through Informal Or Formal Means

Q: Must all penalty mitigation based upon application of the final Audit Policy be effectuated through one uniform type of document such as a formal settlement agreement or is there flexibility to use other mechanisms such as informal letters?

A: Where applicability of the policy arises in the context of settling a pending enforcement action, the penalty mitigation will be effectuated through the normal process used to settle pending cases in the various media-specific programs that EPA enforces -- normally through formal enforceable settlement agreements.[6]

Even in enforcement matters that have not yet matured into pending cases (i.e., before any complaint is filed), an enforceable order normally is used in order to ensure payment of any penalties and/or completion of any compliance obligations. This would occur: (1) when the final Audit Policy would provide for 75% mitigation; (2) if an economic benefit penalty component was being recovered; or (3) where any compliance measures are necessary.

EPA specifically stated in the policy that it may require a regulated entity to enter into a "publicly available written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required." 60 Fed. Reg. at 66711. EPA also notes that it may require as a condition of settlement that any penalty mitigation premised on the final Audit Policy be contingent upon the completeness and accuracy of the violator's representations.

In the absence of a pending enforcement action, where 100% of the gravity-based penalty is being waived and there is no economic benefit penalty component and no outstanding compliance obligations, several of EPA's media-specific enforcement policies do not require that resolution of the matter occur through a formal settlement document. The final Audit Policy applies to enforcement settlements for all the regulatory statutes under which EPA seeks gravity based penalties. Flexibility is necessary to meet the myriad settlement conditions that may be employed as part of such settlements and the numerous objectives to be accomplished. The use of a uniform document for self-disclosure settlements could hamper the settlement process and may even prevent EPA from meeting some objectives of the underlying case (e.g., the need to expedite resolution of the case). Regardless of the approach taken to effectuate such penalty mitigations, EPA will track this data for purposes of implementing the repeat violations provision and it will "independently of FOIA, make publicly available any compliance agreements reached under the policy." 60 Fed. Reg. 66709.

---

[6] In matters where judicial action is contemplated, EPA consults with the Department of Justice (DOJ) in the Audit Policy determination. Where judicial actions are pending, DOJ approves and files formal consent decrees.

EPA SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY

Effective May 1, 1998

A. INTRODUCTION

1. Background

In settlements of environmental enforcement cases, the U.S. Environmental Protection Agency (EPA) requires the alleged violators to achieve and maintain compliance with Federal environmental laws and regulations and to pay a civil penalty. To further EPA's goals to protect and enhance public health and the environment, in certain instances environmentally beneficial projects, or Supplemental Environmental Projects (SEPs), may be part of the settlement. This Policy sets forth the types of projects that are permissible as SEPs, the penalty mitigation appropriate for a particular SEP, and the terms and conditions under which they may become part of a settlement. The primary purpose of this Policy is to encourage and obtain environmental and public health protection and improvements that may not otherwise have occurred without the settlement incentives provided by this Policy.

In settling enforcement actions, EPA requires alleged violators to promptly cease the violations and, to the extent feasible, remediate any harm caused by the violations. EPA also seeks substantial monetary penalties in order to deter noncompliance. Without penalties, regulated entities would have an incentive to delay compliance until they are caught and ordered to comply. Penalties promote environmental compliance and help protect public health by deterring future violations by the same violator and deterring violations by other members of the regulated community. Penalties help ensure a national level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time. Penalties also encourage regulated entities to adopt pollution prevention and recycling techniques in order to minimize their pollutant discharges and reduce their potential liabilities.

Statutes administered by EPA generally contain penalty assessment criteria that a court or administrative law judge must consider in determining an appropriate penalty at trial or a hearing. In the settlement context, EPA generally follows these criteria in exercising its discretion to establish an appropriate settlement penalty. In establishing an appropriate penalty, EPA considers such factors as the economic benefit associated with the violations, the gravity or seriousness of

the violations, and prior history of violations. Evidence of a violator's commitment and ability to perform a SEP is also a relevant factor for EPA to consider in establishing an appropriate settlement penalty. All else being equal, the final settlement penalty will be lower for a violator who agrees to perform an acceptable SEP compared to the violator who does not agree to perform a SEP.

The Agency encourages the use of SEPs that are consistent with this Policy. SEPs may not be appropriate in settlement of all cases, but they are an important part of EPA's enforcement program. While penalties play an important role in environmental protection by deterring violations and creating a level playing field, SEPs can play an additional role in securing significant environmental or public health protection and improvements. SEPs may be particularly appropriate to further the objectives in the statutes EPA administers and to achieve other policy goals, including promoting pollution prevention and environmental justice.

2. Pollution Prevention and Environmental Justice

The Pollution Prevention Act of 1990 (42 U.S.C. § 13101 et seq., November 5, 1990) identifies an environmental management hierarchy in which pollution "should be prevented or reduced whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort ..." (42 U.S.C. §13103). Selection and evaluation of proposed SEPs should be conducted generally in accordance with this hierarchy of environmental management, i.e., SEPs involving pollution prevention techniques are preferred over other types of reduction or control strategies, and this can be reflected in the degree of consideration accorded to a defendant/respondent before calculation of the final monetary penalty.

Further, there is an acknowledged concern, expressed in Executive Order 12898 on environmental justice, that certain segments of the nation's population, i.e., low-income and/or minority populations, are disproportionately burdened by pollutant exposure. Emphasizing SEPs in communities where environmental justice concerns are present helps ensure that persons who spend significant portions of their time in areas, or depend on food and water sources located near, where the violations occur would be protected. Because environmental justice is not a specific technique or process but an overarching goal, it is not listed as a particular SEP category; but EPA encourages SEPs in communities where environmental justice may be an issue.

3. Using this Policy

In evaluating a proposed project to determine if it qualifies as a SEP and then determining how much penalty mitigation is appropriate, Agency enforcement and compliance personnel should use the following five-step process:

(1) Ensure that the project meets the basic definition of a SEP. (Section B)

(2) Ensure that all legal guidelines, including nexus, are satisfied. (Section C)

(3) Ensure that the project fits within one (or more) of the designated categories of SEPs. (Section D)

(4) Determine the appropriate amount of penalty mitigation. (Section E)

(5) Ensure that the project satisfies all of the implementation and other criteria. (Sections F, G, H, I and J)

4. Applicability

This Policy revises and hereby supersedes the February 12, 1991 *Policy on the Use of Supplemental Environmental Projects in EPA Settlements* and the May 1995 *Interim Revised Supplemental Environmental Projects Policy*. This Policy applies to settlements of all civil judicial and administrative actions filed after the effective date of this Policy (May 1, 1998), and to all pending cases in which the government has not reached agreement in principle with the alleged violator on the specific terms of a SEP.

This Policy applies to all civil judicial and administrative enforcement actions taken under the authority of the environmental statutes and regulations that EPA administers. It also may be used by EPA and the Department of Justice in reviewing proposed SEPs in settlement of citizen suits. This Policy also applies to federal agencies that are liable for the payment of civil penalties. Claims for stipulated penalties for violations of consent decrees or other settlement agreements may not be mitigated by the use of SEPs.(1)

This is a settlement Policy and thus is not intended for use by EPA, defendants, respondents, courts or administrative law judges at a hearing or in a trial. Further, whether the Agency decides to accept a proposed SEP as part of a settlement, and the amount of any penalty mitigation that may be given for a particular SEP, is purely within EPA's discretion. Even though a project appears to satisfy all of the provisions of this Policy, EPA may decide, for one or more reasons, that a SEP is not appropriate (e.g., the cost of reviewing a SEP proposal is excessive, the oversight costs of the SEP may be too high, the defendant/respondent may not have the ability or reliability to complete the proposed SEP, or the deterrent value of the higher penalty amount outweighs the benefits of the proposed SEP).

This Policy establishes a framework for EPA to use in exercising its enforcement discretion in determining appropriate settlements. In some cases, application of this Policy may not be appropriate, in whole or part. In such cases, the litigation team may, with the advance approval of Headquarters, use an alternative or modified approach.

B. DEFINITION AND KEY CHARACTERISTICS OF A SEP

Supplemental environmental projects are defined as **environmentally beneficial projects** which a defendant/respondent agrees to undertake **in settlement of an enforcement action,** but which the defendant/respondent is **not otherwise legally required to perform.** The three bolded key parts of this definition are elaborated below.

"Environmentally beneficial" means a SEP must improve, protect, or reduce risks to public health, or the environment at large. While in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits the public health or the environment.

"In settlement of an enforcement action" means: 1) EPA has the opportunity to help shape the scope of the project before it is implemented; and 2) the project is not commenced until after the Agency has identified a violation (e.g., issued a notice of violation, administrative order, or complaint).[2]

"Not otherwise legally required to perform means" the project or activity is not required by any federal, state or local law or regulation. Further, SEPs cannot include actions which the defendant/respondent is likely to be required to perform:

(a) as injunctive relief[3] in the instant case;

(b) as injunctive relief in another legal action EPA, or another regulatory agency could bring;

(c) as part of an existing settlement or order in another legal action; or,

(d) by a state or local requirement.

SEPs may include activities which the defendant/respondent will become legally obligated to undertake two or more years in the future, if the project will result in the facility coming into compliance earlier than the deadline. Such "accelerated compliance" projects are not allowable, however, if the regulation or statute provides a benefit (e.g., a higher emission limit) to the defendant/respondent for early compliance.

Also, the performance of a SEP reduces neither the stringency nor timeliness requirements of Federal environmental statutes and regulations. Of course, performance of a SEP does not alter the defendant/respondent's obligation to remedy a violation expeditiously and return to compliance.

C. LEGAL GUIDELINES

EPA has broad discretion to settle cases, including the discretion to include SEPs as an appropriate part of the settlement. The legal evaluation of whether a proposed SEP is within EPA's authority and consistent with all statutory and

000195

Constitutional requirements may be a complex task. Accordingly, this Policy uses five legal guidelines to ensure that our SEPs are within the Agency's and a federal court's authority, and do not run afoul of any Constitutional or statutory requirements.(4)

1. A project cannot be inconsistent with any provision of the underlying statutes.

2. All projects must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action and must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if:

a. the project is designed to reduce the likelihood that similar violations will occur in the future; or

b. the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or

c. the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.

Nexus is easier to establish if the primary impact of the project is at the site where the alleged violation occurred or at a different site in the same ecosystem or within the immediate geographic(5) area. Such SEPs may have sufficient nexus even if the SEP addresses a different pollutant in a different medium. In limited cases, nexus may exist even though a project will involve activities outside of the United States.(6) The cost of a project is not relevant to whether there is adequate nexus.

3. EPA may not play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP. Nor may EPA retain authority to manage or administer the SEP. EPA may, of course, perform oversight to ensure that a project is implemented pursuant to the provisions of the settlement and have legal recourse if the SEP is not adequately performed.

4. The type and scope of each project are defined in the signed settlement agreement. This means the "what, where and when" of a project are defined by the settlement agreement. Settlements in which the defendant/respondent agrees to spend a certain sum of money on a project(s) to be defined later (after EPA or the Department of Justice signs the settlement agreement) are not allowed.

5. a. A project cannot be used to satisfy EPA's statutory obligation or another federal agency's obligation to perform a particular activity. Conversely, if a federal statute prohibits the expenditure of federal resources on a particular activity, EPA cannot consider projects that would appear to circumvent that prohibition

b. A project may not provide EPA or any federal agency with additional resources to perform a particular activity for which Congress has specifically appropriated funds. A project may not provide EPA with additional resources to perform a particular activity for which Congress has earmarked funds in an appropriations committee report.[7] Further, a project cannot be used to satisfy EPA's statutory or earmark obligation, or another federal agency's statutory obligation, to spend funds on a particular activity. A project, however, may be related to a particular activity for which Congress has specifically appropriated or earmarked funds.

c. A project may not provide additional resources to support specific activities performed by EPA employees or EPA contractors. For example, if EPA has developed a brochure to help a segment of the regulated community comply with environmental requirements, a project may not directly, or indirectly, provide additional resources to revise, copy or distribute the brochure.

d. A project may not provide a federal grantee with additional funds to perform a specific task identified within an assistance agreement.

D. CATEGORIES OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS

EPA has identified seven specific categories of projects which may qualify as SEPs. In order for a proposed project to be accepted as a SEP, it must satisfy the requirements of at least one category plus all the other requirements established in this Policy.

1. Public Health

A public health project provides diagnostic, preventative and/or remedial components of human health care which is related to the actual or potential damage to human health caused by the violation. This may include epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/ tissue samples, medical treatment and rehabilitation therapy.

Public health SEPs are acceptable only where the primary benefit of the project is the population that was harmed or put at risk by the violations.

2. Pollution Prevention

A pollution prevention project is one which reduces the generation of pollution through "source reduction," i.e., any practice which reduces the amount of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment, prior to recycling, treatment or disposal. (After the pollutant or waste stream has been generated, pollution prevention is no longer possible and the waste must be handled by appropriate recycling, treatment, containment, or disposal methods.)

000197

Source reduction may include equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures. Pollution prevention also includes any project which protects natural resources through conservation or increased efficiency in the use of energy, water or other materials. "In-process recycling," wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on site, is considered a pollution prevention project.

In all cases, for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution released to the environment, not merely a transfer of pollution among media. This decrease may be achieved directly or through increased efficiency (conservation) in the use of energy, water or other materials. This is consistent with the Pollution Prevention Act of 1990 and the Administrator's "Pollution Prevention Policy Statement: New Directions for Environmental Protection," dated June 15, 1993

3. Pollution Reduction

If the pollutant or waste stream already has been generated or released, a pollution reduction approach -- which employs recycling, treatment, containment or disposal techniques -- may be appropriate. A pollution reduction project is one which results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment by an operating business or facility by a means which does not qualify as "pollution prevention." This may include the installation of more effective end-of-process control or treatment technology, or improved containment, or safer disposal of an existing pollutant source. Pollution reduction also includes "out-of-process recycling," wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for production off-site.

4. Environmental Restoration and Protection

An environmental restoration and protection project is one which enhances the condition of the ecosystem or immediate geographic area adversely affected.(8) These projects may be used to restore or protect natural environments (such as ecosystems) and man-made environments, such as facilities and buildings. This category also includes any project which protects the ecosystem from actual or potential damage resulting from the violation or improves the overall condition of the ecosystem.(9) Examples of such projects include: restoration of a wetland in the same ecosystem along the same avian flyway in which the facility is located; or purchase and management of a watershed area by the defendant/respondent to protect a drinking water supply where the violation (e.g., a reporting violation) did not directly damage the watershed but potentially could lead to damage due to unreported discharges. This category also includes projects which provide for the protection of endangered species

(e.g., developing conservation programs or protecting habitat critical to the well-being of a species endangered by the violation).

In some projects where a defendant/respondent has agreed to restore and then protect certain lands, the question arises as to whether the project may include the creation or maintenance of certain recreational improvements, such as hiking and bicycle trails. The costs associated with such recreational improvements may be included in the total SEP cost provided they do not impair the environmentally beneficial purposes of the project and they constitute only an incidental portion of the total resources spent on the project.

In some projects where the parties intend that the property be protected so that the ecological and pollution reduction purposes of the land are maintained in perpetuity, the defendant/respondent may sell or transfer the land to another party with the established resources and expertise to perform this function, such as a state park authority. In some cases, the U.S. Fish and Wildlife Service or the National Park Service may be able to perform this function.(10)

With regard to man-made environments, such projects may involve the remediation of facilities and buildings, provided such activities are not otherwise legally required. This includes the removal/mitigation of contaminated materials, such as soils, asbestos and lead paint, which are a continuing source of releases and/or threat to individuals.

5. Assessments and Audits

Assessments and audits, if they are not otherwise available as injunctive relief, are potential SEPs under this category. There are three types of projects in this category: a. pollution prevention assessments; b. environmental quality assessments; and c. compliance audits. These assessments and audits are only acceptable as SEPs when the defendant/respondent agrees to provide EPA with a copy of the report. The results may be made available to the public, except to the extent they constitute confidential business information pursuant to 40 CFR Part 2, Subpart B.

a. Pollution prevention assessments are systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production, and generation of toxic and hazardous materials and other wastes. To be eligible for SEPs, such assessments must be conducted using a recognized pollution prevention assessment or waste minimization procedure to reduce the likelihood of future violations. Pollution prevention assessments are acceptable as SEPs without an implementation commitment by the defendant/respondent. Implementation is not required because drafting implementation requirements before the results of an assessment are known is difficult. Further, many of the implementation recommendations may constitute activities that are in the defendant/respondent's own economic interest.

b. Environmental quality assessments are investigations of: the condition of the

environment at a site not owned or operated by the defendant/respondent; the environment impacted by a site or a facility regardless of whether the site or facility is owned or operated by the defendant/respondent; or threats to human health or the environment relating to a site or a facility regardless of whether the site or facility is owned or operated by the defendant/respondent. These include, but are not limited to: investigations of levels or sources of contamination in any environmental media at a site; or monitoring of the air, soil, or water quality surrounding a site or facility. To be eligible as SEPs, such assessments must be conducted in accordance with recognized protocols, if available, applicable to the type of assessment to be undertaken. Expanded sampling or monitoring by a defendant/respondent of its own emissions or operations does not qualify as a SEP to the extent it is ordinarily available as injunctive relief.

Environmental quality assessment SEPs may not be performed on the following types of sites: sites that are on the National Priority List under CERCLA § 105, 40 CFR Part 300, Appendix B; sites that would qualify for an EPA removal action pursuant to CERCLA §104(a) and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR § 300.415; and sites for which the defendant/respondent or another party would likely be ordered to perform a remediation activity pursuant to CERCLA §106, RCRA §7003, RCRA 3008(h), CWA § 311, or another federal law.

c. Environmental compliance audits are independent evaluations of a defendant/respondent's compliance status with environmental requirements. Credit is only given for the costs associated with conducting the audit. While the SEP should require all violations discovered by the audit to be promptly corrected, no credit is given for remedying the violation since persons are required to achieve and maintain compliance with environmental requirements. In general, compliance audits are acceptable as SEPs only when the defendant/respondent is a small business or small community.(11) (12)

6. Environmental Compliance Promotion

An environmental compliance promotion project provides training or technical support to other members of the regulated community to: 1) identify, achieve and maintain compliance with applicable statutory and regulatory requirements or 2) go beyond compliance by reducing the generation, release or disposal of pollutants beyond legal requirements. For these types of projects, the defendant/respondent may lack the experience, knowledge or ability to implement the project itself, and, if so, the defendant/respondent should be required to contract with an appropriate expert to develop and implement the compliance promotion project. Acceptable projects may include, for example, producing a seminar directly related to correcting widespread or prevalent violations within the defendant/ respondent's economic sector.

Environmental compliance promotion SEPs are acceptable only where the primary impact of the project is focused on the same regulatory program requirements which were violated and where EPA has reason to believe that compliance in the sector would be significantly advanced by the proposed

project. For example, if the alleged violations involved Clean Water Act pretreatment violations, the compliance promotion SEP must be directed at ensuring compliance with pretreatment requirements. Environmental compliance promotion SEPs are subject to special approval requirements per Section J below.

7. Emergency Planning and Preparedness

An emergency planning and preparedness project provides assistance -- such as computers and software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training -- to a responsible state or local emergency response or planning entity. This is to enable these organizations to fulfill their obligations under the Emergency Planning and Community Right-to-Know Act (EPCRA) to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to develop emergency response plans, to train emergency response personnel and to better respond to chemical spills.

EPCRA requires regulated sources to provide information on chemical production, storage and use to State Emergency Response Commissions (SERCs), Local Emergency Planning Committees (LEPCs) and Local Fire Departments (LFDs). This enables states and local communities to plan for and respond effectively to chemical accidents and inform potentially affected citizens of the risks posed by chemicals present in their communities, thereby enabling them to protect the environment or ecosystems which could be damaged by an accident. Failure to comply with EPCRA impairs the ability of states and local communities to meet their obligations and places emergency response personnel, the public and the environment at risk from a chemical release.

Emergency planning and preparedness SEPs are acceptable where the primary impact of the project is within the same emergency planning district or state affected by the violations and EPA has not previously provided the entity with financial assistance for the same purposes as the proposed SEP. Further, this type of SEP is allowable only when the SEP involves non-cash assistance and there are violations of EPCRA, or reporting violations under CERCLA § 103, or CAA § 112(r), or violations of other emergency planning, spill or release requirements alleged in the complaint.

8. Other Types of Projects

Projects determined by the case team to have environmental merit which do not fit within at least one of the seven categories above but that are otherwise fully consistent with all other provisions of this Policy, may be accepted with the advance approval of the Office of Enforcement and Compliance Assurance.

9. Projects Which Are Not Acceptable as SEPs

The following are examples of the types of projects that are not allowable as SEPs:

000201

a. General public educational or public environmental awareness projects, e.g., sponsoring public seminars, conducting tours of environmental controls at a facility, promoting recycling in a community;

b. Contributions to environmental research at a college or university;

c. Conducting a project, which, though beneficial to a community, is unrelated to environmental protection, e.g., making a contribution to a non-profit, public interest, environmental, or other charitable organization, or donating playground equipment;

d. Studies or assessments without a requirement to address the problems identified in the study (except as provided for in § D.5 above);

e. Projects which the defendant/respondent will undertake, in whole or part, with low-interest federal loans, federal contracts, federal grants, or other forms of federal financial assistance or non-financial assistance (e.g., loan guarantees).

E. CALCULATION OF THE FINAL PENALTY

Substantial penalties are an important part of any settlement for legal and policy reasons. Without penalties there would be no deterrence, as regulated entities would have little incentive to comply. Additionally, penalties are necessary as a matter of fairness to those regulated entities that make the necessary expenditures to comply on time: violators should not be allowed to obtain an economic advantage over their competitors who complied.

As a general rule, the net costs to be incurred by a violator in performing a SEP may be considered as one factor in determining an appropriate settlement amount. **In settlements in which defendant/respondents commit to conduct a SEP, the final settlement penalty must equal or exceed either: a) the economic benefit of noncompliance plus 10 percent of the gravity component; or b) 25 percent of the gravity component only; whichever is greater.**

Calculating the final penalty in a settlement which includes a SEP is a five step process. Each of the five steps is explained below. The five steps are also summarized in the penalty calculation worksheet attached to this Policy.

Step 1: Settlement Amount Without a SEP

a. The applicable EPA penalty policy is used to calculate the economic benefit of noncompliance.

b. The applicable EPA penalty policy is used to calculate the gravity component of the penalty. The gravity component is all of the penalty other than the identifiable economic benefit amount, after gravity has been adjusted by all other factors in the penalty policy (e.g., audits, good faith, litigation

considerations), except for the SEP.

c. The amounts in steps 1.a and b are added. This sum is the minimum amount that would be necessary to settle the case without a SEP.

Step 2: Minimum Penalty Amount With a SEP

The minimum penalty amount must equal or exceed the economic benefit of noncompliance plus 10 percent of the gravity component, or 25 percent of the gravity component only, whichever is greater. The minimum penalty amount is calculated as follows:

a. Calculate 10 percent of gravity (multiply amount in step 1.b by 0.1).

b. Add economic benefit (amount in step 1.a) to amount in step 2.a.

c. Calculate 25 percent of gravity (multiply amount in step 1.b by 0.25).

d. Identify the minimum penalty amount: the greater of step 2.c or step 2.b.(13)

Step 3. Calculate the SEP Cost

The net present after-tax cost of the SEP, hereinafter called the "SEP COST," is the maximum amount that EPA may take into consideration in determining an appropriate penalty mitigation for performance of a SEP. In order to facilitate evaluation of the SEP COST of a proposed project, the Agency has developed a computer model called PROJECT.(14) There are three types of costs that may be associated with performance of a SEP (which are entered into the PROJECT model): capital costs (e.g., equipment, buildings); one-time nondepreciable costs (e.g., removing contaminated materials, purchasing land, developing a compliance promotion seminar); and annual operation costs and savings (e.g., labor, chemicals, water, power, raw materials).(15)

To use PROJECT, the Agency needs reliable estimates of the costs associated with a defendant/respondent's performance of a SEP, as well as any savings due to such factors as energy efficiency gains, reduced materials costs, reduced waste disposal costs, or increases in productivity. For example, if the annual expenditures in labor and materials of operating a new waste recycling process is $100,000 per year, but the new process reduces existing hazardous waste disposal expenditures by $30,000 per year, the net cost of $70,000 is entered into the PROJECT model (variable 4).

In order to run the PROJECT model properly (i.e., to produce a reasonable estimate of the net present after-tax cost of the project), the number of years that annual operation costs or savings will be expended in performing the SEP must be specified. At a minimum, the defendant/respondent must be required to implement the project for the same number of years used in the PROJECT model calculation. (For example, if the settlement agreement requires the

defendant/respondent to operate the SEP equipment for two years, two years should be entered as the input for number of years of annual expense in the PROJECT model.) If certain costs or savings appear speculative, they should not be entered into the PROJECT model. The PROJECT model is the primary method to determine the SEP COST for purposes of negotiating settlements.(16)

EPA does not offer tax advice on whether a regulated entity may deduct SEP expenditures from its income taxes. If a defendant/respondent states that it will not deduct the cost of a SEP from its taxes and it is willing to commit to this in the settlement document, and provide the Agency with certification upon completion of the SEP that it has not deducted the SEP expenditures, the PROJECT model calculation should be adjusted to calculate the SEP Cost without reductions for taxes. This is a simple adjustment to the PROJECT model: just enter a zero for variable 7, the marginal tax rate. If a business is not willing to make this commitment, the marginal tax rate in variable 7 should not be set to zero; rather the default settings (or a more precise estimate of the business' marginal tax rates) should be used in variable 7.

If the PROJECT model reveals that a project has a negative cost during the period of performance of the SEP, this means that it represents a positive cash flow to the defendant/respondent and is a profitable project. Such a project is generally not acceptable as a SEP. If a project generates a profit, a defendant/respondent should, and probably will, based on its own economic interests, implement the project. While EPA encourages regulated entities to undertake environmentally beneficial projects that are economically profitable, EPA does not believe violators should receive a bonus in the form of penalty mitigation to undertake such projects as part of an enforcement action. EPA does not offer subsidies to complying companies to undertake profitable environmentally beneficial projects and it would thus be inequitable and perverse to provide such subsidies only to violators. In addition, the primary goal of SEPs is to secure a favorable environmental or public health outcome which would not have occurred but for the enforcement case settlement. To allow SEP penalty mitigation for profitable projects would thwart this goal.(17)

Step 4: Determine the SEP Mitigation Percentage and then the Mitigation Amount

Step 4.a: Mitigation Percentage. After the SEP COST has been calculated, EPA should determine what percentage of that cost may be applied as mitigation against the amount EPA would settle for but for the SEP. The quality of the SEP should be examined as to whether and how effectively it achieves each of the following six factors listed below. (The factors are not listed in priority order.)

Benefits to the Public or Environment at Large. While all SEPs benefit public health or the environment, SEPs which perform well on this factor will result in significant and quantifiable reduction in discharges of pollutants to the environment and the reduction in risk to the general public. SEPs also will perform well on this factor to the extent they result in significant and, to the

extent possible, measurable progress in protecting and restoring ecosystems (including wetlands and endangered species habitats).

Innovativeness. SEPs which perform well on this factor will further the development, implementation, or dissemination of innovative processes, technologies, or methods which more effectively: reduce the generation, release or disposal of pollutants; conserve natural resources; restore and protect ecosystems; protect endangered species; or promote compliance. This includes "technology forcing" techniques which may establish new regulatory "benchmarks."

Environmental Justice. SEPs which perform well on this factor will mitigate damage or reduce risk to minority or low income populations which may have been disproportionately exposed to pollution or are at environmental risk.

Community Input. SEPs which perform well on this factor will have been developed taking into consideration input received from the affected community. No credit should be given for this factor if the defendant/respondent did not actively participate in soliciting and incorporating public input into the SEP.

Multimedia Impacts. SEPs which perform well on this factor will reduce emissions to more than one medium.

Pollution Prevention. SEPs which perform well on this factor will develop and implement pollution prevention techniques and practices.

The better the performance of the SEP under each of these factors, the higher the appropriate mitigation percentage. The percent of penalty mitigation is within EPA's discretion; there is no presumption as to the correct percentage of mitigation. **The mitigation percentage should not exceed 80 percent of the SEP COST, with two exceptions:**

(1) For small businesses, government agencies or entities, and non-profit organizations, this mitigation percentage of the SEP COST may be set as high as 100 percent if the defendant/respondent can demonstrate the project is of outstanding quality.

(2) For any defendant/respondent, if the SEP implements pollution prevention, the mitigation percentage of the SEP COST may be set as high as 100 percent if the defendant/respondent can demonstrate that the project is of outstanding quality.

If the government must allocate significant resources to monitoring and reviewing the implementation of a project, a lower mitigation percentage of the SEP COST may be appropriate.

In administrative enforcement actions in which there is a statutory limit (commonly called "caps") on the total maximum penalty that may be sought in a

000205

single action, the cash penalty obtained plus the amount of penalty mitigation credit due to the SEPs shall not exceed the limit.

Step 4.b: SEP Mitigation Amount. The SEP COST (calculated pursuant to step 3) is multiplied by the mitigation percentage (step 4.a) to obtain the SEP mitigation amount, which is the amount of the SEP cost that may be used in potentially mitigating the preliminary settlement penalty.

Step 5: Final Settlement Penalty

5.a. The SEP mitigation amount (step 4.b) is then subtracted from the settlement amount without a SEP (step 1.c).

5.b The greater of step 2.d or step 5.a is the minimum final settlement penalty allowable based on the performance of the SEP.

F. LIABILITY FOR PERFORMANCE

Defendants/respondents (or their successors in interest) are responsible and legally liable for ensuring that a SEP is completed satisfactorily. A defendant/respondent may not transfer this responsibility and liability to someone else, commonly called a third party. Of course, a defendant/respondent may use contractors or consultants to assist it in implementing a SEP.(18)

G. OVERSIGHT AND DRAFTING ENFORCEABLE SEPS

The settlement agreement should accurately and completely describe the SEP. (See related legal guideline 4 in § C above.) It should describe the specific actions to be performed by the defendant/respondent and provide for a reliable and objective means to verify that the defendant/respondent has timely completed the project. This may require the defendant/respondent to submit periodic reports to EPA. The defendant/respondent may utilize an outside auditor to verify performance, and the defendant/respondent should be made responsible for the cost of any such activities. The defendant/respondent remains responsible for the quality and timeliness of any actions performed or any reports prepared or submitted by the auditor. A final report certified by an appropriate corporate official, acceptable to EPA, and evidencing completion of the SEP and documenting SEP expenditures, should be required.

To the extent feasible, defendant/respondents should be required to quantify the benefits associated with the project and provide EPA with a report setting forth how the benefits were measured or estimated. **The defendant/respondent should agree that whenever it publicizes a SEP or the results of a SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action.**

The drafting of a SEP will vary depending on whether the SEP is being performed as part of an administrative or judicial enforcement action. SEPs with long implementation schedules (e.g., 18 months or longer), SEPs which require

EPA review and comment on interim milestone activities, and other complex SEPs may not be appropriate in administrative enforcement actions. Specific guidance on the proper drafting of settlement documents requiring SEPs is provided in a separate document.

H. FAILURE OF A SEP AND STIPULATED PENALTIES

If a SEP is not completed satisfactorily, the defendant/respondent should be required, pursuant to the terms of the settlement document, to pay stipulated penalties for its failure. Stipulated penalty liability should be established for each of the scenarios set forth below as appropriate to the individual case.

1. Except as provided in paragraph 2 immediately below, if the SEP is not completed satisfactorily, a substantial stipulated penalty should be required. Generally, a substantial stipulated penalty is between 75 and 150 percent of the amount by which the settlement penalty was mitigated on account of the SEP.

2. If the SEP is not completed satisfactorily, but the defendant/respondent:

a) made good faith and timely efforts to complete the project; and b) certifies,

with supporting documentation, that at least 90 percent of the amount of

money which was required to be spent was expended on the SEP, no stipulated

penalty is necessary.

3. If the SEP is satisfactorily completed, but the defendant/respondent spent less than 90 percent of the amount of money required to be spent for the project, a small stipulated penalty should be required. Generally, a small stipulated penalty is between 10 and 25 percent of the amount by which the settlement penalty was mitigated on account of the SEP.

4. If the SEP is satisfactorily completed, and the defendant/respondent spent at least 90 percent of the amount of money required to be spent for the project, no stipulated penalty is necessary.

The determinations of whether the SEP has been satisfactorily completed (i.e., pursuant to the terms of the agreement) and whether the defendant/respondent has made a good faith, timely effort to implement the SEP should be reserved to the sole discretion of EPA, especially in administrative actions in which there is often no formal dispute resolution process.

I. COMMUNITY INPUT

In appropriate cases, EPA should make special efforts to seek input on project proposals from the local community that may have been adversely impacted by the violations.(19) Soliciting community input into the SEP development process can: result in SEPs that better address the needs of the impacted community;

promote environmental justice; produce better community understanding of EPA enforcement; and improve relations between the community and the violating facility. Community involvement in SEPs may be most appropriate in cases where the range of possible SEPs is great and/or multiple SEPs may be negotiated.

When soliciting community input, the EPA negotiating team should follow the four guidelines set forth below.

1. Community input should be sought after EPA knows that the defendant/respondent is interested in doing a SEP and is willing to seek community input, approximately how much money may be available for doing a SEP, and that settlement of the enforcement action is likely. If these conditions are not satisfied, EPA will have very little information to provide communities regarding the scope of possible SEPs.

2. The EPA negotiating team should use both informal and formal methods to contact the local community. Informal methods may involve telephone calls to local community organizations, local churches, local elected leaders, local chambers of commerce, or other groups. Since EPA may not be able to identify all interested community groups, a public notice in a local newspaper may be appropriate

3. To ensure that communities have a meaningful opportunity to participate, the EPA negotiating team should provide information to communities about what SEPs are, the opportunities and limits of such projects, the confidential nature of settlement negotiations, and the reasonable possibilities and limitations in the current enforcement action. This can be done by holding a public meeting, usually in the evening, at a local school or facility. The EPA negotiating team may wish to use community outreach experts at EPA or the Department of Justice in conducting this meeting. Sometimes the defendant/respondent may play an active role at this meeting and have its own experts assist in the process.

4. After the initial public meeting, the extent of community input and participation in the SEP development process will have to be determined. The amount of input and participation is likely to vary with each case. Except in extraordinary circumstances and with agreement of the parties, representatives of community groups will not participate directly in the settlement negotiations. This restriction is necessary because of the confidential nature of settlement negotiations and because there is often no equitable process to determine which community group should directly participate in the negotiations.

J. EPA PROCEDURES

1. Approvals

The authority of a government official to approve a SEP is included in the official's authority to settle an enforcement case and thus, subject to the exceptions set forth here, no special approvals are required. The special

000208

approvals apply to both administrative and judicial enforcement actions as follows:

a. Regions in which a SEP is proposed for implementation shall be given the opportunity to review and comment on the proposed SEP.

b. In all cases in which a project may not fully comply with the provisions of this Policy (e.g., see footnote 1), the SEP must be approved by the EPA Assistant Administrator for Enforcement and Compliance Assurance. If a project does not fully comply with all of the legal guidelines in this Policy, the request for approval must set forth a legal analysis supporting the conclusion that the project is within EPA's legal authority and is not otherwise inconsistent with law.

c. In all cases in which a SEP would involve activities outside the United States, the SEP must be approved in advance by the Assistant Administrator and, for judicial cases only, the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice.

d. In all cases in which an environmental compliance promotion project (section D.6) or a project in the "other" category (section D.8) is contemplated, the project must be approved in advance by the appropriate office in OECA, unless otherwise delegated.

2. Documentation and Confidentiality

In each case in which a SEP is included as part of a settlement, an explanation of the SEP with supporting materials (including the PROJECT model printout, where applicable) must be included as part of the case file. The explanation of the SEP should explain how the five steps set forth in Section A.3 above have been used to evaluate the project and include a description of the expected benefits associated with the SEP. The explanation must include a description by the enforcement attorney of how nexus and the other legal guidelines are satisfied.

Documentation and explanations of a particular SEP may constitute confidential settlement information that is exempt from disclosure under the Freedom of Information Act, is outside the scope of discovery, and is protected by various privileges, including the attorney-client privilege and the attorney work-product privilege. While individual Agency evaluations of proposed SEPs are confidential, privileged documents, this Policy is a public document and may be released to anyone upon request.

This Policy is primarily for the use of U.S. EPA enforcement personnel in settling cases. EI the right to change this Policy at any time, without prior notice, or to act at variance to this This Policy does not create any rights, duties, or obligations, implied or otherwise, in any ti parties.

ATTACHMENT

SEP PENALTY CALCULATION WORKSHEET

This worksheet should be used pursuant to section E of the Policy.

Specific Applications of this Worksheet in a Case Are Privileged, Confidential Documents.

STEP	AMOUNT
STEP 1: CALCULATION OF SETTLEMENT AMOUNT WITHOUT A SEP.	
1.a. BENEFIT: The applicable penalty policy is used to calculate the economic benefit of noncompliance.	$
1.b. GRAVITY: The applicable penalty policy is used to calculate the gravity component of the penalty; this is gravity after all adjustments in the applicable policy.	$
1.c SETTLEMENT AMOUNT without a SEP: Sum of step 1.a plus 1.b.	$
STEP 2: CALCULATION OF THE MINIMUM PENALTY AMOUNT WITH A SEP	
2.a 10% of GRAVITY: Multiply amount in step 1.b by 0.10	$
2.b BENEFIT PLUS 10% of GRAVITY: Sum of step 1.a plus step 2.a.	$
2.c. 25 % of GRAVITY: Multiply amount in step 1.b by 0.25.	$
2.d MINIMUM PENALTY AMOUNT: Select greater of step 2.c or step 2.b.	$
STEP 3: CALCULATION OF THE SEP COST USING PROJECT MODEL.	$
STEP 4: CALCULATION OF MITIGATION PERCENTAGE AND MITIGATION AMOUNT.	
4.a. SEP Cost Mitigation Percentage. Evaluate the project pursuant to the 6 mitigation factors in the Policy. Mitigation percentage should not exceed 80 % unless one of the exceptions applies.	%
4.b. SEP Mitigation Amount. Multiply step 3 by step 4.a	$
STEP 5: CALCULATION OF THE FINAL SETTLEMENT PENALTY.	
5.a Subtract step 4.b from step 1.c	$
5.b. **Final Settlement Penalty**: Select greater of step 2.d or step 5.a.	$

1. In extraordinary circumstances, the Assistant Administrator may consider mitigating potential stipulated penalty liability using SEPs where: (1) despite the circumstances giving rise to the claim for stipulated penalties, the violator has the ability and intention to comply with a new settlement agreement obligation to implement the SEP; (2) there is no negative impact on the deterrent purposes of stipulated penalties; and (3) the settlement agreement establishes a range for stipulated penalty liability for the violations at issue. For example, if a respondent/defendant has violated a settlement agreement which provides that a violation of X requirement subjects it to a stipulated penalty between $1,000 and $5,000, then the Agency may consider SEPs in determining the specific

penalty amount that should be demanded.

2. Since the primary purpose of this Policy is to obtain environmental or public health benefits that may not have occurred "but for" the settlement, projects which the defendant has previously committed to perform or have been started before the Agency has identified a violation are not eligible as SEPs. Projects which have been committed to or started before the identification of a violation may mitigate the penalty in other ways. Depending on the specifics, if a regulated entity had initiated environmentally beneficial projects before the enforcement process commenced, the initial penalty calculation could be lower due to the absence of recalcitrance, no history of other violations, good faith efforts, less severity of the violations, or a shorter duration of the violations.

3. The statutes EPA administers generally provide a court with broad authority to order a defendant to cease its violations, take necessary steps to prevent future violations, and to remediate any harm caused by the violations. If a court is likely to order a defendant to perform a specific activity in a particular case, such an activity does not qualify as a SEP.

4. These legal guidelines are based on federal law as it applies to EPA; States may have more or less flexibility in the use of SEPs depending on their laws.

5. The immediate geographic area will generally be the area within a 50 mile radius of the site on which the violations occurred. Ecosystem or geographic proximity is not by itself a sufficient basis for nexus; a project must always satisfy subparagraph a, b, or c in the definition of nexus. In some cases, a project may be performed at a facility or site not owned by the defendant/respondent.

6. All projects which would include activities outside the U.S. must be approved in advance by Headquarters and/or the Department of Justice. See section J.

7. Earmarks are instructions for changes to EPA's discretionary budget authority made by appropriations committee in committee reports that the Agency generally honors as a matter of policy.

8. If EPA lacks authority to require repair of the damage caused by the violation, then repair itself may constitute a SEP.

9. Simply preventing new discharges into the ecosystem, as opposed to taking affirmative action directly related to preserving existing conditions at a property, would not constitute a restoration and protection project, but may fit into another category such as pollution prevention or pollution reduction.

10. These federal agencies have explicit statutory authority to accept gifts of land and money in certain circumstances. All projects with these federal agencies must be reviewed and approved in advance by legal counsel in the agency, usually the Solicitor's Office in the Department of the Interior.

11. For purposes of this Policy, a small business is owned by a person or another

entity that employs 100 or fewer individuals. Small businesses could be individuals, privately held corporations, farmers, landowners, partnerships and others. A small community is one comprised of fewer than 2,500 persons.

12. Since most large companies routinely conduct compliance audits, to mitigate penalties for such audits would reward violators for performing an activity that most companies already do. In contrast, these audits are not commonly done by small businesses, perhaps because such audits may be too expensive.

13. Pursuant to the February 1995 Revised Interim Clean Water Act Settlement Penalty Policy, section V, a smaller minimum penalty amount may be allowed for a municipality.

14. A copy of the PROJECT computer program software and PROJECT User's Manual may be purchased by calling that National Technology Information Service at (800) 553-6847, and asking for Document #PB 98-500408GEI, or they may be downloaded from the World Wide Web at "http://www.epa.gov/oeca/models/".

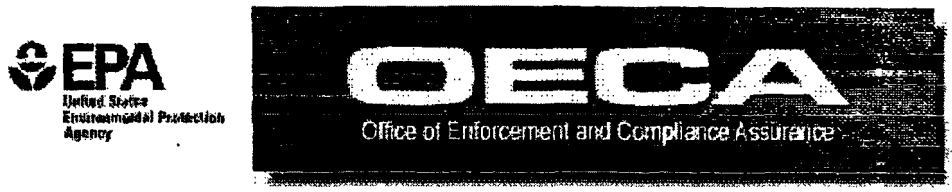
15. The PROJECT calculated SEP Cost is a reasonable estimate, and not an exact after-tax calculation. PROJECT does not evaluate the potential for market benefits which may accrue with the performance of a SEP (e.g., increased sales of a product, improved corporate public image, or improved employee morale). Nor does it consider costs imposed on the government, such as the cost to the Agency for oversight of the SEP, or the burden of a lengthy negotiation with a defendant/ respondent who does not propose a SEP until late in the settlement process; such factors may be considered in determining a mitigation percentage rather than in calculating after-tax cost.

16. See PROJECT User's Manual, January 1995. If the PROJECT model appears inappropriate to a particular fact situation, EPA Headquarters should be consulted to identify an alternative approach. For example, PROJECT does not readily calculate the cost of an accelerated compliance SEP. The cost of such a SEP is only the additional cost associated with doing the project early (ahead of the regulatory requirement) and it needs to be calculated in a slightly different manner. Please consult with the Office Of Regulatory Enforcement for directions on how to calculate the costs of such projects.

17. The penalty mitigation guidelines provide that the amount of mitigation should not exceed the net cost of the project. To provide penalty mitigation for profitable projects would be providing a credit in excess of net costs.

18. Non-profit organizations, such as universities and public interest groups, may function as contractors or consultants.

19. In civil judicial cases, the Department of Justice already seeks public comment on lodged consent decrees through a Federal Register notice. See 28 CFR §50.7. In certain administrative enforcement actions, there are also public notice requirements that are followed before a settlement is finalized. See 40



Policy on Compliance Incentives For Small Businesses

Issued May 20, 1996; effective June 10, 1996

A. INTRODUCTION

This document sets forth the U.S. Environmental Protection Agency's Policy on Compliance Incentives for Small Businesses. This Policy is one of the 25 regulatory reform initiatives announced by President Clinton on March 16, 1995, and implements, in part, the Executive Memorandum on Regulatory Reform, 60 FR 20621 (April 26, 1995).

The Executive Memorandum provides in pertinent part:

To the extent permitted by law, each agency shall use its discretion to modify the penalties for small businesses in the following situations. Agencies shall exercise their enforcement discretion to waive the imposition of all or a portion of a penalty when the violation is corrected within a time period appropriate to the violation in question. For those violations that may take longer to correct than the period set by the agency, the agency shall use its enforcement discretion to waive up to 100 percent of the financial penalties if the amounts waived are used to bring the entity into compliance. The provisions [of this paragraph] shall apply only where there has been a good faith effort to comply with applicable regulations and the violation does not involve criminal wrongdoing or significant threat to health, safety, or the environment.

This Policy also implements section 323 of the Small Business Regulatory Enforcement Fairness Act of 1996, signed into law by the President on March 29, 1996.

As set forth in this Policy, EPA will refrain from initiating an enforcement action seeking civil penalties, or will mitigate civil penalties, whenever a small business makes a good faith effort to comply with environmental requirements by receiving compliance assistance or promptly disclosing the findings of a voluntarily conducted environmental audit, subject to certain conditions. These conditions require that the violation: is the small business's first violation of the particular requirement; does not

000214

involve criminal conduct; has not and is not causing a significant health, safety or environmental threat or harm; and is remedied within the corrections period. Moreover, EPA will defer to State actions that are consistent with the criteria set forth in this Policy.

B. BACKGROUND

The Clean Air Act (CAA) Amendments of 1990 require that States establish Small Business Assistance Programs (SBAPs) to provide technical and environmental complianceassistance to stationary sources. On August 12, 1994, EPA issued an enforcement response policy for stationary sources which provided that an authorized or delegated state program may, consistent with federal requirements, either:

> (1) assess no penalties against small businesses that voluntarily seek compliance assistance and correct violations revealed as a result of compliance assistance within a limited period of time; or
>
> (2) keep confidential information that identifies the names and locations of specific small businesses with violations revealed through compliance assistance, where the SBAP is independent of the state enforcement program.

In a further effort to assist small businesses to comply with environmental regulations, and to achieve health, safety, and environmental benefits, the Agency is adopting a broader policy for all media programs, including water, air, toxics, and hazardous waste.

C. PURPOSE

This Policy is intended to promote environmental compliance among small businesses by providing incentives for them to participate in on-site compliance assistance programs and to conduct environmental audits. Further, the Policy encourages small businesses to expeditiously remedy all violations discovered through compliance assistance and environmental audits. The Policy accomplishes this in two ways: by setting forth a settlement penalty Policy that rewards such behavior, and by providing guidance for States and local governments to offer these incentives.

D. APPLICABILITY

This Policy applies to facilities owned by small businesses as defined here. A small business is a person, corporation, partnership, or other entity who employs 100 or fewer individuals (across all facilities and

000215

operations owned by the entity). This definition is a simplified version of the CAA õ507 definition of small business. On balance, EPA determined that a single definition would make implementation of this Policy straightforward and would allow for consistent application of the Policy in a multimedia context.

This Policy is effective June 10, 1996, and on that date supersedes the Interim version of this Policy issued on June 13, 1995 and the September 19, 1995 Qs and As guidance on the Interim version. This Policy applies to all civil judicial and administrative enforcement actionstaken under the authority of the environmental statutes and regulations that EPA administers, except for the Public Water System Supervision Program under the Safe Drinking Water Act. This Policy applies to all such actions filed after the effective date of this Policy, and to all pending cases in which the government has not reached agreement in principle with the alleged violator on the amount of the civil penalty.

This Policy sets forth how the Agency expects to exercise its enforcement discretion in deciding on an appropriate enforcement response and determining an appropriate civil settlement penalty for violations by small businesses. It states the Agency's views as to the proper allocation of enforcement resources. This Policy is not final agency action and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. This Policy is to be used for settlement purposes and is not intended for use in pleading, or at hearing or trial. To the extent that this Policy may differ from the terms of applicable enforcement response policies (including penalty policies) under media-specific programs, this document supersedes those policies. This Policy supplements, but does not supplant the August 12, 1994 *Enforcement Response Policy for Treatment of Information Obtained Through Clean Air Act Section 507 Small Business Assistance Programs.*

E. CRITERIA FOR CIVIL PENALTY MITIGATION

EPA will eliminate or mitigate its settlement penalty demands against small businesses based on the following criteria:

(1) The small business has made a good faith effort to comply with applicable environmental requirements *as demonstrated by satisfying either a. or b. below.*

(a) Receiving on-site compliance assistance from a government or government supported program that offers services to small businesses (such as a SBAP or state university), and the violations are detected during the

compliance assistance. If a small business wishes to obtain a corrections period after receiving compliance assistance from a confidential program, the business must promptly disclose the violations to the appropriate regulatory agency.

(b) conducting an environmental audit (either by itself or by using an independent contractor) and promptly disclosing in writing to EPA or the appropriate state regulatory agency all violations discovered as part of the environmental audit pursuant to section H of this Policy.

For both a. and b. above, the disclosure of the violation must occur before the violation was otherwise discovered by, or reported to the regulatory agency. See section I.1 of the Policy below. Good faith also requires that a small business cooperate with EPA and provide such information as is necessary and requested to determine appl icability of this Policy.

(2) **This is the small business's first violation of this requirement.** This Policy does not apply to businesses that have previously been subject to an information request, a warning letter, notice of violation, field citation, citizen suit, or other enforcement action by a government agency for a violation of that requirement within the past three years. This Policy does not apply if the small business received penalty mitigation pursuant to this Policy for a violation of the same or a similar requirement within the past three years. If a business has been subject to two or more enforcement actions for violations of environmental requirements in the past five years, this Policy does not apply even if this is the first violation of this particular requirement.

(3) **The business corrects the violation within the corrections period set forth below.** Small businesses are expected to remedy the violations within the shortest practicable period of time, not to exceed 180 days following detection of the violation. However, a small business may take an additional period of 180 days, i.e., up to a period of one year from the date the violation is detected, only if necessary to allow a small business to correct the violation by implementing pollution prevention measures. For any violation that cannot be corrected within 90 days of detection, the small business should submit a written schedule, or the agency should issue a compliance order with a schedule, as appropriate. Correcting the violation includes remediating any environmental harm associated with the violation, as well as implementing steps to prevent a recurrence of the violation.

(4) The Policy applies if:

000217

(a) The violation has not caused actual serious harm to public health, safety, or the environment; and

(b) The violation is not one that may present an imminent and substantial endangerment to public health or the environment; and

(c) The violation does not present a significant health, safety or environmental threat (e.g., violations involving hazardous or toxic substances may present such threats); and

(d) The violation does not involve criminal conduct.

F. PENALTY MITIGATION GUIDELINES

EPA will exercise its enforcement discretion to eliminate or mitigate civil settlement penalties as follows.

(1) EPA will eliminate the civil settlement penalty in any enforcement action if a small business satisfies *all* of the criteria in section E.

(2) If a small business meets all of the criteria, except it needs a longer corrections period than provided by criterion 3 (i.e., more than 180 days for non-pollution prevention remedies, or 360 days for pollution prevention remedies), EPA will waive up to 100% of the gravity component of the penalty, but may seek the full amount of any economic benefit associated with the violations.

(3) If a small business meets all of the criteria, except it has obtained a significant economic benefit from the violation(s) such that it may have obtained an economic advantage over its competitors, EPA will waive up to 100% of the gravity component of the penalty, but may seek the full amount of the significant economic benefit associated with the violations. EPA retains this discretion to ensure that small businesses that comply with public health protections are not put at a serious marketplace disadvantage by those who have not complied. EPA anticipates that this situation will occur very infrequently.

If a small business does not fit within guidelines 1 2, or 3 immediately above, this Policy does *not* provide any special penalty mitigation. However, if a small business has otherwise made a good faith effort to comply, EPA has discretion, pursuant to its applicable enforcement response or penalty policies, to refrain from filing an enforcement action seeking civil penalties or to mitigate its demand for penalties. Further,

these policies allow for mitigation of the penalty where there is a documented inability to pay all or a portion of the penalty, thereby placing emphasis on enabling the small business to finance compliance. See *Guidance on Determining a Violator's Ability to Pay a Civil Penalty* of December 1986. Penalties also may be mitigated pursuant to the *Interim Revised Supplemental Environmental Projects Policy* of May 1995 (60 F.R. 24856, 5/10/95) and *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Policy of December 1995* (60 F.R. 66706, 12/22/95).

G. COMPLIANCE ASSISTANCE

1. Definitions and Limitations

Compliance assistance is information or assistance provided by EPA, a State or another government agency or government supported entity to help the regulated community comply with legally mandated environmental requirements. Compliance assistance does not include enforcement inspections or enforcement actions.

In its broadest sense, the content of compliance assistance can vary greatly, ranging from basic information on the legal requirements to specialized advice on what technology may be best suited to achieve compliance at a particular facility. Compliance assistance also may be delivered in a variety of ways, ranging from general outreach through the Federal Register or other publications, to conferences and computer bulletin boards, to on-site assistance provided in response to a specific request for help.

The special penalty mitigation considerations provided by this Policy only apply to civil violations which were identified as part of an on-site compliance assistance visit to the facility. If a small business wishes to obtain a corrections period after receiving compliance assistance from a *confidential* program, the business must promptly disclose the violations to the appropriate regulatory agency and comply with the other provisions of this Policy. This Policy is restricted to on-site compliance assistance because the other forms of assistance (such as hotlines) do not expose a small business to an increased risk of enforcement and do not provide the regulatory agency with a simple way to determine when the violations were detected and thus when the violations must be corrected. In short, small businesses do not need protection from penalties as an incentive to use the other types of compliance assistance.

2. Delivery of On-Site Compliance Assistance By Government Agency or Government

000219

Supported Program

Before on-site compliance assistance is provided under this Policy or a similar State policy, businesses should be informed of how the program works and their obligations to promptly remedy any violations discovered. Ideally, before on-site compliance assistance is provided pursuant to this Policy or similar State policy, the agency should provide the facility with a document (such as this Policy) explaining how the program works and the responsibilities of each party. The document should emphasize the responsibility of the facility to remedy all violations discovered within the corrections period and the types ofviolations that are excluded from penalty mitigation (e.g., violations that caused serious harm). The facility should sign a simple form acknowledging that it understands the Policy. Documentation explaining the nature of the compliance assistance visit and the penalty mitigation guidelines is essential to ensure that the facility understands the Policy.

At the end of the compliance assistance visit, the government agent should provide the facility with a list of all violations observed and report within 10 days any additional violations identified resulting from the visit, but not directly observed, e.g., results from review and analysis of data or information gathered during the visit. Any violations that do not fit within the penalty mitigation guidelines in the Policy -- e.g., those that caused serious harm -- should be identified. If the violations cannot all be corrected within 90 days, the facility should be requested to submit a schedule for remedying the violations or a compliance order setting forth a schedule should be issued by the agency.

3. Requests for On-Site Compliance Assistance

EPA, States and other government agencies do not have the resources to provide on-site compliance assistance to all small businesses that request such assistance. This Policy does not create any right or entitlement to compliance assistance. A small business that requests on-site compliance assistance will not necessarily receive such assistance. If a small business requests on-site compliance assistance (or any other type of assistance) and the assistance is not available, the government agency should provide a prompt response indicating that such assistance is not available. The small business should be referred to other public and private sources of assistance that may be available, such as clearinghouses, hotlines, and extension services provide by some universities. In addition, the small business should be informed that it may obtain the benefits offered by this Policy by conducting an environmental audit pursuant to the provisions of this

Policy.

H. ENVIRONMENTAL AUDITS

For purposes of this Policy, an environmental audit is defined as "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." See EPA's new auditing policy, entitled *Incentives for Self-Policing*, 60 F.R. 66706, 66711, December 22, 1995.

The violation must have been discovered as a result of a voluntary environmental audit, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the Policy does not apply to:

(1) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

(2) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring; or

(3) violations discovered through an audit required to be performed by the terms of a consent order or settlement agreement.

The small business must fully disclose a violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA or the appropriate state or local government agency.

ENFORCEMENT

To ensure that this Policy enhances and does not compromise public health and the environment, the following conditions apply:

(1) Violations detected through inspections, field citations, reported to an agency by a member of the public or a " whistleblower" employee, identified in notices of citizen suits, or previously reported to an agency as required by applicable regulations or permits, remain fully enforceable.

(2) A business is subject to all applicable enforcement response policies (which may include discretion whether or not to take formal enforcement action) for all violations that had been

000221

detected through compliance assistance and were not remedied within the corrections period. The penalty in such action may include the time period before and during the correction period.

(3) A State's or EPA's actions in providing compliance assistance is not a legal defense in any enforcement action. This Policy does not limit EPA or a state's discretion to use information on violations revealed through compliance assistance as evidence in subsequent enforcement actions.

(4) If a field citation is issued to a small business (e.g. under the Underground Storage Tank program), the small business may provide information to the Agency to show that specific violations cited in the field citation are being remedied under a corrections schedule established pursuant to this Policy or similar State policy. In such a situation, EPA would exercise its enforcement discretion not to seek civil penalties for those violations.

J. APPLICABILITY TO STATES

EPA recognizes that states are partners in enforcement and compliance assurance. Therefore, EPA will defer to state actions in delegated or approved programs that are generally consistent with the criteria set forth in this Policy. Whenever a State agency provides a correction period to a small business pursuant to this Policy or a similar policy, the agency should notify the appropriate EPA Region. This notification will assure that federal and state enforcement responses are properly coordinated.

K. Public Accountability

Within three years of the effective date of this Policy, EPA will conduct a study of the effectiveness of this Policy in promoting compliance among small businesses. EPA will make the study available to the public. EPA will make publicly available the terms of any EPA agreements reached under this Policy, including the nature of the violation(s), the remedy, and the schedule for returning to compliance.

Return to top of this document

Search MapIndex Feedback OECA Home EnviroSense EPA Home

Last Updated: February 27, 1998
URL: http://es.epa.gov/oeca/smbusi.html

EC-G-1998-0
A.1

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

DEC 16 1986

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Determining a Violator's Ability to Pay a Civil Penalty

FROM: Thomas L. Adams, Jr.
Assistant Adminstrator for
Enforcement and Compliance Monitoring

TO: Assistant Administrators
Regional Administrators

I. PURPOSE

This guidance amplifies the discussion in the Uniform Civil Penalty Policy on how to adjust a penalty target figure when a violator claims paying a civil penalty would cause extreme financial hardship. This guidance was developed to meet the commitment made in the Uniform Civil Penalty Policy issued February 16, 1984, and in response to Regional Office requests for amplification of the "Framework for Statute-Specific Approaches to Penalty Assessments" (GM-22).

II. APPLICABILITY

This guidance applies to the calculation of civil penalties under medium-specific policies issued in accordance with the Uniform Civil Penalty Policy that EPA imposes on:

1. For-profit publicly or closely held entities; and

2. For-profit entities owned by not-for-profit entities.

This guidance does not apply to:

1. The calculation of civil penalties that EPA imposes on municipalities and other not-for-profit entities; or

2. A violator who files for bankruptcy or is in bankruptcy proceedings after EPA initiates the enforcement action.

FEB 25 1993

000224
000224

III. SCOPE

This guidance only gives a general evaluation of the financial health of a violator and the possible effects of paying a civil penalty for the purpose of settlement negotiations. It describes when to apply the ability to pay factor and provides a methodology for applying the factor using a computer program, ABEL.

The guidance does not prescribe the amount by which EPA may reduce a civil penalty if the ability to pay factor is applied. The methodology in this guidance will not calculate a specific dollar amount that a violator can afford in civil penalties nor does it provide a way to predict whether paying a certain amount for a civil penalty will cause an already financially troubled firm to go out of business.

For an ability to pay analysis, EPA needs specific financial information from a violator (see section V). EPA includes the financial data in a litigation report only when the data are requested by the Department of Justice or offered by the violator.

IV. THE ABILITY TO PAY FACTOR

Under the Uniform Civil Penalty Policy, EPA may consider using the ability to pay factor to adjust a civil penalty when the assessment of a civil penalty may result in extreme financial hardship. Financial hardship cannot be expressed in absolute terms. Any limitation on a violator's ability to pay depends on how soon the payments must be made and what the violator has to give up to make the payments. A violator has several options for paying a civil penalty:

1. Use cash on hand;

2. Sell assets;

3. Increase debt by commercial borrowing;

4. Increase equity by selling stock;

5. Apply toward a civil penalty for a period of time what would otherwise be distributed as profit; or

6. Use internally-generated future cash flows by deferring or eliminating some planned future investments.

Each of these options will affect a for-profit violator's operations to some degree. EPA must decide whether to adjust

a proposed penalty amount and by how much, taking into acc the gravity of the violation and other criteria in medium-specific guidance.

V. INFORMATION TO DETERMINE ABILITY TO PAY

If ability to pay is at issue, EPA may request from a violator any financial information the Agency needs to eva the violator's claim of extreme financial hardship. A vio who raises the issue has the burden of providing informati to demonstrate extreme financial hardship.

Financial information to request from for-profit enti may include the most recent three to five years of:

1. Tax returns;

2. Balance sheets;

3. Income statements;

4. Statements of changes in financial position;

5. Statements of operations;

6. Retained earnings statements;

7. Loan applications, financing agreements, security agreements;

8. Annual reports; or

9. Business services, such as Compustat, Dun and Bradstreet, or Value Line.

Tax returns are the most complete and in the most co tent form for analysis. Tax returns also provide financi information in a format for direct input into ABEL. Annu reports are the most difficult to analyze and may require the assistance of a financial analyst.

When requesting information informally or through interrogatories or discovery, EPA should ask for three to five years of tax returns along with all other financial information that a violator regularly maintains as busine records. If a violator refuses to give EPA the informati to evaluate the violator's ability to pay, EPA should see the full calculated penalty amount under the assumption t the violator can pay.

VI. CONFIDENTIALITY OF FINANCIAL INFORMATION

A violator can claim confidentiality for financial information submitted to EPA. In accordance with the regulations on confidential business information, 40 CFR 2.203, EPA must give notice to a violator that the violator may assert a business confidentiality claim. EPA's notice must contain the information required in 40 CFR 2.203. The notice must include a statement that if the violator submits financial information without a confidentiality claim, EPA may release the information without further notice to the violator.

The violator can make a claim of confidentiality for financial information in a cover letter accompanying the information. Information in published annual reports would not be entitled to confidential treatment.

VII. APPLYING THE ABILITY TO PAY FACTOR

Under the terms of a consent decree, a violator pays a civil penalty in addition to making any capital investment necessary to come into compliance. EPA considers the costs of attaining compliance when applying the ability to pay factor to a civil penalty calculation.

EPA determines whether to apply the ability to pay factor using a four-step process:

1. Determine, if possible, whether a violator plans to claim extreme financial hardship;

2. Determine whether criteria in the Uniform Civil Penalty Policy and medium-specific guidance require consideration of ability to pay;

3. Evaluate the overall financial health of a violator's operations by analyzing financial information provided by a violator or from other sources, such as business services; and

4. Project the probabilities of a violator having future internally-generated cash flows to evaluate how paying a proposed civil penalty may affect a violator's financial decisions.

VIII. FINANCIAL COMPUTER PROGRAM

EPA's computer program, ABEL, assists in evaluating the financial health of for-profit entities, based on the estimated strength of internally-generated cash flows. ABEL uses financial information on a violator to evaluate the overall financial health of a violator (step 3 above). The program uses standard

financial ratios to evaluate a violator's ability to borrow money and pay current and long-term operating expenses.

ABEL also projects the probable availability of future internally-generated cash flows to evaluate some of a violator's options for paying a civil penalty (step 4 above). EPA is developing a user's manual to provide self instruction in the use of ABEL in addition to the documentation and help aids in the computer program.

Exhibit 1 is a hypothetical use of ABEL to evaluate a violator's financial health. If the ABEL analysis indicates that a violator may not be able to finance a civil penalty with internally-generated cash flows, EPA should check all available financial information for other possible sources of cash flows for paying a civil penalty.

For example, in corporate tax returns, item 26 of Schedule A (cost of goods sold) sets forth deductions for entertaining, advertising, and professional dues. Schedule E shows the compensation of officers. In Schedule L (balance sheets), item 8 sets forth investments that may include certificates of deposit or money market funds. These types of assets and expenses do not directly affect operations and may vary considerably from year to year without adversely affecting the violator's operations. Because a civil penalty should be viewed as a one-time expense, these kinds of assets and expenses could be sources of cash for a civil penalty.

Using the sources of financial information from the example above, liquid assets such as certificates of deposit and money market funds could be used to pay a penalty. Expenses for advertising, entertaining, or professional dues could be reduced for a short period to pay a civil penalty. A corporate officer might even be willing to take less compensation for a short period. A combination of options like these may produce enough cash flow to pay a civil penalty without causing the violator extreme financial hardship in meeting operating expenses.

Attachment

RECEIVED
OCT 27 1992
OFFICE OF REGIONAL COUNSEL
EPA - REGION X

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

OCT 19 1992

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Change in Methodology for Determining the BEN Model's Discount Rate

FROM: Herbert H. Tate, Jr.
Assistant Administrator for Enforcement

TO: Assistant Administrators
Regional Administrators

Effective thirty days from the issuance of this memorandum, the Office of Enforcement (OE) will employ a different methodology for calculating the BEN computer model's discount rate. As a result of this change, the discount rate will decline from the current 17.2% to 11.9%. The purpose of this memorandum is to notify you and your respective staffs of the change and to discuss some of its implications.

Background

The Office of Enforcement first developed an economic benefit model in 1978. One of the central theoretical issues in the model's development was deciding on an appropriate discount rate to evaluate pollution control expenditures. The discount rate is an interest rate employed by the model in performing benefit analyses. After extensive study of this issue, and careful consideration of our corporate finance consultant's views, OE decided on an "equity" based rate. The equity discount rate approach was later adopted in 1984 when the Agency developed the BEN computer model.[1] The Agency based its decision on its understanding of prevailing corporate financing of compliance expenditures, which was that pollution control investments did not contribute to a firm's profit-making activities. Thus it was logical to assume that a firm raised the capital for this

[1] The ABEL model, which calculates a violator's financial ability to comply, clean up or pay a civil penalty, will soon employ a WACC discount rate. The discount rate plays a different role in ABEL: ABEL is concerned with a firm's overall financing as opposed to just the financing of pollution control equipment.

FEB 25 1993
FDIC
000230

investment by selling shares of stock (i.e. equity financing), one of the most expensive ways to finance investments. The more expensive the financing of pollution control equipment is, the larger the economic benefit of noncompliance.

In choosing an equity-based number, the Agency rejected the main competing theory, known as the weighted average cost of capital (WACC). WACC is an average of the cost of equity and the cost of debt (i.e. borrowing from a bank or issuing corporate bonds), each weighted by its proportion of the firm's overall financing. The WACC view of pollution control investment is that while firms recognize that the pollution control investments will not by themselves produce revenue, they are like the roof on the factory. The roof does not produce revenue, but it enables the firm to make profits. Analogously, the WACC view is that a firm must make pollution control investments to stay in business. Viewed in this context, pollution control is part of the cost of doing business, is supported by the overall capital structure of the firm, and has the same financing as other projects the firm undertakes.

The equity financing assumption remains a viable methodology, and is supported by a segment of expert opinion. Taken in that light, the equity financing assumption is not wrong. Nevertheless, it is our view and the view of many top corporate finance experts that the WACC financing assumption is the more convincing theory. In addition, the WACC assumption is more progressive than the equity assumption in that it regards pollution control expenditures as normal business expenses. This is more consistent with the Agency's perspective in this area and is more in the corporate finance mainstream than assuming only equity financing. For these reasons, the Agency is now adopting a WACC based discount rate for BEN model analyses. A new version of the BEN model, BEN92, will be available on the mainframe computer in thirty days. Users will have a choice of which model to use until February 1, 1993. After that date, only BEN92 will be available. New <u>BEN User Manuals</u> should be in the mail in early January.

<u>Impact of the Change on Economic Benefit Calculations</u>

Because WACC is a weighted average of both borrowing and selling shares of stock, the cost for financing pollution control investments, as calculated by BEN, is now substantially lower. Since the cost of financing is a key assumption in the BEN model, lowering the discount rate from 17.2% to 11.9% will result in lower benefit calculations for businesses. (It will have no effect on not-for-profit entities.) In a typical case, the

benefit analysis will be 25% to 30% lower.[2]

The 11.9% standard value represents the average WACC rate for a business. The BEN model automatically defaults to this value unless an alternative WACC rate is substituted. If the Agency's own expert witness feels a different WACC value is more appropriate, then that value can be substituted. (In some cases, the corporate-specific WACC rate will actually be higher than the standard WACC value.) EPA enforcement professionals should not make this determination on their own, or on the recommendation of a violator's expert. Determining alternative WACC values is a complex matter that must be left for the Agency's experts. At the same time, it is important to note that nothing in this memorandum prohibits EPA litigation teams from using an equity-based discount rate should our expert feel it is appropriate.

Application to Agency Enforcement Actions

The need to recalculate benefit analyses will depend upon what stage the case is in. For purposes of this memorandum, we will divide the cases into three categories: 1) cases that are settled, 2) cases where no penalty analysis has been transmitted to the defendant other than the figure in the complaint, and 3) cases where a figure has been transmitted to the defendant, but the case has not settled.

1. Settled Cases

If a case has settled or there is agreement as to the penalty figure even though there is no final settlement, there should be no recalculation of the benefit. It is important to emphasize that the equity theory is not wrong, and those settlements/agreements were arrived at through good-faith negotiations. There is no reason to disturb those results.

2. Cases Where the Government Has Not Presented the BEN Analysis to the Defendant

If a case is at the stage where the defendant has not yet seen any BEN analysis, then the litigation team will use BEN92 even if that requires recalculating the benefit portion of the penalty.

---

[2] The actual change in the benefit figure may be less than 25% or more than 30%. The 25% to 30% range is for the typical case. The extent of the change depends on the cost and date inputs used in the analysis. For example, a BEN analysis for a short term violation involving a mostly operation and maintenance expenses might only decrease slightly with the new discount rate.

3. Cases Where the Government Has Presented the BEN Analysis to the Defendant, But There is No Final Agreement as to the Penalty

The more complex situation is where the defendant has seen an Agency benefit analysis, but there is neither an agreement over the penalty nor a settlement. In these cases, the litigation team may decide in its discretion whether to recalculate the benefit component using BEN92. Each case is unique, and it makes sense to allow this flexibility rather than to impose one rule for all the cases in this category. While we are allowing each litigation team in this situation the flexibility to use either version of BEN, the litigation team should be cognizant of the implications of staying with BEN90, the previous version of BEN. There are two points to keep in mind.

First, the change in the discount rate will be public information shortly. Many defendants, particularly those facing substantial penalties based on economic benefit, are likely to become aware of the change. The litigation teams that stay with equity-based benefit analyses should carefully consider the impact on negotiations if the defendant hears about the change from sources other than the Agency's negotiators.

Second, if the litigation team negotiates over an equity-based number but starts discovery, our expert witness would most probably support the WACC view since it will be the official Agency position. Thus, the litigation team might be faced with the anomalous situation of seeking a larger economic benefit amount at settlement than it would in discovery or at trial or hearing. Depending on the amount of economic benefit contained in the proposed penalty, this could create an obvious incentive for defendants to hold out for a trial or hearing rather than settle the case. Litigation teams should carefully consider the impact on their cases in deciding whether to recalculate the benefit using BEN 92.

Litigation Practicalities

Because the WACC-equity dispute became a major issue in a number of our enforcement actions, several litigation teams used it as a reason to justify a lower bottom line settlement penalty. While we entertained those considerations in the past, the change in methodologies will remove this issue from the "litigation risk" category. So while the bottom line settlement figures may drop due to the recalculation of the benefit number, the bottom line figures should not be affected henceforth by any litigation risk over the discount rate.

Should you have any questions about this memorandum, please contact Jonathan Libber of my staff. He may be reached at (202) 260-6777.

cc: Enforcement Counsels
John Cruden, Department of Justice
Regional Counsels
BEN Users

ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE
NATIONAL ENFORCEMENT INVESTIGATIONS CENTER
BUILDING 53, BOX 25227, DENVER FEDERAL CENTER
DENVER, COLORADO 80225

DATE: ~~March 21~~ August 2 1996, 1996

MEMORANDUM

SUBJECT: Financial Analysis / General Synopsis
Electronic File Name is NEICFA01.GEN

FROM: Kimberly A. Zanier CPA
Senior Financial Analyst
Information Services Section
National Enforcement Investigations Center

TO: ORC Attorneys
OECA Attorneys
Enforcement Personnel Involved in Litigation Support
Financial Analysts

The Information Services Section (ISS) at the National Enforcement Investigations Center (NEIC) has been providing training for financial analysts charged with the responsibility of making ability to pay determinations. To assist with this training the attached General Synopsis has been developed. The attachment is intended to be used by financial analysts who have experience with the financial transactions being evaluated.

We are distributing this document to other enforcement personnel in an attempt to:

1. Provide insight into a complete ability-to-pay analysis. The document outlines the various steps an analyst will generally go through in performing such an analysis. The reader must keep in mind that all steps will not necessarily be performed for each case. For example, if the ABEL run indicates an 80% probability of payment, there is no need to perform additional analysis. Also there are instances where, after having obtained the initial financial documents, a determination can be easily made that the ability to pay adjustment factor should not be made. Those steps completed are determined on a case by case basis.

2. Provide the reader with some understanding as to the potential time factors involved in an analysis to facilitate the planning process.

3. Assist the regions in gathering the appropriate documentation for those situations where an analyst will be needed.

4. Provide awareness to EPA personnel of the importance of, acting as a team, and continuing communication throughout the enforcement process.

5. Provide awareness of the value of bringing in an analyst early.

6. Inform personnel of the availability of sources of financial information (ISS) and assistance (CIs).

The attached general synopsis is available in electronic form from the Information Services Section at NEIC. Please contact Char Ressequie at (303) 236-3636 ext. 546.

If you have any suggestions, comments, or questions with respect to the attached document, please contact Kimberly Zanier at (303) 236-3636 ext. 555.

Attachment

Civil Gene Lubieniecki: 236-5111

Criminal

ENFORCEMENT CONFIDENTIAL
FINANCIAL ANALYSIS/GENERAL SYNOPSIS
NATIONAL ENFORCEMENT INVESTIGATIONS CENTER

//27/95

GENERAL COMMENTS

This worksheet is provided as a guide and reflects only general documentation to be obtained to perform a financial analysis. It provides only limited insight into potential issues.

An important point to keep in mind, while reviewing the below information, is the benefits associated with bringing an analyst in early.

Early involvement in the case will allow the analyst to:

- Acquire historical knowledge of the case
- Provide assistance in on the spot reviews or discussions
- Provide assistance in other financial areas besides ability to pay
- Provide enough interjection to persuade the respondent that raising the ability to pay issue would not be prudent
- The case will be handled in a more timely fashion because an ability to pay case can take anywhere from 2 to 12 months. Waiting to start this process, when the liability issues are resolved, will add (potentially) another 2 to 12 months to the case.

So, consult with any analyst EARLY.

STEPS

I. INITIAL DOCUMENTATION TO BE PROVIDED BY ATTORNEY

A. Request memo detailing the following:

- Synopsis of the case (complete history)
- Inspection date
- Program personnel involved - names and phone numbers
- Violation details
- Penalty amount
- Current status of case
- Description of business activity, type of entity (individual or corporation)

- Details of ability to pay
  What is Respondents position? - Respondent needs to provide this in writing, not only their position but also all documents substantiating their position
- Description of documents which have been provided by Respondent and include copies
- Attorney's opinion as to ability to pay argument settlement
- Hearing potential

B. Copies of the complaint, answer, rehearing exchanges, motions, etc.

C. Respondents written position in re: Ability to Pay and copies of all supporting documentation received

D. Provide ABEL results

- If 80%, attorney can rely on ABEL for negotiations. No need to bring analyst in except for general advice. If settlement fails then discuss with analyst. ABEL is not to be used in trial.

E. Tax returns and financial statements (5 year)-copies only

F. Form 8821 Tax Information Authorization signed and dated by the respondent. NOTE: 60-day expiration date. Must have to the IRS within 60 days.

G. Depreciation schedule, all inclusive since date of incorporation

H. Affiliation schedule, detailing corporate affiliations

I. D&Bs and other data base searches

J. Other considerations

- Has an asset search been run?
- Has an executive search been run?
- Have the SEC filings been reviewed?
- Provide copies of all above output.

ENFORCEMENT CONFIDENTIAL
FINANCIAL ANALYSIS/GENERAL SYNOPSIS
NATIONAL ENFORCEMENT INVESTIGATIONS CENTER

II. WHEN THE CASE IS RECEIVED

A. Review package, and pre-plan case.

- Make sure you have only COPIES; originals are to be maintained by attorney.
- Make sure all requested information has been received.
- Review synopsis of case to get general idea of status of case.
- Read through complaint, answer, rehearing exchanges, etc.

B. Call program personnel involved in the case to get general history and additional details as to what he/she knows about the entity, its officers, business dealings, etc.

C. Discuss with attorney.

D. Begin set up of case file.

- Develop time line
- Organization chart
- Options available

E. Verify that all the appropriate (to date) searches have been done. **IF NOT, ORDER THOSE NECESSARY.**

F. Review the return to determine other assets, locations, officers, related entities, legal actions, new loans, etc., for which additional data base searches should be conducted. These services can be obtained through your regional library or by contacting Irene Erhart, Information Services, NEIC (303) 236-3636, ext. 558.

G. Review the ABEL output provided by the attorney.

H. Consider civil investigator (CI) involvement in your region (primarily Superfund) or Multi-Media CI Support from NEIC. CIs can collect other financial information which may help validate and/or supplement information provided by the respondent and other sources. Some services offered by the NEIC Civil Investigator program include:

- Asset information gathering
- Corporate affiliation and structure identification
- Witness location and interview services
- Other information gathering services
- For more information contact the Civil Investigator Branch Chief, Jeff Lightner, at NEIC (303) 236-3636 ext. 504. Telephonic discussion of proposed case specifics and requirements prior to official request is desirable

I. If necessary, research counties which are not online, and request assistance from them. Have them call the various counties, etc., to request the needed information. (This is performed if return information and data base searches already conducted indicate the firm cannot pay the penalty.)

J. If any lawsuits discovered, review synopsis and possibly order copies of complaint and decision.

K. Identify issues. Research applicable laws (environmental and tax, etc.), where necessary so that you will know what elements need to be addressed in your write-up.

L. Review applicable penalty policies.

M. Develop organizational chart and time line.

N. Discuss up-to-date status with attorney. Outline alternatives, etc.

O. Develop document request.

P. Develop initial interview questions.

Q. Schedule initial interview through the attorney.

III. CONDUCT THE INITIAL INTERVIEW

IV. REQUEST ADDITIONAL DOCUMENTS

NOTE: EPA has the burden to prove the penalty is appropriate. "Ability TO Pay" is one element to be considered in evaluating the appropriateness of the penalty.

A. Voluntary document request submitted

B. Subpoenas - Where statute provides authority

- May be used in instances where they have provided information which superficially indicates inability to pay.

C. File a motion requesting the court to grant permission to acquire the information needed [see 40 CFR 22.16 and 40 CFR 22.19(f)]. Other discovery ... will be permitted only upon determination by the Presiding Officer:

- That such discovery will not in any way unreasonably delay the proceeding
- That the information to be obtained is not otherwise obtainable
- That such information has significant probative value

V. WHEN ADDITIONAL INFORMATION IS RECEIVED

A. Review the additional information and identify additional sources of funds. Address issues which were identified in step II, such as thinly capitalized, additional debt capacity, loans to shareholders = capital, liquid assets, unnecessary assets, unreported income, etc.

B. Third party contacts. The attorney should have already discussed this with the respondent when ability to pay was initially raised. Third party verification is a necessary step in a financial analysis.

C. Go out to the field if necessary.

VI. DISCUSS WITH ATTORNEY CONCLUSIONS AND COURSES OF ACTION TO DATE

VII. SCHEDULE CONFERENCE CALL OR SETTLEMENT MEETING

A. Discuss conclusion with respondent; ask additional questions to further support our case and answer any questions they may have.

B. Depending on the course of the case, this may be the time to identify to whom we may need to issue subpoenas if conflicting or missing information.

VIII. ISSUE SUBPOENAS FOR ANY ADDITIONAL INFORMATION REQUIRED TO SUPPORT OUR CASE IN COURT

A. Make sure we have ALL the necessary evidence to support our case/rebut their position.

IX. SETTLE THE CASE.

OR

X. GO TO COURT

ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE
NATIONAL ENFORCEMENT INVESTIGATIONS CENTER
BUILDING 53, BOX 25227, DENVER FEDERAL CENTER
DENVER, COLORADO 80225

DATE: August 2, 1995

MEMORANDUM

SUBJECT: Financial Analysis Memorandum #2
Obtaining Financial Documentation/Discovery Motion
Electronic File Name is NEICFA02.DIS

FROM: Kimberly A. Zanier, CPA K. Zanier
Senior Financial Analyst
Information Services Section
National Enforcement Investigations Center

TO: ORC Attorneys
OECA Attorneys
Enforcement Personnel Involved in Litigation Support
Financial Analysts

Information Services Section (ISS) at NEIC has been assisting in obtaining financial documentation, with respect to ability to pay determinations, from various Respondents using a number of different options. These options have included 3008 and 104(e) requests, voluntary submissions, subpoenas, and discovery motions. Based on this experience, the attached Complainants Motion for Issuance of a Discovery Order has been developed to provide assistance with generating these types of requests. This sample motion is a combination of a number of motions and affidavits previously filed. ISS will be continuously updating this document as new issues are identified and raised in cases.

BACKGROUND

There were a number of instances where it appeared the Respondent and/or the Judge was unaware of what and why we were asking for certain financial documents and, therefore, we were being denied access to them. To overcome this, we are including an attachment with our motions, which includes two explanatory paragraphs for each document being requested. One paragraph explains what the document is, and one explains the relevance of the document. We have had good results using this format. Hence, the attached accumulation of explanatory paragraphs pertaining to all documents pursued in this manner to date.

THE MOTION AND ATTACHMENT

As stated, the attached Discovery Motion provides a description of the financial documentation being requested and explains the necessity and relevance of the information being requested. By providing this cumulative listing of financial documentation we are not recommending the acquisition of all documents included in the attachment. Which documents to request are determined on a case-by-case basis. There are some instances where copies of the Respondents tax returns may be sufficient to conclude that the ability to pay adjustment factor should not be applied.

PROCESS

The most effective process identified to date is to first request the following initial documents voluntarily.

1. Details of the Respondents position in writing, and any substantiating documentation Respondent would like to provide

2. Tax Returns and Financial Statements past 5 years (one year prior to inspection)

3. Depreciation Schedule

4. Affiliations Schedule

5. Signed Form 8821 Tax Information Authorization. NOTE: 60-day expiration date; must have to the IRS within 60 days

6. Initial Questionnaire (depends on case, ISS is currently working on this)

We have found the Respondent will usually provide these initial documents, although there are exceptions. After a review of the initial documentation is completed, a subsequent document request should be issued for additional financial information needed to continue the analysis. At this point it may become necessary to issue a subpoena or file a motion etc., to obtain the documentation, in which case I hope the attached Discovery Motion will be of use to you. A listing of documents included to date is provided on the following page.

The described Motion and Attachment is available in electronic form from Information Services Section at NEIC. Please contact Char Resseguie at (303) 236-3636 ext. 546.

If you have any questions, comments, additions or suggestions please call me at (303) 236-3636 ext. 555.

000245

LISTING OF DOCUMENTS INCLUDED IN DISCOVERY MOTION/ATTACHMENT DATED JUNE 19, 1995

GENERAL DOCUMENTS

1. Year-End Trial Balances
2. Chart Of Accounts
3. General Ledger
4. Tax Returns
5. Financial Statements
6. Depreciation Schedule

SPECIFIC DOCUMENTS

1. 1099s, 1098s, and W-2s
   - 1099-Div.
   - 1099-B
   - 1099-S
   - 1099-MISC.
   - 1098
   - W-2
2. Lease Agreements
3. Financial Institutions Identification and Disclosure Authorization (see sample form attached)
4. Assets - sold or transferred
5. Assets - bought
6. Bank statements
7. Outstanding loans to
8. Shareholder loans to
9. Managements representation letter
10. Other investments
11. Liabilities
12. Interest income
13. Leases

[Underlined Items represent new updates]

000246

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	Docket No.
	)	
	)	COMPLAINANT'S MOTION
	)	FOR ISSUANCE OF A
	)	DISCOVERY ORDER
Respondent.	)	
	)	

Pursuant to Section 22.19(f) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation and Suspension of Permits (Consolidated Rules), 40 C.F.R. § 22.19(f), Complainant United States Environmental Protection Agency, Region 10 (EPA) moves for the issuance of a discovery order to obtain financial information to evaluate Respondent's ability to pay the proposed penalty.

BACKGROUND

EPA issued a Complaint in this matter on May 28, 1993, for the assessment of a civil penalty for nine reporting violations under Section 313 of the Emergency Planning Community Right to Know Act (EPCRA), 42 U.S.C. 11023.

Consistent with EPA's Enforcement Response Policy, the Complaint proposes a penalty of $150,800. In its Answer, alleges inter alia that "(t)he proposed penalty, and any penalty, would exceed ' ability to pay." Paragraph 34.

000247

ARGUMENT

THE DISCOVERY REQUEST MEETS THE REQUIREMENTS OF THE CONSOLIDATED RULES.

Section 22.19(f) of the Consolidated Rules establish the procedures for obtaining discovery beyond that provided by the prehearing exchange. Specifically, Section 22.19 permits the Presiding Officer to issue a discovery order if the Officer finds that (1) the discovery will not unreasonably delay proceedings, (2) the information is not otherwise obtainable, and (3) the information has significant probative value. EPA's discovery request meets all three elements.

A. The discovery will not unreasonably delay the proceedings.

Currently the parties are scheduled to begin the formal hearing on April . Provided Respondent provides the requested documents by April , EPA will have adequate time to complete preparations for the hearing.

B. The financial information requested is not otherwise obtainable.

The information requested below is not otherwise obtainable. The documents that are the subject of this request are in the possession of Respondent (or its parent , which has asserted is the appropriate entity to evaluate to determine whether Respondent has the ability to pay), financial and auditing companies, and the Internal Revenue Service. On March 7, 1995, EPA requested to provide the documents listed below and other documents. While on March , did provide many of the documents EPA requested, it did not produce the documents listed below.

Office of Regional Counsel
000248

C. The information has significant probative value.

The financial documents will permit EPA to confirm the appropriateness of the penalty or adjust it if necessary. While the information which Respondent has provided includes some evidence regarding the ability to pay issue, it does not allow for a complete assessment of Respondent's financial position and its ability to pay the penalty. In most instances, the requested documents should be easy to retrieve. For these reasons, EPA requests production of the documents listed below. A detailed explanation supporting each of the requests is attached hereto.

DOCUMENTS REQUESTED

EPA requests the following financial documents:

PROVIDE A LISTING OF THE DOCUMENTS ONLY, EXPLANATIONS INCLUDED IN ATTACHMENT

CONCLUSION

For the reasons discussed above, Complainant EPA respectfully moves for the issuance of a discovery order.

Dated this _____ day of March 1995.

_____

Assistant Regional Counsel

ATTACHMENT

EXPLANATION OF DOCUMENT REQUEST

The following is a description of the financial information requested, its necessity, relevance, and an explanation as to how the information requested will be used in determining Respondent's ability to pay the proposed penalty.

GENERAL DOCUMENTS

GENERAL FINANCIAL RECORDS - Please provide copies of the following documents:

TAX RETURNS

1. 's tax return for the fiscal year ending June 30, 1994, or, if this return has not yet been filed, a copy of the preliminary draft

(decided an explanation was unnecessary; however, in next issuance will provide)

FINANCIAL STATEMENTS

2. 's most current financial statements

These are centrally relevant documents and will provide the most recent financial data available. Both documents are essential to my general analysis. The documents will be analyzed to determine whether there have been any recent changes in 's financial status which should be incorporated into my ability to pay analysis.

YEAR END TRIAL BALANCES

3. year-end trial balances for the fiscal years ending June 30, 1993 and June 30, 1994 *(time period determined on case-by-case basis)*

A year-end trial balance is a listing of all the accounts maintained by a company for accounting purposes and the respective year-end balances in each of the accounts identified. A number of these accounts may be grouped together prior to transferring the total dollar amount balances to the tax return and or financial

statements. For example, a company may maintain numerous contract labor accounts, including contractor dollars paid to outside entities, contractor dollars paid to 's corporate officers and or shareholders, and year-end bonuses paid to corporate officers. In the tax return, however, these four accounts may be combined, totaled, and listed under the single heading "cost of labor" and included in 's cost of goods sold. To analyze 's ability to pay the proposed penalty, knowledge of the components which make up each of the specific accounts listed on the tax return is necessary so that the relevant assets, expenses, and liabilities may be evaluated to determine the necessity and appropriateness of each. The trial balance must be reviewed first to identify those accounts which are relevant to 's ability to pay the proposed penalty.

In addition to containing relevant substantive data, the trial balance is also a finding aid thereby reducing the amount of time spent by both the Respondent and EPA with respect to an ability to pay analysis.

's year-end trial balances have been requested for its fiscal years ending June 30, 1993 and June 30, 1994, since these are the most recent trial balances and will provide me with the most recent account data available.

CHART OF ACCOUNTS

4. 's chart of accounts for the fiscal years ending June 30, 1993 and June 30, 1994

A chart of accounts is a listing, by account number and description, of each account included in a company's financial records. Certain company-generated documents (including entries in the general ledger, and sometimes the trial balance) may identify accounts by account number only. If the account description associated with the account number is unknown, a proper analysis of the accounts and substantiating documents cannot be performed, since the analyst will be unable to determine which accounts are relevant. Thus, 's chart of accounts will be used to facilitate the financial analysis by making the process as quick and efficient as possible.

GENERAL LEDGER

5a. 's general ledger for the month ending June 30, 1993

5b. 's general ledger for the time period January 1, 1994 through June 30, 1994

The record used to record increases and decreases in a single asset, expense, liability, or equity amount is called an account. All these separate accounts are usually kept in a loose-leaf binder, and the entire group of accounts is called a general ledger. The general ledger documents requested will provide the transactional detail pertaining to the specified time period. For example, if account #201 reflects loans made by the company to shareholders, review of the general ledger account #201 would indicate all additional loans made to the shareholders, and any payments made by the shareholders with respect to the outstanding loans.

The general ledgers for the time periods identified represent a sample, which will be used in conjunction with the other documentation requested to make numerous determinations including the necessity of specific expenditures, the accuracy of the accounts being analyzed, and the validity of the amounts identified.

DEPRECIATION SCHEDULE

6. Provide the depreciation schedule for , Inc., and the all inclusive since the date of incorporation

A depreciation schedule is a detailed schedule of a corporation's assets which have a useful life of one year or more. It provides a description of each asset, date the asset was purchased, cost of the asset, expected useful life, depreciation expense currently taken, the accumulated depreciation to date, book value of the asset and when and if the asset was disposed of. If an asset has been sold or otherwise disposed of, it would still appear on the depreciation schedule as a previously owned asset. The same holds true if an asset has been fully depreciated (expensed).

The depreciation schedule has relevance in an ability to pay analysis for a number of different reasons. The depreciation schedule:

(a) Will show if any assets have recently been purchased and the associated cost of the asset. If the corporation paid cash for these assets, the assets may be used to secure a new loan. The proceeds from the loan could be used to pay the penalty.

(b) Will show if there are unnecessary or luxury items being paid for by the corporation. (Please note, other areas of the financial statement or tax return may also indicate additional luxury items.) If the corporation has invested in real property, rental property, condominiums, luxury automobiles, airplanes, boats, or any other assets which are not necessary for the continued operation of the business, these nonessential assets could be sold to generate additional cash which could be used to pay the penalty.

(c) Will indicate assets which have been transferred by the corporation either through a sale to an unrelated party or a distribution to one of the shareholders or other related party.[1] These transfers may not be reported on the tax return or they may not be reported at the asset's fair market value. Proceeds from the sale of an asset which was not reported on the tax return would be a source of additional income which could be used to pay a penalty as would a distribution of assets from a corporation to its shareholders at less than fair market value. A shareholder is required to pay fair market value for any assets sold to him or her. If the assets were sold for less than fair market value, the difference between the sale price and the fair market value *would at*

---

[1] *Related parties are defined in Internal Revenue Code Section 267 and include an individual and a corporation more than 50% in value of the outstanding stock of which is owned, directly or indirectly, by or for such individual, and two corporations which are members of the same controlled group... among others. Indirect ownership includes ownership through family members and other entities. Treasury Regulation 1.267.*

a minimum represent a receivable to the corporation. The receivable would provide the corporation with additional funds to pay the penalty.

(d) Will show the actual amount that the company paid for an asset. This amount generally does not represent the current fair market value of the asset. Fair market value may be substantially higher than the asset's historical cost to the corporation. If that is the case, such assets listed on the depreciation schedule may be used to obtain a new loan, the proceeds of which may be used to pay the penalty. Or, the assets may be liquidated, in which case there would be additional funds for payment of a penalty.

SPECIFIC DOCUMENTS

1099s, 1098s, and W-2s

7. Provide copies of all completed 1099, 1098, and W-2 forms issued to all officers and shareholders of Inc., and the Corporate Group for the years 1991, 1992, and 1993

Each of the forms identified above is required to be filed by , Inc. and/or the Corporate Group with the Internal Revenue Service and the recipient of the reported income (in this case the officers and shareholders). The amount reported on each form represents the total amount paid by the corporation to each shareholder/officer for each of the income categories described below.

(a) Form 1099-INT will show how much interest a shareholder has received from the corporation. A determination must be made as to the validity of the underlying loan and whether the interest rate is competitive with rates of outside lending institutions. If the interest paid to the shareholder/officer is excessive in relationship to interest paid to nonrelated parties, the excess interest should be allocated back to the corporation providing additional income to be used to pay the penalty.

(b) Form 1099-DIV will show how much each shareholder received in dividends for the year. Corporations

generally issue dividends: (1) in times of strong financial health because the income is not needed to meet financial obligations, or (2) when corporate assets have been liquidated and the proceeds received from such liquidation are being distributed to the shareholders. The issuance of dividends is, thus, a strong indication that the firm will be able to meet its penalty obligations. Also, dividends can be held back from being distributed and used to pay a penalty.

(c) Form 1099-B identifies the value of any bartering exchanges which have taken place. With regard to bartering transactions which have taken place between the corporation and the shareholder/officers (where goods or services are exchanged for goods or services), the fair value of these exchanges must be determined. If the corporation has received less than fair market value for what it exchanged, a receivable representing the difference between the value received and the fair market value of what it gave up would result. This receivable would provide additional income to meet the penalty obligation.

(d) Form 1099-S identifies the dollar amount a shareholder or officer received from the corporation as a result of the sale of real estate to the corporation. Sales and exchanges between the corporation and related parties must be reported as an arm's-length transaction. If the reported sale price is above fair market value, the difference between the sale price and the fair value would be reclassified to the corporation as income. This additional income would be available to pay the penalty.

(e) Form 1099-MISC shows how much a shareholder or officer received for rent and/or other miscellaneous payments. Here again, the fair value of these payments must be determined. If the payment made to the shareholder/ officer is for property rental and the cash payments are substantially higher in relationship to other rental fees charged for similar type property, then the difference

between the actual payments and the fair rental value of the payments represents a receivable to the corporation. This receivable would provide the corporation with additional income to pay its penalty.

(f) Form 1098 will show if there is a mortgage between the corporation and one of the officers or shareholders. A determination would have to be made as to whether the underlying loan is a valid loan with a competitive interest rate, and whether the asset was transferred at fair market value. If it is determined that the interest rate is below the market rate or the asset changed hands at less than fair market value, then a receivable for the additional interest or sales proceeds due would be established. This receivable would provide the corporation with additional income to pay the penalty.

(g) Form W-2 will show the amount of wages received by the shareholders and officers as well as any fringe benefits they have received. These forms are necessary to determine if the officers and shareholders are being paid reasonable salaries in light of the amount of time they devote to the business. If it is determined that the salary of an officer or shareholder is excessive or unreasonable, that portion which is determined to be excessive should be allocated back to the corporation. This reallocation would provide the corporation with additional income to pay the penalty amount.

The 3 years of documentation requested for each of the above categories is necessary to determine any significant increases or decreases in reportable amounts. A 3-year comparison will allow us to determine if the corporation has authorized any such increases. Salary increases, additional fringe benefits and dividend payments are all indications of a financially secure corporation and provide evidence that the corporation has the ability to meet its penalty obligations. If the corporation is able to steadily increase an officer's salary, provide for additional fringe benefits, and/or

declare dividends, it is a clear indication that the corporation is experiencing growth and is in a strong financial position.

Please note, if the above scenarios do not pertain to this corporation then the documents outlined above will not exist and, therefore, understandably will not be provided.

LEASE AGREEMENTS

8. Provide copies of lease agreements for all property rented by _____, Inc. since 1991. Include any amendments to such lease agreements

Lease agreements will show the parties to the lease arrangement and identify related party transactions. The lease agreements which involve related parties must be reviewed to determine if they are consistent with fair rental value. If the company's lease payments are in excess of fair rental value, the difference between the payments and the fair rental value can be allocated back to the corporation and made available to pay the penalty.

The leases may also show that the corporation is leasing luxury automobiles or nonessential assets. In such circumstances, the leases could be cancelled, freeing up additional cash which could be used to pay the penalty.

DISCLOSURE AUTHORIZATION FORMS

9. Please identify all financial institutions which _____, Inc., and the _____ Corporate Group have done business with over the past 5 years, and sign the attached disclosure authorization form for each institution

The disclosure authorization form allows the financial institutions to release information concerning liabilities, credit, and additional loans. The authorization form will allow EPA to:

(a) Verify the accuracy of liabilities to financial institutions included on the tax return. The tax return may reflect greater liabilities than actually exist. If the actual liabilities are less than the amount reported on the tax return, it would indicate that the corporation

is in a better financial position to pay the penalty amount.

(b) Verify the amount of loans outstanding against corporate assets and determine if additional funds could be borrowed against these assets.

(c) Review financial statements provided to the bank which may disclose additional assets not listed on the depreciation schedule. These assets may be sold or leveraged to pay the penalty.

ASSETS SOLD OR TRANSFERRED

10. If any assets have been sold by , Inc. or the Corporate Group within the past 5 years, provide copies of the sales agreement, bill of sale, deeds transferred and any information pertaining to such sale

The documents requested in paragraph 6 will describe the assets sold, the date the asset was sold, the sales price, the parties to the transaction, the date of transfer, and the terms of the sale.

This information, in conjunction with the 1099-Ss issued and the loan information requested is necessary to analyze asset transfers which have taken place. In addition, this information will provide the following information:

(a) If an asset was transferred to a related party at a sale price which was below fair market value, a receivable would be due to the corporation for the difference between the sale price and fair market value. This receivable would provide the corporation with additional income to pay its penalty obligation.

(b) If the corporation financed the sale of one of its assets and is holding the note on the asset, the payments the corporation is receiving pertaining to this note would be a source of cash available for payment of penalties.

ASSETS BOUGHT

11. If any assets have been bought by , Inc. or the Corporate Group within the past 5 years, provide copies of the sales agreement, bill of sale, deeds transferred, and any other information pertaining to such purchase

The analysis of these documents in conjunction with loan information requested will provide:

(a) Verification of the accuracy of the cost of assets reported on the balance sheet and depreciation schedule. If an asset's purchase price is higher than the amount reported on the balance sheet and depreciation schedule, it is an indication that the corporation is in better financial condition than appears because the value of the corporation's assets would be higher than reported.

(b) Information as to whether the assets were purchased with cash, in which case the corporation may be able to obtain a new loan against the asset. The proceeds from this new loan could be used to meet the corporation's penalty obligation.

(c) Information as to whether the assets purchased are essential to the business. If the assets are not essential to the business, they can be sold. The cash generated from the sale could be used pay the penalty.

BANK STATEMENTS

12. Provide copies of all bank statements for the past 3 years for all bank accounts of , Inc. and the Corporate Group

Bank statements detail all banking activity during a particular month for each of the different types of accounts an entity maintains including, but not limited to, deposits, withdrawals, checks written, and balances. An analysis of the bank records may:

(a) Uncover unreported income. Unreported income is additional income available to the corporation to pay the penalty.

(b) Disclose an installment sale which was reported in a previous year for which payments are being received currently. These payments provide an influx of cash to the corporation which would be available to pay the penalty.

(c) Disclose large or unusual withdrawals or checks which would indicate further analysis is needed. This analysis may lead to the discovery of luxury or unnecessary purchases. Such purchases could be sold or withdrawals reclassified, making additional funds available to the corporation.

The provision of documentation on all bank accounts allows review of any money market accounts, certificates of deposits, or other investment accounts which may possess. These types of accounts are liquid and represent a source of available funds to pay a penalty.

OUTSTANDING LOANS TO

13. <u>For all outstanding loans to , Inc. or the Corporate Group, provide copies of loan applications, loan documents, notes, etc.</u>

This information:

(a) May disclose unrecorded assets. Such assets could be used to secure new loans or could be sold to generate additional income.

(b) May identify a loan to from a related party which is not an arm's-length transaction. If the interest rate on the loan is excessive, the difference between the stated interest rate and the current market rate can be reclassified to the corporation as income, thereby providing additional income to pay the penalty.

SHAREHOLDER LOANS TO

14. For any loans from a shareholder of , Inc. or the Corporate Group, provide copies of the cancelled check written to the corporation and loan documents

This information:

(a) Will allow verification that a reported loan was actually made. If the payment to was not made, the corporation would not owe the amount of the loan. Therefore, the corporate liabilities would be reduced, allowing for additional funds to meet the penalty obligation.

(b) May show that the money infused into the corporation was not a loan but rather a contribution of capital. This situation would reduce the liabilities of the corporation and provide the corporation with additional capital to pay the penalty.

MANAGEMENT REPRESENTATION LETTER

15. Copies of documents and documentation of communication addressing any information provided by or to the Independent Auditor with regard to the 1993 and 1994 Audits regarding: (a) any litigation involving the company which could have a material impact on the company's financial statements, and (b) the going concern of and .

Professional auditing standards recommend that the Independent Auditor request of a company's management its representations regarding many issues, including: loss contingencies; litigation, claims, and assessments; violations or possible violations of laws or regulations; and any other such matter that the Auditor deems appropriate--all of which would then be addressed in the Audit Report by accrual or disclosure. With respect to the litigation, claims and assessments, the Auditor is advised to direct inquiries to the corporation's legal counsel.

and assert in the Affidavit that both companies may have difficulty continuing as going concerns and that is in litigation with the IRS and may have to make a payment of more than $700,000. While the "going concern" issue was noted in the 1990, 1991, and 1992 Audit Reports, no such statement was made in the 1993 Audit Report. The responses to this request will indicate whether and how the companies presented their concerns in these regards to the Auditor.

OTHER INVESTMENTS

16. OTHER INVESTMENTS

a. With reference to the "Other investments" in the amount of $103,259, listed in column D of the Balance Sheet at page 4 of 's tax return for the fiscal year ending June 30, 1993; please list and identify each investment separately, including a description of the asset/ investment, the estimated fair market value of the asset/ investment, the purchase price, the purchase date, and the name and address of the broker who initiated the purchase.

b. With reference to the other investments referred to in paragraph 2.a. above, please provide copies of the following documents:

(1) All brokerage statements from June 1, 1992 through the present

(2) All IRS Forms 1099 reflecting dividend income received by since January 1, 1993

c. If there are any brokerage firms and/or individuals whom has dealt with since June 1, 1992 which have not provided statements, please identify all such firms and/or individuals by name and address.

Other investments generally represent assets owned by an entity such as stocks, bonds, and certificates of deposit, which may be sold, or utilized as collateral to obtain a loan or loans.

The IRS Forms 1099 requested will provide current details with regard to the rate of return (dividends) being generated by some of the investments identified. The estimate of fair market value is necessary since the historical cost basis (purchase price) of an asset does not necessarily reflect its current fair market value. The value of the asset may have appreciated, depreciated, or

remained the same. In any event, it is necessary to estimate the fair market value of 's assets because the value of these assets represents a source from which would have the ability to pay the proposed penalty.

The brokerage statements and broker identification information requested will be used to verify if has provided a complete list of its other investments and to verify that assets owned by have remained in the corporation and have not been distributed to shareholders or other related individuals.

In general, the requested information will provide details as to 's other investments, including what investments currently has (and therefore can be sold to pay the penalty), which have been sold recently (thereby already having generated additional cash flow), and what type of return is getting with regard to these investments on a continuing basis (available for payment of the penalty).

LIABILITIES

17. LIABILITIES - s tax return for the fiscal year ending June 30, 1993, indicates outstanding loans as follows: Mortgages, notes, bonds payable in less than 1 year - $4,324; and Mortgages, notes, bonds payable in 1 year or more - $1,260. If any new loans have been initiated or are now outstanding which are not reflected in the balance sheet of 's tax return for the fiscal year ending June 30, 1993, please provide copies of the following documents, and the following information

    a. All loan documents, settlement sheets, closing statements, and other documents pertaining to each loan

    b. An explanation as to why the loan was necessary and what the proceeds were used for

These documents and information will evidence and describe any new loans initiated by after June 30, 1993. This data will provide updated information with respect to 's total liabilities, which must be taken into account in evaluating 's ability to pay the proposed penalty.

INTEREST INCOME

18. INTEREST INCOME - Please provide copies of all IRS Forms 1099 reflecting any interest income earned by in 1993 and 1994.

The Form 1099-INTs received by will show reportable interest received by during each year from a specific company or individual. A determination must be made as to the validity of the underlying loan and whether the interest rate is competitive with outside lending institutions. If the interest is being received from a related party, and is substantially less then the market rate, the additional interest due would be a receivable from the related party. Payment of the receivable would provide additional cash flow to be used to pay a penalty. The Form 1099-INTs will also provide information as to whether holds substantial funds in a financial institution, which would be available for payment of a penalty.

LEASES

19. LEASES - Please provide a copy of any lease agreement pursuant to which rents property from the officers of , including the original lease and any amendments thereto.

Lease agreements will show the parties to the lease arrangement and identify related party transactions. The lease agreements which involve related parties must be reviewed to determine if they are consistent with fair rental value. If 's lease payments to related parties are in excess of fair rental value, the difference between the payments and the fair rental value can be allocated back to and made available to pay the penalty. The leases may also show that is leasing luxury automobiles or other nonessential assets. In these circumstances, the leases could be cancelled, freeing up additional cash which could be used to pay a penalty.

EC-G-1998-0

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

JAN 24 1990

D.3

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Use of Stipulated Penalties in EPA Settlement Agreements

FROM: James M. Strock
Assistant Administrator

TO: Addressees

This memorandum provides guidance on the use of stipulated penalties in settlement of enforcement actions. For each issue discussed, a preferred approach is stated along with its rationale. These preferred approaches should be followed absent unusual circumstances dictating an alternative approach. The guidance applies to judicial settlements except that it does not supersede the September 21, 1987 Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees. It also applies to administrative cases where EPA has legal authority to assess stipulated penalties.

Stipulated penalties are penalties agreed to by the parties to a settlement agreement for violation of the agreement's provisions. These penalties are then made a part of the agreement, and are enforceable if it is violated. In EPA settlement agreements, the primary goal of a stipulated penalty is to act as an effective deterrent to violating the settlement agreement.

I. Types of Requirements to Which Stipulated Penalties Should Apply

Any clearly definable event in a settlement agreement may be appropriate for stipulated penalties in a given case. Such events include testing and reporting requirements, interim and final milestones in compliance schedules, and final demonstration of compliance. The government litigation team assigned to a case should carefully consider which

ECDIC

000266

consent agreement provisions are appropriate for stipulated penalties and be prepared to vigorously enforce them. Stipulated penalties can even be attached to consent agreement provisions requiring payment of up-front penalties so long as the stipulated penalties are higher than the interest, computed at the statutory interest rate, on the underlying amount. Every consent agreement requirement to which stipulated penalties are attached should be drafted to ensure that the standards for determining compliance are clear and objective, and that any information required to be submitted to EPA is clear and unequivocal.

In general, stipulated penalties are particularly important for requirements of the consent agreement which do not represent regulatory or statutory violations for which the agency could potentially get statutory maximum penalties. Such provisions may include a requirement to install specific control equipment where the regulations and statute involved require only compliance with a discharge or emissions standard, or environmental auditing or management requirements designed to ensure future compliance. Without stipulated penalty provisions, penalties for violation of such provisions in judicial cases are only available at the judge's discretion in a contempt action under the court's inherent authority to enforce its own order.

Attaching stipulated penalties to violations of consent agreement provisions which are also violations of a statute or regulation with a specified statutory maximum penalty has advantages and disadvantages which Agency attorneys should consider carefully in the context of a particular case. The advantage is ease of enforcement. The Agency can pursue violations without having to bring a new enforcement action or, in the judicial context, a contempt action. The disadvantage is where stipulated penalties for such violations are set at less than the statutory maximum, parties may argue that the government has bargained away some of its enforcement discretion.

If a particularly egregious statutory or regulatory violation occurs for which the government feels the applicable stipulated penalties are not adequate, sources may claim the government is equitably estopped from pursuing other enforcement responses. Sources may argue in the context of a contempt action or new enforcement action that the government has already conceded in the consent agreement that a fair penalty for this type of violation is the stipulated penalty, and therefore, the court should not require any

additional penalty. Sources may make this argument even if the government has reserved all rights to pursue various enforcement responses for consent agreement violations.[1]

II. Level of Stipulated Penalties

Because the statutes EPA is charged with enforcing vary so widely, penalty schedules for all media or types of violations are not practical. There are, however, several important criteria which should always be considered in setting stipulated penalty amounts. Each program office, in concert with the appropriate OECM Associate Enforcement Counsel, may want to consider providing further, more specific guidance on appropriate levels or ranges for stipulated penalties based on the criteria below.

One key element which applies to setting the levels of all stipulated penalties for violation of a consent agreement provision is that the defendant is by definition a repeat offender when the provision is violated. For this reason, such stipulated penalties should be higher on a per day basis than the initial civil penalties imposed. See Guidelines for Enforcing Federal District Court Orders in Environmental Cases (GM-27).

The economic benefit accruing to a source due to a violation should be recovered in order for the stipulated penalty to be an effective deterrent. For some types of violations, such as notice provisions, the economic benefit of noncompliance may be minimal, though significant stipulated penalties may be appropriate based on other criteria as discussed below. For these types of violations, no formal BEN analysis is necessary. For violation of provisions which involve quantifiable delayed or avoided costs, such as installation of control equipment as part of a compliance schedule, the minimum stipulated penalty should be the economic benefit of noncompliance. However, the recidivism factor will nearly always justify a penalty well above this minimum, which often serves as the point of departure for a minimum initial penalty.

The source's ability to pay can be another important criterion to consider. How much of a deterrent a stipulated penalty is will depend on how financially significant it is to the source. The same stipulated penalty may be

---

[1] In considering whether to attach penalties to violations uncovered by an environmental audit, the November 14, 1986 Final EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements (GM-52) should be consulted.

financially crippling to one source, while merely a routine business expense for another. However, the burden is always on the defendant to raise such issues during negotiations and to justify lower stipulated penalties than the government has proposed. Financial ability to pay a penalty can be determined using the ABEL computer program for corporate violators and the MABEL computer program for municipal violators.

It should be emphasized that this factor should not be considered a reason for lowering the level of stipulated penalties below the level equal to the economic benefit. It would mainly affect the degree to which this base minimum amount is increased to account for the recidivist nature of the violation. The key concern is that stipulated penalties should be set at levels which are significant enough to deter violations rather than resulting in a "pay-to-pollute" scheme.

Another criterion which should be considered in setting stipulated penalty amounts is the gravity of the violation, i.e., how critical is the requirement to the overall regulatory scheme and how environmentally significant is the violation. The environmental significance factor should include consideration of potential and actual harm to human health and the environment. In general, consent agreement provisions which are central to a particular regulatory scheme should have higher stipulated penalties than provisions that are considered less significant. It is up to each enforcement program to make judgments about the relative importance of respective requirements. As previously noted, some consent agreement requirements such as notice provisions may have little or no associated economic benefit, but may nevertheless be critical to the regulatory program in question and would warrant high stipulated penalties.

Another consideration related to the gravity component is the source's history of compliance. If the source has a record of previous violations, a higher stipulated penalty may be necessary because earlier enforcement responses were ineffective in deterring subsequent violations.

Another option to consider whenever setting stipulated penalty levels is an escalating schedule, in which the stipulated penalty increases with the length of the violation. For example, violations of up to two weeks might have stipulated penalties of $1000 per day while violations of two to four weeks might have stipulated penalties of $2000 per day, and so on.

III. Method of Collection

Settlement agreements should state the method by which stipulated penalties will be collected. Two options are for the settlement agreement to provide that the penalty is automatically due upon the occurrence or non-occurrence of a specified event, or it may make the penalty payable only on demand by the government.

Automatic payment is the preferred approach. It saves resources which would otherwise be devoted to making demands for payment and may put the government in a more advantageous position should the source declare bankruptcy. If payment is made on demand, the consent agreement should make it clear that the legal liability of the source for the stipulated penalty attaches immediately upon violation, and it is only payment of the penalty to the Agency which is not due until demand is made.

Settlement agreements should always state where and how the penalty should be paid and how the check should be drafted. See EPA Manual on Monitoring and Enforcing Administrative and Judicial Orders for additional guidance. In addition, settlement agreements should not agree to pre-enforcement review of accrued stipulated penalties.

IV. Timing of Enforcement Responses

Prompt action to collect stipulated penalties due under any consent agreement is crucial. If stipulated penalties are due on demand, it is very important such demands be timely. The government encounters significant difficulty collecting stipulated penalties if it sits on its rights. Delay allows penalties to increase to levels parties may argue are inequitable. Sources may also raise equitable defenses such as laches or estoppel, arguing that the government cannot fail to exercise its rights for extended periods of time allowing stipulated penalties to continue to accrue and then move to collect unreasonably high penalties. The government, of course, can and should always rebut such claims by arguing it is simply enforcing the decree or agreement as agreed to by defendant, and is not subject to such equitable defenses. However, this unnecessary complication should be avoided.

A cap on the amount of stipulated penalties which can accrue is generally not a preferred solution to this problem. The stipulated penalty would lose its deterrent value once the cap is reached. Also, the main goal of any enforcement action must be compliance with the law so that public health and welfare is protected. If consent agreement provisions

are allowed to be violated long enough for a cap to be reached, serious environmental consequences may have occurred.

Providing that stipulated penalties only apply for a specific, reasonably short period of time in conjunction with reserving to the government all available enforcement responses for violation of the consent agreement, however, solves many of the problems mentioned above. By its own terms, stipulated penalties will not accrue to levels defendants can argue are inequitable. The government will be in a strong position when it pursues other enforcement options, such as contempt actions or a new enforcement action to get additional penalties, because it can argue that the penalties in the original consent agreement were not enough to deter the defendant from further violations and the possibility of additional penalties was clearly contemplated.

V. Reservation of Rights

All consent agreements must contain a provision which reserves to the government the right to pursue any legally available enforcement response for violation of any consent agreement provision. These enforcement responses would include civil contempt proceedings and injunctive relief, and criminal contempt proceedings for particularly egregious violations. However, for provisions mandated by statute or regulation and which have stipulated penalties attached, a reservation to pursue statutory penalties is suggested but not required. For model language, see the October 19, 1983 Guidance for Drafting Judicial Consent Decrees (GM-17).

VI. Collection of Stipulated Penalties

The government should be prepared to collect the full amount of stipulated penalties due under a consent agreement. No agreement should ever anticipate compromise by specifying instances where it will be allowed, aside from a standard force majeure clause. In rare, unforeseeable circumstances, however, the equities of a case may indicate that the government may compromise the amount it agrees to collect. For penalties payable on demand, the government may also exercise prosecutorial discretion by declining to proffer a demand for stipulated penalties for minor violations of a consent agreement.

It may also be appropriate to provide that stipulated penalties for violation of interim milestones in a compliance schedule will be forgiven if the final deadline for achieving compliance is met. This is clearly inappropriate where there is significant environmental harm caused by the defendant missing the interim deadlines. If such a provision is used,

the defendant should generally be required to place accrued penalties in an escrow account until compliance by the final deadline is achieved.

In judicial cases, the Attorney General and his delegatees in the Department of Justice (DOJ) have plenary prosecutorial discretion to compromise stipulated penalties. This authority stems from 25 U.S.C. § 516, which reserves to DOJ authority to conduct the litigation of the United States, including cases in which an agency of the United States is a party, and the cases and regulations broadly interpreting this authority.

In administrative cases handled solely by EPA, stipulated penalties should be collected pursuant to the enforcement authority granted to EPA under the statute governing the case. This authority to collect and compromise stipulated penalties varies from statute to statute.

Separate from the process for collecting stipulated penalties, EPA must keep track of money owed the federal government (accounts receivable) resulting out of the activities of the Agency, including administrative penalty assessments. A stipulated penalty becomes an account receivable when the appropriate Agency official determines that a violation of a consent agreement provision with an attached penalty has occurred. Under Agency financial regulations and policies for monitoring accounts receivable, stipulated penalties due and owing must be reported within three days to the Regional Financial Management Office (FMO). The FMO is responsible for entering the stipulated penalty as an accounts receivable into the Agency's Integrated Financial Management System (IFMS). The "appropriate agency official" who determines the existence of a stipulated penalty account receivable is responsible for keeping the FMO updated on the status of enforcement penalty collection efforts. A more detailed account of these procedures is included in the Manual on Monitoring and Enforcing Administrative and Judicial Orders.

Addressees:

Regional Administrators
Regions I-X

Deputy Regional Administrators
Regions I-X

Regional Counsels
Regions I-X

E. Donald Elliott
General Counsel

Headquarters Compliance Program Divisions Directors

Mary T. Smith, Acting Director
Field Operations and Support Division
Office of Mobile Sources

David Buente, Chief
Environmental Enforcement Section
U.S. Department of Justice

Associate Enforcement Counsels

Workgroup Members

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

EC-6-1998-02
A.2

JUL 25 [illegible]

MEMORANDUM

SUBJECT: Guidance on Certification of Compliance with Enforcement Agreements

FROM: Thomas L. Adams, Jr.
Assistant Administrator for Enforcement and Compliance Monitoring

TO: Assistant Administrators
Regional Administrators
Regional Counsels

I. BACKGROUND

Over the past several years, EPA has initiated record numbers of civil judicial and administrative enforcement actions. The vast majority of such actions have been resolved by judicial consent decree or administrative consent order.

The terms of many of these settlements require the violator to perform specific tasks necessary to return to or demonstrate compliance, to accomplish specific environmental cleanup or other remedial steps, and to take prescribed environmentally beneficial action.

Settlement agreements typically specify that the violator perform certain required activities and thereafter report their accomplishment to EPA. Verification that the required activities have actually been accomplished is an essential element in the overall success of the Agency's enforcement program.

II. PURPOSE

The focus of this advisory guidance is on verification of compliance with settlement agreements which require specific performance to achieve or maintain compliance with a regulatory standard. EPA has ongoing responsibility for ensuring that settling parties are in compliance with the terms of their negotiated agreements. To this end, the Agency may require that a responsible official (as that term is defined herein) personally attest to the accuracy of information contained in compliance documents made available to EPA pursuant to the terms of a settlement agreement.

FEB 4 5 1999

ECDI 000275

The inspection programs of EPA and other federal regulatory agencies are based of necessity on the concept that a limited number of regulated facilities will be inspected each year. Conversely, this means that a large number of regulated parties can operate for extended periods of time without being the subject of an on-site inspection by EPA staff. Hence, it is crucial to ensure that all required compliance reports are received from the regulated facility in a timely manner. In addition--and equally as important--timely review of such reports must be undertaken by EPA to ensure that the reports are adequate under the terms of the settlement agreement.

EPA experience shows that the majority of regulated parties make good faith efforts to comply with their responsibilities under the environmental laws and regulations. Nevertheless, the Agency must have effective monitoring procedures to detect instances of noncompliance with a settlement agreement. A vital component of these procedures will be to ensure that the environmental results obtained in the enforcement action are indeed achieved and that criminal sanctions, where appropriate, are available to respond to instances of intentional misrepresentation or fraud committed by such violators.

EPA will ensure that all responsible officials entering into settlement agreements with the Agency are held accountable for their subsequent actions and the actions of any subordinates responsible for the information contained in compliance reports submitted to the Agency.

III. GUIDANCE

A. Certification by Responsible Corporate Official

The terms of settlement agreements, as well as any certification language in subsequent reports to the Agency, should be drafted in a manner to trigger the sanctions of 18 U.S.C. §1001, 1/ in the event that false information is knowingly and willfully submitted to EPA. Submission of such false information

---

1/ United States Code, Title 18, Section 1001 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be

may also expose the defendant(s) in judicial consent decree falsification incidents to both civil and criminal contempt proceedings.

This provision of law is a key sanction within the federal criminal code for discouraging any person from intentionally deceiving or misleading the United States government.

1. Signatories to Reports

Settlement agreements should specify that all future reports by the settling party to the Agency, which purport to document compliance with the terms of any agreement, shall be signed by a responsible official. The term "responsible official" means as follows:2/

a. For a corporation: a responsible corporate officer. A responsible corporate officer means: (a) A president, secretary, treasurer or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation, or (b) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in 1987 dollars when the Consumer Price Index was 345.3), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

b. For a partnership or sole proprietorship: a general partner or the proprietor, respectively.

2. When to Require a Certification Statement

The requirement for an attestation by a responsible official is always useful as a matter of sound regulatory management practice. Such a requirement is more urgent,

---

(Note 1, cont'd)

fined not more than $10,000 or imprisoned not more than five years, or both."

There are four basic elements to a Section 1001 offense: (1) a statement; (2) falsity; (3) the false statement be made "knowingly and willfully"; and (4) the false statement be made in a "matter within the jurisdiction of any department or agency of the United States". United States v. Marchisio, 344 F.2d 653, 666 (2d Cir. 1965).

2/ For NPDES matters, the definitions of "responsible official" and "certification", as set forth in 40 CFR §122.22, may be used as alternative language to this guidance.

however, where a regulated party has a history of noncompliance or where prior violations place one's veracity into question. 3/

3. Terms of a Certification Statement

An example of an appropriate certification statement for inclusion in reports submitted to the Agency by regulated parties who are signatory to a settlement agreement is as follows:

> "I certify that the information contained in or accompanying this (submission) (document) is true, accurate, and complete.
>
> "As to (the) (those) identified portion(s) of this (submission) (document) for which I cannot personally verify (its) (their) truth and accuracy, I certify as the company official having supervisory responsibility for the person(s) who, acting under my direct instructions, made the verification, that this information is true, accurate, and complete." 4/

B. Documentation to Verify Compliance

Typical settlement agreements require specific steps to be undertaken by the violator. As EPA staff members engage in settlement negotiations and the drafting of settlement documents, they should identify that documentation which constitutes the

---

3/ While personal liability is desirable to promote compliance, it should be noted that corporations may be convicted under 18 U.S.C. §1001 as well. A corporation may be held criminally responsible for the criminal acts of its employees, even if the actions of the employees were against corporate policy or express instructions. See U.S. v. Automated Medical Laboratories, 770 F.2d 339 (4th Cir. 1985); U.S. v. Richmond, 700 F.2d 1183 (8th Cir. 1983). Moreover, both a corporation and its agents may be convicted for the same offense. See U.S. v. Basic Construction Co., 711 F.2d 570 (4th Cir. 1983).

4/ It is inevitable that in negotiating consent agreements, counsel for respondents will seek to insert language in the certification statement as to the truth of the submissions to be to the "best information" or to the "fullest understanding" or "belief" of the certifier. Such qualifiers should not be incorporated, since the provisions of 18 U.S.C. §1001 provide for prosecution for making false statements knowingly and willfully--not for forming erroneous beliefs, etc.

most useful evidence that the action required has actually been undertaken. The most useful evidence would be that information or documentation that best and most easily allows the Agency to verify compliance with the terms (including milestones) of a settlement agreement. Examples of documentation to substantiate compliance include, but are not limited to, invoices, work orders, disposal records, and receipts or manifests.

Attachment A is a suggested type of checklist that can be developed for use within each program area. 5/ The checklist includes examples of specific documentary evidence which can be required to substantiate that prescribed actions have, in fact, been undertaken.

IV. SUMMARY

This guidance is to provide assistance to EPA employees who negotiate and draft settlement documents: It is appropriate when circumstances so dictate that such documents contain sufficient certification language for ensuring, to the maximum extent possible, that all reports made to EPA, pursuant to the terms of any settlement agreement, are true, accurate, and complete, and that such reports are attested to by a responsible official.

The Agency must incorporate within its overall regulatory framework all reasonable means for assuring compliance by the regulated community. The inclusion of compliance certification language, supported by precise documentation requirements, in negotiated settlement agreements may, in appropriate instances, mean the difference between full compliance with both the letter and the spirit of the law, and something less than full compliance. In the case of the latter, the violating party is then subject to the sanctions of the federal criminal code.

Attachment A

5/ EPA or a State may be unable to confirm the accuracy of certifications for an extended period of time. Therefore, it is suggested that, whenever certification by a respondent/defendant is required, the order/decree provide that "back-up" documentation--such as laboratory notes and materials of the types listed in the examples in the text above--be retained for an appropriate period of time, such as three years. See, for example, the 3 year retention time in 40 CFR §122.41(j)(2).

000279

MEANS OF CERTIFYING COMPLIANCE WITH CONSENT AGREEMENTS (Examples)

Action Required By Consent Agreement	Violator's Official Certifies That:	Documents Accompanying Certification:
*Purchase pollution control equipment.	*Equipment purchased	*Invoice
*Installation	*Equipment installed and tested	*Invoice for work with photograph
*Ongoing operation and maintenance	*Operating as required	*Continuous monitoring tape *Periodic sample results *Maintenance of records
*Meet discharge levels	*Discharge levels have been met	*Continuous monitoring tapes *Periodic sample results
*Labeled transformers	*Transformers have been labeled	*Photographs
*Do risk study	*Study has been completed	*Study report and recommendations
*Hire employees	*Employees have been hired	*Personnel records *Position descriptions *Entry on duty dates *Salary data
*Use complying coatings	*Verifying complying coatings are used	*Documents to verify VOC content
*Train employees (e.g., work practices)	*Employee training has been completed	*Educational materials and record of employee attendance at training session
*Set up environmental auditing unit	*Unit has been established *Orientation and instruction completed	*Same as above re: personnel *Charter of audit group,

(continued on next page)

000280

01/11/1900 14:40 FROM TO 8200420I P.03

MEANS OF CERTIFYING AND CONFIRMING COMPLIANCE WITH CONSENT AGREEMENTS
(Examples)

(continued from previous page)

Action Required By Consent Agreement	Violator's Official Certifies That:	Documents Accompanying Certification:
*Dispose of PCBs	*PCBs disposed of in lawful manner	*Copies of manifests
*Replace PCB transformers	*New transformers installed	*Copies of purchase and installation receipts
*Register pesticide certification of applicator	*Applicator certification has been accomplished	*Copies of certificates
*Remove cancelled product from the market	*Removal has been accomplished	*Copies of correspondance with customers and documentation of removal *Copies of customer lists for independent verification by EPA and states
*Comply with asbestos removal and disposal regulations	*Compliance with asbestos removal and disposal regulations on a job-by-job basis	*List of locations of all jobs
*Monitor waste stream	*Waste stream has been properly monitored	*Discharge Monitoring Report
*Sludge removal	*Sludge removed by milestone deadline	*Copies of invoices on sludge removal
*Conduct groundwater monitoring	*Groundwater monitoring accomplished in appropriate manner	*Q/A (quality analysis) tests; certification by laboratory
*Collect and analyze soil samples	*Soil samples collected and analyzed in specified manner	*Same as above
*Remove contaminated soils and dispose of in compliance with RCRA	*Contaminated soils removed and disposed of in compliance with RCRA	*Copies of contract documents and manifests

B

TOTAL P.09

000281

EC-F-1998-07

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

A.
18

MAR 0 3 1995

MEMORANDUM

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

SUBJECT: Processing Requests for Use of Enforcement Discretion

FROM: Steven A. Herman
Assistant Administrator

TO: Assistant Administrators
Regional Administrators
General Counsel
Inspector General

In light of the reorganization and consolidation of the Agency's enforcement and compliance assurance resources activities at Headquarters, I believe that it is useful to recirculate the attached memorandum regarding "no action" assurances[1] as a reminder of both this policy and the procedure for handling such requests. The Agency has long adhered to a policy against giving definitive assurances outside the context of a formal enforcement proceeding that the government will not proceed with an enforcement response for a specific individual violation of an environmental protection statue, regulation, or legal requirement. This policy, a necessary and critically important element of the wise exercise of the Agency's enforcement discretion, and which has been a consistent feature of the enforcement program, was formalized in 1984 following Agency-wide review and comment. Please note that OECA is reviewing the applicability of this policy to the CERCLA enforcement program, and will issue additional guidance on this subject.

A "no action" assurance includes, but is not limited to: specific or general requests for the Agency to exercise its enforcement discretion in a particular manner or in a given set of circumstances (i.e., that it will or will not take an enforcement action); the development of policies or other statements purporting to bind the Agency and which relate to or would affect the Agency's enforcement of the Federal environmental laws and regulations; and other similar requests

[1] Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring, Policy Against "No Action" Assurances (Nov. 16, 1984) (copy attached).

Recycled/Recyclable
Printed with Soy/Canola Ink on paper that contains at least 75% recycled fiber

CDIC

for forbearance or action involving enforcement-related activities. The procedure established by this Policy requires that any such written or oral assurances have the advance written concurrence of the Assistant Administrator for Enforcement and Compliance Assurance.

The 1984 reaffirmation of this policy articulated well the dangers of providing "no action" assurances. Such assurances erode the credibility of the enforcement program by creating real or perceived inequities in the Agency's treatment of the regulated community. Given limited Agency resources, this credibility is a vital incentive for the regulated community to comply with existing requirements. In addition, a commitment not to enforce a legal requirement may severely hamper later, necessary enforcement efforts to protect public health and the environment, regardless of whether the action is against the recipient of the assurances or against others who claim to be similarly situated.

Moreover, these principles are their most compelling in the context of rulemakings: good public policy counsels that blanket statements of enforcement discretion are not always a particularly appropriate alternative to the public notice-and-comment rulemaking process. Where the Agency determines that it is appropriate to alter or modify its approach in specific, well-defined circumstances, in my view we must consider carefully whether the objective is best achieved through an open and public process (especially where the underlying requirement was established by rule under the Administrative Procedures Act), or through piecemeal expressions of our enforcement discretion.

We have recognized two general situations in which a no action assurance may be appropriate: where it is expressly provided for by an applicable statute, and in extremely unusual circumstances where an assurance is clearly necessary to serve the public interest and which no other mechanism can address adequately. In light of the profound policy implications of granting no action assurances, the 1984 Policy requires the advance concurrence of the Assistant Administrator for this office. Over the years, this approach has resulted in the reasonably consistent and appropriate exercise of EPA's enforcement discretion, and in a manner which both preserves the integrity of the Agency and meets the legitimate needs served by a mitigated enforcement response.

There may be situations where the general prohibition on no action assurances should not apply under CERCLA (or the Underground Storage Tanks or RCRA corrective action programs). For example, at many Superfund sites there is no violation of law. OECA is evaluating the applicability of no action assurances under CERCLA and RCRA and will issue additional guidance on the subject.

Lastly, an element of the 1984 Policy which I want to highlight is that it does not and should not preclude the Agency from discussing fully and completely the merits of a particular action, policy, or other request to exercise the Agency's enforcement discretion in a particular manner. I welcome a free and frank exchange of ideas on how best to respond to violations, mindful of the Agency's overarching goals, statutory directives, and enforcement and compliance priorities. I do, however, want to ensure that all such requests are handled in a consistent and coordinated manner.

Attachment

cc: OECA Office Directors
Regional Counsels
Regional Program Directors

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

NOV 16 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Policy Against "No Action" Assurances

FROM: Courtney M. Price
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Assistant Administrators
Regional Administrators
General Counsel
Inspector General

This memorandum reaffirms EPA policy against giving definitive assurances (written or oral) outside the context of a formal enforcement proceeding that EPA will not proceed with an enforcement response for a specific individual violation of an environmental protection statute, regulation, or other legal requirement.

"No action" promises may erode the credibility of EPA's enforcement program by creating real or perceived inequities in the Agency's treatment of the regulated community. This credibility is vital as a continuing incentive for regulated parties to comply with environmental protection requirements.

In addition, any commitment not to enforce a legal requirement against a particular regulated party may severely hamper later enforcement efforts against that party, who may claim good-faith reliance on that assurance, or against other parties who claim to be similarly situated.

This policy against definitive no action promises to parties outside the Agency applies in all contexts, including assurances requested:

- both prior to and after a violation has been committed;
- on the basis that a State or local government is responding to the violation;

- on the basis that revisions to the underlying legal requirement are being considered;
- on the basis that the Agency has determined that the party is not liable or has a valid defense;
- on the basis that the violation already has been corrected (or that a party has promised that it will correct the violation); or
- on the basis that the violation is not of sufficient priority to merit Agency action.

The Agency particularly must avoid no action promises relating either to violations of judicial orders, for which a court has independent enforcement authority, or to potential criminal violations, for which prosecutorial discretion rests with the United States Attorney General.

As a general rule, exceptions to this policy are warranted only

- where expressly provided by applicable statute or regulation (e.g., certain upset or bypass situations)
- in extremely unusual cases in which a no action assurance is clearly neccessary to serve the public interest (e.g., to allow action to avoid extreme risks to public health or safety, or to obtain important information for research purposes) and which no other mechanism can address adequately.

Of course, any exceptions which EPA grants must be in an area in which EPA has discretion not to act under applicable law.

This policy in no way is intended to constrain the way in which EPA discusses and coordinates enforcement plans with state or local enforcement authorities consistent with normal working relationships. To the extent that a statement of EPA's enforcement intent is necessary to help support or conclude an effective state enforcement effort, EPA can employ language such as the following:

"EPA encourages State action to resolve violations of the _____ Act and supports the actions which (State) is taking to address the violations at issue. To the extent that the State action does not satisfactorily resolve the violations, EPA may pursue its own enforcement action."

EC-R-1998-02

~~R-STSA~~

CC:OE-Th2

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

A.7

MEMORANDUM

SUBJECT: Procedures to Improve Coordination before the Environmental Appeals Board

FROM: Ray Ludwiszewski
Acting General Counsel
Office of General Counsel
(LE-130)

Herbert H. Tate, Jr.
Assistant Administrator
Office of Enforcement (LE-133)

TO: Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum and Edward E. Reich

Attached to this memorandum are procedures which we are adopting to improve coordination among the Office of General Counsel (OGC), Office of Enforcement (OE) and the Offices of Regional Counsel (ORC) on positions taken by each of these offices before the Environmental Appeals Board (EAB). These procedures were developed directly in response to a request from the EAB and incorporate comments made by Ed Reich on behalf of the EAB.

These procedures will be effective immediately. We are requesting that the EAB continue its practice of sending copies of all of its final decisions to the Regional Counsels, the Associate General Counsels and the Enforcement Counsels. In addition, we are requesting that, in addition to sending copies of notices to appeal permit decisions to the affected Regional Counsel, the EAB send copies of these notices to the affected Associate General Counsel and Enforcement Counsel.

We believe that these procedures will go a long way toward improving coordination among our offices on positions taken before the EAB. These procedures commit our offices to evaluate our success in implementing these procedures and accomplishing our objectives in approximately six months. We welcome your active participation in this process and hope that together we can improve the Agency's administrative litigation practice.

Attachment

cc: Regional Counsels
Associate General Counsels
Enforcement Counsels

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

JAN 25 1993

MEMORANDUM

SUBJECT: Procedures to Improve Coordination before the Environmental Appeals Board

FROM: Ray Ludwiszewski
Acting General Counsel
Office of General Counsel
(LE-130)

Herbert H. Tate, Jr.
Assistant Administrator
Office of Enforcement
(LE-133)

TO: Regional Counsels
Associate General Counsels
Enforcement Counsels

Attached to this memorandum are procedures which we are adopting to improve coordination among the Office of General Counsel (OGC), Office of Enforcement (OE) and the Offices of Regional Counsel (ORC) on positions taken by each of our offices before the Environmental Appeals Board (EAB). As you will recall, the EAB requested that we work together to develop these procedures.

The procedures adopted reflect discussions held at the OGC/ORC management retreat in October 1992 and incorporate OE's existing policy in this area. In addition, these procedures reflect comments received from many of you and comments received from Ed Reich on behalf of the EAB.

000292

These procedures will be effective immediately. Under the procedures, each of you responsible for matters which go before the EAB is requested to designate at least one person to serve as a contact person to aide in the coordination process established by the procedures. The option of whether to designate one or more persons to fulfill all these functions is up to you. By February 12, 1993, please identify the person(s) you are designating to coordinate matters related to permit appeals to Susan Lepow (FAX 202-260-7702) and the person(s) you are designating to coordinate matters related to enforcement appeals to Fred Stiehl (FAX 202-260-4201). They will compile a complete list of these contacts and distribute them to you.

We believe that these procedures will go a long way toward improving coordination among our offices on positions taken before the EAB. We appreciate the commitment each of you is making to improve the Agency's administrative litigation practice. These procedures commit our offices to evaluate our success in implementing these procedures and accomplishing our objectives in approximately six months. We encourage you and your staff to actively participate in this process.

Attachment

cc: Environmental Appeals Board Judges Firestone, McCallum and Reich
Regional Administrators
Assistant Administrator for Water
Assistant Administrator for Air and Radiation
Assistant Administrator for Solid Waste and Emergency Response
Assistant Administrator for Prevention, Pesticides and Toxic Substances

OFFICE OF GENERAL COUNSEL, OFFICE OF ENFORCEMENT AND OFFICE OF REGIONAL COUNSEL COORDINATION ON MATTERS BEFORE THE ENVIRONMENTAL APPEALS BOARD

Under the environmental statutes administered by the Environmental Protection Agency, the Administrator has delegated authority to decide appeals of permit decisions made by the Agency's Regional Administrator's and administrative penalty decisions made by the Agency's Administrative Law Judges to an Environmental Appeals Board (EAB). The specific matters delegated to the EAB are detailed in a final rule published in the Federal Register on February 13, 1992, 57 Fed. Reg. 5320.

At the request of the EAB, the Office of General Counsel (OGC), the Office of Enforcement (OE) and the Offices of Regional Counsel (ORC) have identified ways to improve coordination on positions taken by each of these offices before the EAB. The Office of General Counsel and the Offices of Regional Counsel discussed this issue at the OGC-ORC Management Retreat held in October 1992. The Office of Enforcement has had an existing policy in this area.

Unless and until modified, this memorandum outlines the policies and procedures which will be followed to coordinate positions taken with respect to permit appeals and appeals of enforcement cases (including significant interlocutory appeals) before the EAB. Each Regional Counsel, Associate General Counsel and Enforcement Counsel responsible for matters which go before the EAB will designate at least one individual to serve as a contact person to aide in the coordination process established in this memorandum.

A. Permit Appeals

The EAB sends notice to the Regional Counsel when a notice of appeal of a permit is filed; the Region has 45 days to file a response with the EAB. We will request the EAB to send a copy of this notice to the affected Associate General Counsel and Enforcement Counsel, as well.

After the notice of appeal is received by ORC/OGC, staff in ORC will consult with OGC staff about each case. The discussions will focus on any important issues raised by the case. Each case will be handled in one of three ways: (1) OGC will sign the response as co-counsel and will have written or participated in writing the response; (2) OGC will appear as "of counsel" on the response and OGC will have reviewed the response; or (3) OGC will not be on the response and though ORC will have coordinated with OGC, OGC will not necessarily review the response.

OGC and ORC will both need to consent to the appropriate level of handling for each case. Staff in each office will consult with their supervisors, as appropriate. Any disagreements between the Regional Counsels and the Associate

General Counsels will be elevated to the appropriate Deputy General Counsel.

It is important to coordinate positions taken in one case with other Regions and with the Headquarters program office. Significant enforcement issues may also be raised in the context of certain permit appeals. In appropriate cases OGC and ORC staff need to coordinate with OE, other Regions and their respective program offices before a response is filed. Upon receipt of a notice of appeal, the Enforcement Counsel or OE Branch Chief will identify any enforcement issues that should be addressed in the appeal. In most cases it may be adequate for OE and other Regions to be informed of positions taken before the EAB through the monthly OGC/OE/ORC branch chief conference calls. This will be a standing agenda item for the monthly calls; the ORC branch chief will generally be responsible for leading this discussion.

It is important for the Regions to coordinate as early as possible with all Headquarters offices on the issues raised in permit appeals and requests for evidentiary hearings so that EPA will be advancing consistent positions. Some of this coordination needs to be initiated by the program offices and some by ORC.

B. Enforcement Appeals

There is less time for the Agency to decide its position on appeals of enforcement cases. Pursuant to 40 CFR section 22.29(a), enforcement appeals typically obtain as a matter of right, and the Agency must file its notice of appeal and an accompanying brief within 20 days after service of the initial decision or order of the Presiding Officer. See 40 CFR section 22.30(a). [1]

In a May 3, 1989 memorandum from then Acting Assistant Administrator Edward Reich, a process was established to provide for review of adverse decisions of ALJs as well as favorable decisions that are appealed by the respondent. (See attached memorandum.) That process is still an appropriate method to provide an efficient way to identify and address important issues in a case that should be raised to the EAB. It should be noted that important legal and policy issues warranting an appeal may be raised in cases even though the Agency prevailed in the relief sought. This memorandum reaffirms the procedures of the earlier memorandum with the following modifications.

---

[1] In appropriate circumstances, agency counsel, however, may seek leave from the EAB for extensions of time in which to file such appeals or briefs, if they can satisfy the requirements of 40 CFR section 22.07(b). Depending on the circumstances, it may be advisable to seek an extension only for the filing of the brief, rather than the notice of appeal.

The ORC attorneys will consult directly with the Regional Counsel (or Deputy Regional Counsel if so directed by the Regional Counsel) to discuss their recommendation as to whether EPA should appeal each enforcement case. This view should be included in the summary of the decision forwarded to the OE Branch Chief, the OGC Branch Chief, and the ORC contacts. The Regional Counsels will report on decisions to appeal enforcement cases in their weekly report to Headquarters. Decisions in Headquarters cases will be reported in OE's Weekly Highlights. As with permit appeals, each case where a decision is made to proceed with an appeal will be handled in one of three ways: (1) OE will sign the brief as co-counsel and will have written or participated in writing the brief; (2) OE will appear as "of counsel" on the brief and OE will have reviewed the brief; or (3) OE will not be on the brief and though ORC will have coordinated with OE, OE will not necessarily review the brief.

The Regional Counsels and Enforcement Counsels will take personal responsibility to decide what kind of coordination is necessary with OGC before a decision is made to seek, or forego, an appeal of an enforcement case. OGC agrees to identify any generic areas where it needs to be consulted on a routine basis before a decision to appeal or not to appeal is made.

C. Headquarters Assistance to EAB

Subject to the prohibition on ex parte communications, nothing in this memorandum is intended to derogate the ability of OGC or OE to provide technical assistance to the EAB when the EAB deems it appropriate.

As part of their participation in the review of appeals, OGC and OE should assure that any relevant policies or new regulations are brought to the attention of the Board, since Headquarters offices will often be more aware of such matters than Regional offices.

D. Oral Arguments

The attorney best able to present the Agency's position should present oral argument to the EAB. This will be decided on a case by case basis. The Board has a strong preference in favor of having a single attorney present the Agency's argument. Nevertheless, the Board has allowed more than one attorney to divide the argument where the Agency deemed it essential for the effective presentation of its case. Accordingly, there should be an opportunity for Regional and Headquarters attorneys to argue before the Board in appropriate cases.

Any disagreements between the Regional Counsel and the Associate General Counsel or Enforcement Counsel regarding who should present the oral argument to the EAB will be elevated to the appropriate Deputy General Counsel or Director of Civil Enforcement.

The Agency attorney(s) presenting oral argument should be able to represent to the fullest extent possible that the positions taken in argument have been coordinated with, and approved by, ORC, OGC and OE, as appropriate.

E. Decisions

The EAB sends copies of all final decisions to the Regional Counsels, the Associate General Counsels and the Enforcement Counsels.

F. Follow-up

Our success in implementing these procedures and accomplishing our objectives will be evaluated in an ORC/OGC/OE conference call in approximately six months.

Attachment

EC-G-1998-9

A.13

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

JUL 11 1994

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases

FROM: Steven A. Herman
Assistant Administrator

TO: Assistant Administrators
Regional Administrators
Deputy Assistant Administrators
Regional Counsels
OECA Office Directors and Division Directors

On May 31, 1994, the Administrator commissioned an effort to follow up on the issues raised by the Regional Impacts Task Force (RITF) regarding the division of roles and responsibility between the Regions and Headquarters in the enforcement and compliance assurance program. The principal area which needed further discussion regarded the management of civil judicial and administrative cases. The specific question to be addressed concerned the nature and extent of Headquarters involvement in case development and litigation.

A small work group, which included personnel from OECA, the Regions, and OGC, was formed to undertake this follow-up effort. The work group approached its assignment in two phases. Phase 1 has focussed on the roles issue in the regulatory enforcement context; Phase 2 will examine the issue in the Superfund context. Phase 1, on which the work group has completed its work, is the subject of this memorandum; Phase 2 will be brought to closure in the near term.

The RITF provided a basic framework for the Headquarters/Regional relationship in the case management arena, concluding that Headquarters involvement was appropriate in a number of contexts: a) cases or issues that rise to a level of national attention; b) multi-regional cases against the same company; c) national initiative cases. The RITF Report encouraged redelegation of authority for matters that are not of national import. The relevant portions of the RITF Report are attached to this memorandum as Attachment A. Also attached to

000299

FEB 23 1993
FCDIC

Printed on Recycled

this memorandum are supplemental guidance developed by the follow-up work group (Attachment B), giving further definition to the concept of "national significance," and a new redelegation of authority to the Regions that builds on the work of the RITF and reflects the views of the work group (Attachment C).

This memorandum and its attachments, taken together, establish the general framework and guidance that the Agency will hereafter follow in the processing and management of civil regulatory enforcement cases. The effective date for implementation of this new approach will be October 1, 1994. In the meantime, we will be developing further the auditing concept outlined below and visiting the Regions to discuss expectations regarding implementation.

A NEW APPROACH TO OVERSIGHT

As articulated by the RITF, the fundamental role of OECA is to provide overall leadership in the enforcement and compliance assurance arena. This leadership role has a number of different facets, including devising the national strategy for the program, addressing matters of national policy and concern, ensuring national consistency, ensuring the development of regulations and laws that are clear and enforceable, representing the Agency before the Congress and with other agencies, and ensuring effective implementation of the Agency's enforcement and compliance assurance program.

Although, as discussed further below, there are significant benefits associated with Headquarters involvement in cases, case involvement has been historically used by Headquarters at least in part as a means of overseeing Regional implementation of EPA's enforcement program. The principal vehicle for effecting this oversight has been the requirement that Headquarters formally concur on all Regional settlements of civil judicial matters, whether or not those matters raise issues of national concern. This concurrence process has been criticized for increasing transaction costs, causing processing delays, and diverting Headquarters and Regional staff attention from other, more compelling work.

With this memorandum, and in keeping with the principles of empowerment, reinvention, and accountability, we are fundamentally reorienting our approach to Regional oversight. The new approach has the following features:

- o Value-added approach to case involvement -- Headquarters involvement in cases will operate according to the "value added" principle. Under this principle, Headquarters staff will be involved in cases when the case or the program at large will benefit from such involvement (see below for

further discussion).

o Focus on "nationally significant" matters and issues -- The concurrence process will no longer be used for purposes of routine oversight. Instead, it will be reserved for cases or issues which call for Headquarters sign-off because of their national significance -- i.e., because they are national in terms of their impact or attention, are sensitive in nature, raise unresolved policy issues, establish an important precedent, arise in an area where national consistency is of paramount importance (e.g., Shell Oil, where an adverse legal decision raised major programmatic concerns under RCRA), or otherwise affect the overall program. The new approach eliminates the distinctions between administrative and judicial cases, as cases in either forum can be nationally significant and can raise issues of national consequence. Attachment B provides specific examples of nationally significant matters. Because of its unique national perspective and its role as policy-maker and national "voice" for the enforcement and compliance assurance program, Headquarters staff involvement during the pendency of the litigation and ultimately the AA/OECA's review and sign-off in these circumstances adds value to program implementation and is essential to effective program implementation and public accountability.

o Redelegation of authority -- Regional civil judicial and administrative cases which seek a bottom line penalty[1] of less than $500,000 will be presumed to not be nationally significant. Accordingly, consistent with the attached delegation, I am redelegating to the Regional Counsel the AA's authority to concur on settlements undertaken by the Regional Administrator (or Regional Division Director, where the RA's authority has been redelegated), provided such settlements adhere to national policy and guidance and do not raise issues of national significance. The Regional Counsel will, in the first instance and in keeping with this guidance, make and document the determination whether such a matter raises an issue of national significance. Judicial and administrative cases involving a bottom line penalty of $500,000 or more assume a sufficient national profile so as to be presumptively nationally significant and will be

---

[1]Under the Agency's penalty policies, this generally means recovery of the economic benefit of noncompliance plus a gravity component. Where the Region has not prepared a bottom line penalty before filing an administrative case, cases will be presumed to be nationally significant if the proposed penalty sought in the complaint to be filed is greater than or equal to $500,000.

reserved for the AA/OECA's concurrence.[2]

o Flexible involvement -- Flexibility is built into the redelegation. If a nationally significant issue arises in a case with a bottom line penalty under the $500,000 threshold, the delegation will require the Region to consult with the appropriate division in the Office of Regulatory Enforcement (ORE) in OECA; OECA would, at the Division Director level, then have the authority to opt in for purposes of concurrence if appropriate.[3] For the $500,000 and over cases, the redelegation would give OECA, at the Office Director level, the authority to opt out for purposes of concurrence if, for example, there are no issues of national significance and the case is not likely to assume a national profile.

o Differential oversight -- The case-by-case approach to oversight will be replaced with a systematic approach to accountability which will include, at a minimum, periodic auditing of regional compliance with the requirements of the redelegation, regular docket reviews, and after-the-fact review of regional decision documents. Regional Counsel

---

[2]The delegations that are currently in place for administrative penalty actions under, e.g., the Clean Water Act (2-52-A), the Clean Air Act (7-6-A), RCRA Subtitle J (8-3), and TSCA (12-2-A), reserve the OECA Assistant Administrator's authority in "multi-Regional cases, cases of national significance or nationally managed programs." Consequently, the approach outlined in this memorandum for administrative cases is consistent with delegations relating to these authorities. Because the delegations that are currently in place for RCRA Subtitle C and the Safe Drinking Water Act do not include this explicit reservation, we will need to make conforming amendments to the Administrator's delegation under these authorities. This will be done as part of the third phase of delegations adjustments associated with the reorganization. In the meantime, as a function of their reporting relationship with the OECA AA, the Regional Counsels will be expected to consult with OECA, consistent with this memorandum, on nationally significant administrative matters arising under these authorities.

[3]Where OECA opts in, the concurrence requirement will be fashioned to reflect the character of the matter at hand. In some circumstances, OECA's concurrence will be required only for resolution of the nationally significant issue (as opposed to requiring concurrence on the settlement); in others, such as where the nationally significant issue is so fundamental to the case that the resolution of the case inevitably speaks to the issue in an important way, the Assistant Administrator's concurrence will be required for the settlement.

forth below:

o "National Program" cases -- These are cases that arise in programs that are not implemented at the Regional level, such as the Mobile Source program and enforcement of the adverse effects reporting requirements under FIFRA, and cases which are Headquarters-driven because the data systems necessary to identify noncompliance are maintained at Headquarters (e.g., CFC import and export cases, certain acid rain cases, etc.). In these cases, Headquarters has the lead role, with little or no regional involvement.[4]

o "National Violator" cases -- These are cases against a single entity involving violations at facilities in more than one Region (e.g., the Louisiana Pacific multi-facility case). In these cases, Headquarters will have the EPA lead for overall case direction and coordination. Generally, Regional personnel will be responsible for developing and supporting those components of the case that arise in their Region. In national violator cases in which a disproportionate number of violating facilities are located in a single region, OECA may determine that it is more appropriate for personnel from that Region to play the lead role, essentially reporting to OECA in this capacity.

o "National Initiatives" -- These are clusters of cases involving more than one Region centered around a sector of the regulated community (e.g., the pulp and paper initiative), a geographic area (e.g., the Mexican border), a pollutant (e.g., the lead initiative), or a particular kind of regulatory requirement (e.g., the RCRA non-notifier initiative). In these circumstances, OECA personnel will have a lead role in coordinating the overall project, including developing initiative guidance, screening cases for inclusion in the initiative, and giving direction in terms of timing of activities, communication strategy, etc. Generally, Regional personnel will serve as the Agency lead for the individual cases that are included in the initiative.

o Single Region cases -- This category includes cases which arise in the ordinary course of events within a Region as well as self-contained regional initiatives. Regional personnel will serve as the Agency lead for cases in this category. Headquarters involvement will be determined largely by the redelegation of authority. Thus, in redelegated cases, Headquarters personnel will ordinarily

---

[4]In the near term, I will be doing an additional delegation of authority within OECA for settlements in cases falling into this category.

not be involved; in non-redelegated cases, Headquarters personnel will be involved for the purpose of providing national perspective and expertise, keeping the AA/OECA and other critical Headquarters decision-makers advised, and informing AA/OECA concurrence. Whether or not Headquarters is involved, the Regional Counsels will, by providing copies to ORE of referrals to the Department of Justice and through regular reports and periodic consultation, be responsible for keeping the AA/OECA and ORE informed regarding program activities.

This guidance regarding Headquarters involvement should not be viewed rigidly. Rather, it should be viewed flexibly, with an eye towards using the overall resources available to the program to get the job done. Thus, where, for example, a national initiative calls for work that is beyond a Region's resources, OECA personnel may be deployed to the Region to work with Regional management in leading case developing efforts.

Similarly, apart from the redelegation, the need to provide training opportunities that will leave Headquarters personnel better able to perform their policy and regulatory role may suggest involvement in circumstances not expressly contemplated above. Additionally, OECA retains the authority to take action, after consultation with the Regional Administrator, in the place of a Region in the rare situation where the Region is unprepared to respond to a problem of national concern or to assume the lead in a case which is of such paramount national interest as to require daily involvement by the AA/OECA (e.g., Love Canal).

CONCLUSION

In sum, this guidance and redelegation should help the Agency turn a corner in the Headquarters/Regional relationship in the enforcement and compliance assurance arena. Our new approach not only will preserve, but reinforce OECA's leadership role for the enforcement and compliance assurance program, particularly as it relates to nationally significant cases and issues. At the same time, it will empower managers in the Regions to implement the Regional enforcement program in a more efficient manner. Moreover, the accountability mechanism contemplated here -- systematic audits, after-the-fact review of pertinent decision documents, and differential oversight -- should leave OECA better able to identify problems and respond to them holistically than is possible under the current system. Frequent and regular contacts between Headquarters and Regional managers will be essential to the success of the new system. At the one-year anniversary of the effective date of this memorandum we will review this guidance and redelegation to determine whether any adjustments are needed.

Attachments

ATTACHMENT A

REPORT OF THE EPA

REGIONAL ENFORCEMENT IMPACTS

TASK FORCE

MAY 1994

000305

Recycled/Recyclable
Printed on paper that contains
at least 50% recycled fiber

should have the lead, with participation from the other, depending on the nature of the matter.

6. Case Development and Management

a. General Background

The area of case development and management presents the largest challenge for setting out appropriate roles and responsibilities because there are so many functions, so much work, and legitimate disagreements over dividing responsibilities between the Regions and Headquarters. The Task Force spent a great deal of its time and effort dealing with roles and responsibilities in this area.

The Task Force believes that a number of principles should guide the Headquarters/Regions relationship in case development and management including: Use resources efficiently and effectively; avoid duplication of effort and second guessing; maximize delegations; use a team approach to problem solving based on trust, cooperation, and respect; determine roles based on need for unique perspectives and knowledge; provide clear and timely Headquarters guidance that allows Regions a specified degree of flexibility and sets out a process for greater flexibility based on the facts of a specific case.

The Task Force's recommended roles and responsibilities between Regions and Headquarters reflect the general and normal delineation of roles and responsibilities that would take place for case development and management and should not be viewed as an absolute. Overall, there needs to be a balance between empowerment and consistency. Specific case facts relating to precedential concerns, the need to deviate from established policies, or other matters may warrant the need for greater Headquarters involvement. However, with the exception of nationally run enforcement programs, the presumption is that Regions manage their cases.

Currently, responsibility for administrative cases is largely delegated to the Regions with minimal Headquarters involvement. Headquarters involvement is usually limited to administrative cases resulting from national programs that are managed entirely out of Headquarters (e.g., mobile sources) and administrative actions brought under new statutory or regulatory authority, for which the Regions typically have submitted their first three such actions for Headquarters approval. However, there are also occasional circumstances when, because of the

precedential nature of issues involved in administrative cases, Headquarters becomes involved.

Under the reorganized enforcement program, the Task Force generally believes that development, management, and settlement of the significant majority of administrative cases should continue to be handled by the Regions. However, for regional cases that (a) rise to a level of national attention, (b) are multi-regional cases against a company, economic sector, or ecosystem, or (c) are part of national enforcement initiatives, the Task Force generally believes that some degree of Headquarters involvement (which can range from consultation to concurrence) would be advisable and that in some cases a Headquarters lead would be appropriate. The Task Force believes these three types of cases are likely to be a relatively small percentage of all regional administrative cases. Whether a Region or Headquarters should have the "lead" and the extent of the other office's participation and/or concurrence in these cases would depend on the nature and facts of the case. There should be criteria and guidance to help guide these decisions. The most important consideration, however, is that the decision on the lead responsibility for such administrative cases must be made as early in the process as possible.

Currently, Regions have been delegated less authority for initiating, conducting, and settling judicial cases than for administrative cases. Headquarters involvement is significant. Under the reorganized enforcement program, the Task Force generally believes that development, management, and settlement of the majority of judicial cases should be delegated to Regions. However, the Task Force believes that cases that (a) rise to a level of national attention, (b) are multi-regional cases against the same company, or (c) are part of national enforcement initiatives, could be either Regional lead with Headquarters concurrence/participation or Headquarters lead with Regional concurrence/participation, depending on the nature and facts of each case. As with administrative cases, there should be criteria and guidance to help guide these decisions. The most important consideration, however, is that the decision on the lead responsibility for such judicial cases must be made as early in the process as possible.

b. Delegations Proposal

In light of these considerations, the Task Force recommends that the Assistant Administrator for OECA consider a number of delegations in the context of overall environmental enforcement case management. These delegations are

appropriate in light of the Administrator's commitment to streamlining, ensuring national consistency, and implementing the recommendations of the National Performance Review. These delegation principles are not intended to substitute for the principle that good communication between Headquarters and the Regions is essential for consistent and efficient Agency enforcement.

The Task Force suggests consideration of the following principles:

(i) It is appropriate to further delegate civil judicial case initiation, management, and settlement authorities to Regional Administrators/Regional Counsels. The Task Force expects that authority for initiation, management, and settlement of the majority of cases will be delegated to the Regions, and Regions will be held accountable for appropriate exercise of that authority. These include all cases not falling within the exceptions to be set forth in guidelines, as noted in (ii) below.

Administrative enforcement authorities have largely been delegated to regional offices. The Task Force expects that the authorities for initiation, management, and settlement of these cases will be maintained in the Regions, with exceptions limited to those set forth in guidelines, as noted in (ii) below.

(ii) Consistent with the Administrator's desire that EPA speak with one enforcement voice, the Assistant Administrator for OECA should be included in the decision-making process at any time that it becomes apparent that a civil judicial or administrative case will raise issues of national precedence or national significance. Depending upon the level of national precedence or significance, inclusion and participation of the Assistant Administrator for OECA will vary from consultation to concurrence in regionally-managed cases to actual Headquarters lead in case development and management.

The Task Force believes that a number of factors should be considered in ascertaining whether a case is of national significance or nationally-precedential, and what level of delegation is therefore appropriate. These factors include the dollar value of assessed penalties, the precedential character of the case or specific issues involved, the degree of national importance and public interest in the case, whether a case covers facilities or environmental contamination problems in multiple Regions, whether a proposed settlement is within national norms, whether a case is initiated within the context of a national initiative, and whether a case is consistent with legislative proposals under consideration.

(iii) Assuring that the Administrator's goals of national consistency and streamlining are met will require that the Assistant Administrator for OECA introduce and implement a system of accountability. In accordance with the delegations outlined in (b) above, the system must include some contemporaneous review of the case initiation, management, and settlement in nationally significant cases, as well as in cases in which national settlement criteria have not been met (e.g., recovery of economic benefit of non-compliance). In addition, the Task Force recommends institution of systematic post hoc reviews of regional enforcement program performance, and consistency with national enforcement policies. The Task Force recommends that this review yield sanctions for non conformance with national policy, a recognition of superior performance, and consideration of differential delegations if appropriate.

c. Recommended Roles and Responsibilities

Based on the above discussion, a number of functions should fall into the category of Headquarters in the lead with Regional participation. These include national priority setting and targeting, technical and legal support on national issues, clearinghouse/coordination, development of information systems, Headquarters providing technical and legal support on Regional cases, providing technical experts on key cases, DOJ interface, policy and guidance on case management, coordination with OGC, communication and coordination among Regions, criminal case development, and citizen suit matters.

Regions should have the lead on regional targeting and screening, and communicating and coordinating with Headquarters and States.

The Regions and Headquarters should share the responsibility for ensuring consistency with national policy guidance, but the Task Force recognizes that Headquarters should have an audit function with respect to the Regions. On administrative appeals, the Regions should have the lead with Headquarters concurrence on both the decision to appeal and the conduct of the case. For judicial appeals, Headquarters should have the lead with Regional concurrence. The same is true for contractor listing. In defensive litigation, in both pre-enforcement review and counterclaims, Headquarters or the Regions should have the lead, with the other participating, depending on the case.

On most administrative cases, the Regions should have the lead in developing, managing, litigating, and resolving the matters. In several categories of administrative cases, Headquarters should be involved, and on rare occasions

Guidelines for Identification of Nationally Significant Cases or Issues

The following guidelines and examples set forth indicators of national significance for purposes of determining the involvement of the Office of Enforcement and Compliance Assurance in Regional enforcement cases, and the exercise of any case settlement authorities delegated to Regional Counsels. These guidelines should not, however, be the sole basis for any determination regarding the presence of nationally significant issues in an enforcement action; indeed, what is "nationally significant" will necessarily reflect the current climate in which the Agency carries out its mission. For example, matters which would not ordinarily be nationally significant may become such when they relate to statutory reauthorization or other legislative developments. Regional Counsels are expected to consult with the appropriate Office of Regulatory Enforcement Division Director on any issues of national significance which have been identified, yet do not otherwise fall within any of the guidelines set forth below. These guidelines may be periodically supplemented or revised to reflect additional indicia of national significance, or to remove any indicia listed below for which Headquarters attention is no longer required.

Examples of case or issues which raise indicia of national significance:

1) **Cases or issues that have precedential character**

- o Initial use of new authorities
- o New use of existing authority
- o Issue of first impression
- o Unresolved policy, legal or technical issue
- o Change in national policy or legal interpretation
- o Applications of new technology

2) **Cases or issues that rise to a level of national attention or significant public interest**

- o Significant citizen concern (especially significant environmental justice issues)
- o Significant political attention
- o Major state/local government relationship issues
- o Cases against municipalities
- o Major environmental or public health threat
- o Shut down of a facility

- o International implications (e.g. trade, import violations, Basel Convention)
- o Major inter-agency implications, including federal facilities
- o Settlements involving cutting edge Supplemental Environmental Projects

3) Cases or issues that are potentially affected by legislative proposals under consideration, emerging regulatory proposals, or evolving policy changes

(e.g. Clean Water Act reauthorization, municipal incineration)

4) Cases that are multi-Regional

- o Multi-Regional case against one company
- o Multi-Regional initiative (e.g. geographic, sector, pollutant, regulation)

5) Cases or issues that deviate from the national norm

- o Deviation from established policy
- o Deviation from established guidance
- o Deviation from previous legal positions

ATTACHMENT C

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

JUL 8 1994

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Redelegation of the Assistant Administrator for OECA's Concurrence Authority in Settlement of Certain Civil Judicial and Administrative Enforcement Actions

FROM: Steven A. Herman
Assistant Administrator

TO: Assistant Administrators
Regional Administrators
Deputy Regional Administrators
Regional Counsel
OECA Office Directors
OECA Division Directors

This memorandum constitutes the formal redelegation of certain settlement concurrence authorities currently reserved for the Assistant Administrator for Enforcement and Compliance Assurance, and serves as an attachment to the July 8, 1994 OECA memorandum entitled, "Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases." The authorities which are hereby redelegated are listed below, as well as the procedure, conditions, and limitations that apply when such redelegated authorities are exercised by either the Regional Counsels or the Director of the Office of Regulatory Enforcement of OECA. The July 8, 1994 memorandum mentioned above should be consulted for additional clarification on the procedures to be used to implement these redelegations, as well as the expectations and responsibilities that follow these settlement authorities.

Authorities

To settle or exercise the Assistant Administrator's concurrence in the settlement of civil judicial and administrative enforcement actions which involve a bottom-line penalty of less than $500,000 under the Clean Water Act, the Safe Drinking Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide and Rodenticide Act, and the Toxic Substances Control Act.

000312

Printed on

To settle or exercise the Assistant Administrator's concurrence in the settlement of civil judicial and administrative enforcement actions which involve a bottom-line penalty of $500,000 or above, in actions under the above-mentioned statutes for which the Director for the Office of Regulatory Enforcement of OECA determines that, in light of the issues presented, the concurrence of the Assistant Administrator is not necessary.

To Whom Redelegated

The Regional Counsels. This authority may not be redelegated.

Process and Limitations

The Regional Counsels must consult with the Assistant Administrator for Enforcement and Compliance Assurance or his designee prior to exercising this redelegated authority under the following circumstances: (1) a proposed settlement would not comport with applicable penalty policies or recover the full amount of economic benefit of noncompliance from a violator not in bankruptcy; or (2) the case raises issues of national significance or otherwise rises to a level of national attention.

The Regional Counsels are responsible in the first instance for identifying such cases and/or issues as they arise, and are expected to inform the Director of the Office of Regulatory Enforcement of the Office of Enforcement and Compliance Assurance as soon as they are identified. Criteria for determining whether a case or issue are nationally significant, or have risen to a level of national attention, are set forth in the July 8, 1994 OECA memorandum entitled "Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases." Particular issues of national interest or concern may also be identified by the Division Directors in the Office of Regulatory Enforcement. Regional Counsels should use discretion in identifying other issues which are nationally significant, yet do not otherwise fall within the guidelines or examples contained therein.

Following the appropriate consultation between the Regional Counsel and the Director of the Office of Regulatory Enforcement of OECA, or the appropriate ORE Division Director, regarding the above-referenced issues, OECA may, at the Division Director level, determine that concurrence of the Assistant Administrator is appropriate for the matter at hand, in which case concurrence will be required.

This redelegation does not extend to Headquarters-initiated cases.

-- 6-1998-10
9/16

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

NOV 9 1994

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: OECA/Regional Procedures for Civil Judicial and Administrative Enforcement Case Redelegation

FROM: Robert I. Van Heuvelen, Director
Office of Regulatory Enforcement

TO: Deputy Regional Administrators, Regions I - X
Regional Counsel, Regions I - X
Regional Program Division Directors, Regions I - X

I. INTRODUCTION

Attached for your reference and use are the procedures for implementing Steven Herman's July 11, 1994 memorandum on "Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases" ("Redelegations Memorandum"). The attached materials also include media-specific examples of nationally significant enforcement issues, a key concept in the redelegations. We expect that the redelegations will result in a substantial net reduction of single Region cases in which OECA's Office of Regulatory Enforcement (ORE) will be significantly involved, including a substantial decrease in the number of settlements requiring OECA/ORE concurrence. As a result, we will be able to focus our involvement on a far smaller number of truly nationally significant cases.

The attached materials result from extensive discussions among the various ORE Divisions and regional program divisions and counsel offices. We would like to take this opportunity to thank all of the regional personnel who worked so cooperatively with us over the last two months to develop both the general cross-program procedures and the media-specific lists and criteria for defining nationally significant issues and cases. We expect these procedures to evolve based on our mutual experience with them, and plan to regularly re-examine and revise them as necessary.

Our intent through these procedures is to lay out a consistent process for identifying to OECA those regionally-initiated judicial and administrative cases that

FEB 13 1998
ECDIC
Recycled/Recyclable
Printed with Soy/Canola Ink on paper that contains at least 50% recycled fiber
000315

present issues of national significance. Specifically, the procedures require regional staff to work with the ORE Divisions and reach agreement on the appropriate level and extent of ORE/OECA's formal role in enforcement case management. In developing these procedures, we have been guided by the following principles set out in the Redelegations Memorandum:

(1) that OECA will focus its efforts and resources on those cases where OECA can add value,

(2) that OECA's involvement will be reserved for cases and issues of national significance;

(3) that for judicial and administrative cases that seek a bottom line penalty of less than $500,000, the Regional Counsel will be delegated the Assistant Administrator's authority to concur on settlements undertaken by the Regional Administrator (or the Regional Division Director, where the Regional Administrator's authority has been redelegated), provided that the settlements adhere to national policy and do not otherwise raise issues of national significance;

(4) that OECA will be flexible in determining the appropriate level of involvement (e.g., ORE has the flexibility to opt out of a case with a bottom line penalty greater than or equal to $500,000 where there are no issues of national significance and the case is not likely to assume a national profile); and

(5) that OECA will be conducting systematic oversight of the Regions through Regional evaluations rather than focusing exclusively on a case-by-case "real time" review approach to determine the extent to which Regions are complying with national policy and the requirements of the redelegations.

Finally, in keeping with the spirit of the redelegations, we want to ensure that ORE's involvement in specific cases makes sense, and that we facilitate effective and efficient resolution of any issues. Regional comments have greatly assisted in designing a cross-program process which provides an opportunity for ORE involvement where appropriate. We appreciate the significant input received from you and your staff, and hope that this constructive dialogue will continue.

II. SUMMARY CHART

The first attachment ("Attachment A") is a chart that summarizes the general ORE/Regional procedures for determining ORE's formal involvement in individual Region cases. The chart provides a quick overview of the general cross-program

procedures, but necessarily leaves out many important details. Accordingly, Attachment B (below) must be consulted to ensure satisfaction of all requirements.

III. GENERAL PROCEDURES

The next attachment ("Attachment B"), entitled "Outline of General Procedures for Regional Enforcement Case Delegation," contains a full description of the general ORE/Regional procedures for determining ORE's formal involvement in Regional civil judicial and administrative enforcement cases. These procedures were thoroughly vetted in an ORE/Regional workgroup that included representatives from all ten Regions, from both the Office of Regional Counsel and from various program divisions.[1] In accordance with Steve Herman's Redelegations Memorandum, the procedures emphasize trust, common sense and streamlining, while at the same time ensuring that decisions regarding ORE's case involvement are adequately documented.

For example, in judicial cases Regions will use an already-existing section in the referral's litigation report to both document and notify ORE of nationally significant issues in the cases. For administrative cases, a simple one-page form will serve as documentation and notice. (For federal facilities cases, Regions should forward the one-page form to the Director of OECA's Federal Facilities Enforcement Office.) Moreover, for judicial and administrative cases with bottom line penalties below $500,000, ORE will require notice only if the cases present nationally significant issues. Of course, because ORE will not otherwise receive formal notice regarding these cases, the Office of Regional Counsel (ORC) must provide adequate advance notice of subsequent significant developments in the litigation (e.g., trial or settlement) and of significant press or other public attention.

Regarding administrative cases with nationally significant issues, the procedures offer some flexibility regarding the timing of coordination with ORE by requiring Regions to notify ORE of such issues before filing the administrative complaint if at all possible, but no later than concurrent with filing. Again, this accords with the Redelegations Memorandum's emphasis on early warning, trust and common sense: we expect that in most situations pre-filing notice will be achievable, but where not,

---

[1] With regard to the procedures, I want to thank Tom Olivier of Region I, Wilkie Sawyer of Region II, John Ruggero and Mary Coe of Region III, Nancy Tommelleo and Truly Bracken of Region IV, Joe Boyle of Region V, Pam Phillips of Region VI, Chuck Figur from Region VIII, Ann Nutt of Region IX and Meg Silver of Region X. These Regional representatives were critical in developing a workable process for implementing the redelegations.

concurrent notice will be sufficient. (There may be very rare occasions where even concurrent notice is not achievable; in such circumstances, notice as close as possible to concurrent with filing will be adequate.)

In almost all circumstances, the five ORE Divisions will use these general cross-program procedures in order to simplify implementation as much as possible. In a few narrow circumstances, media-specific procedures have been established (see Attachment C below). These variations are noted in the attached media-specific guidances, which also identify appropriate individuals to contact within each Division.

Moreover, to further streamline these procedures, the Air Enforcement Division is experimenting with "categoric opt outs" for certain classes of long-established, familiar cases such as Clean Air Act Asbestos NESHAP demolition/renovation actions. These cases will be presumed not to be nationally significant even if their bottom line penalties are above $500,000. Accordingly, Regions will not be required to seek ORE concurrence unless the cases present some other, separate nationally significant issue. (This approach is described in detail in the cross-program procedures.) As with other cases for which OECA is receiving no formal notice, ORC must provide adequate advance notice through other avenues of communication, including the weekly Regional Counsel reports to the Assistant Administrator, of major litigation milestones (e.g., settlement, trial) and of significant press or other public attention. Based on our experience with these categoric opt outs, we may expand them to cover other selected categories of cases in Air or other media.

IV. MEDIA-SPECIFIC GUIDANCE AND NATIONALLY SIGNIFICANT ISSUES LISTS

Also attached are memoranda from each of ORE's Divisions that outline media-specific contacts and procedures where appropriate, as well as media-specific examples of naticnally significant issues ("Attachment C"). Please note that the Redelegations Memorandum itself contains an attachment with general guidelines for identifying nationally significant issues ("Attachment D"). The media-specific examples are intended to be used together with the general guidelines; some of the lists of examples include a listing of the general guidelines for convenience. The media-specific examples will be updated periodically to remove or add issues as appropriate.

V. MULTI-MEDIA CASES

In the interests of streamlining, OECA is seeking to establish a system whereby, absent extenuating circumstances, Regions would need to coordinate with a single office or division that would serve as the lead on a particular case. For cases

brought under multiple statutes (except those brought against federal facilities), the Regions should contact ORE's Multi-Media Enforcement Division, which will coordinate with other OECA offices and divisions as appropriate.

VI. FEDERAL FACILITIES CASES

As listed in Attachment B to the Redelegations Memorandum, federal facilities matters raise indicia of national significance. OECA's contact in federal facilities cases is through the Federal Facilities Enforcement Office (FFEO) rather than the Office of Regulatory Enforcement. Otherwise, procedures in federal facilities cases match those in other nationally significant cases. Thus, Regional Counsels should consult with FFEO regarding federal facilities enforcement cases. Where the Region is assessing a bottom line penalty of less than $500,000 the Director of FFEO or a Division Director level designee may opt in for purposes of concurrence. Where the bottom line penalty is $500,000 or more, the Director of FFEO, at the Office Director level, may opt out of the case for purposes of concurrence. In federal facility cases that present issues of national significance in other program areas, FFEO will take the lead and will work with other OECA offices and divisions, as appropriate, to address the issues.

The above-described process does not alter the procedures in the "Guidance on Coordination of Federal Facility Enforcement Actions with the Office of Enforcement" dated October 20, 1992, which continue as before, and provide for notice to the Director of FFEO as early a possible before certain actions are taken or announced against either federal agencies or their contractor-operators.

VII. CURRENT ENFORCEMENT DOCKETS

Because the Redelegations Memorandum applies to all enforcement cases, the attached procedures and guidance apply to both pending and new cases as of November 1, 1994. Accordingly, for newly-initiated cases, we ask that you implement the procedures immediately. For all existing judicial and administrative cases, Regions should focus their initial efforts on evaluating cases with near-term, action-forcing events, such as hearings, trials, filing of dispositive pleadings or settlements, that will occur within the next 60 days. For other existing judicial cases, the ORE Divisions will be working with

the Regions to review the judicial dockets and identify those cases in which ORE will continue to be involved; this should be completed no later than January 3, 1995.[2]

With regard to all existing administrative cases that do not have near-term, action-forcing events, we ask that by January 3, 1995, the Regions evaluate each case, complete the "Standard Form to Specify Office of Regulatory Enforcement Involvement in Cases"[3], and submit the completed form to the appropriate ORE Division if required by the cross-media procedures. Because ORE may receive a very large number of forms all at once, each of which will require discussions between ORE and Regional staff, we will process these forms within 30 days rather than 10 days (sooner if possible). Future administrative case forms will be processed within 10 days in accordance with the cross-program procedures.

In closing, we want to emphasize that each ORE Division will work closely with their colleagues in the Regions to help ensure that implementation of the attached procedures is as smooth as possible. We want to facilitate issuance of strong enforcement cases within each Region -- that's our bottom line. We intend to approach the implementation of the procedures in that spirit. Again, thank you for your assistance and we look forward to working with you on this.

Attachments

cc: Steven Herman
Scott Fulton
Michael Stahl
OECA Office Directors
John Cruden, DOJ
Bruce Gelber, DOJ
Joel Gross, DOJ

---

[2] In some programs (e.g., Air and Water), much of the work to evaluate the existing judicial docket has already been done. For such programs, we anticipate that the reviews will be completed well before January 3, 1995.

[3] See the cross-program procedures (Attachment C) at page 8.

Summary of EPA Enforcement Case Redelegation Procedures

0003321

Types of Cases	Judicial Referral or Administrative Complaint Stage		Post-Filing Stages
	Nationally Significant Issues (NSIs)	No Nationally Significant Issues	Newly Emerging Issues
Judicial Cases $500,000 and over	o When referral is made, Region will notify OECA of NSIs in referral's litigation report o Separate section in lit report will identify, describe NSIs o 30 days for ORE review o Appropriate ORE Division and Region will discuss, agree on ORE involvement o Memo from ORE Division Director (DD) to Regional Counsel (RC) will memorialize agreement o ORE DD can opt out of case entirely where appropriate	o When referral is made, Region will notify OECA of no NSIs in referral's litigation report o Separate section in lit report will state that there are no NSIs, and recommend that OECA opt out o 30 days for ORE review o If ORE agrees that there are no NSIs, ORE will opt out; if NSIs, ORE and Region will discuss, agree on ORE involvement o Memo from ORE DD to RC will memorialize agreement	o Region will notify OECA of new NSIs as soon as Region identifies them o Informal notice (e.g., phone calls) o Expedited ORE review, with first priority on response to NSI rather than on memorializing agreement o ORE and Region will discuss, agree on ORE involvement o Memo from ORE DD to RC will memorialize agreement, generally within 30 days o ORE DD can decide where appropriate that ORE will have no involvement
Admin Cases $500,000 and over	o Preferably before filing administrative complaint, but no later than concurrent with filing, Region will notify OECA of NSI o One page form signed by RC or designee, identifying NSI and proposing level of ORE involvement in case o 10 days for ORE review o ORE and Region will discuss, agree on ORE involvement o ORE DD or designee will countersign and return form with any agreed-upon amendments; form will be kept in Regional files o ORE DD can opt out of case entirely where appropriate	o Preferably before filing administrative complaint, but no later than concurrent with filing, Region will notify OECA that there are no NSIs o One page form signed by RC, stating that there are no NSIs in case and recommending that ORE opt out o 10 days for ORE review o If ORE agrees that there are no NSIs, ORE will opt out; if NSIs, ORE and Region will discuss, agree on ORE involvement o ORE DD will countersign and return form with any agreed-upon amendments; form will be kept in Regional files	o Region will notify OECA of new NSIs as soon as Region identifies them o One page form signed by RC or designee, identifying NSI and proposing level of ORE involvement in case o 10 days for ORE review o ORE and Region will discuss, agree on ORE involvement o ORE DD or designee will countersign and return form with any agreed-upon amendments; form will be kept in Regional files o ORE DD can decide where appropriate that ORE will have no involvement
Judicial Cases under $500,000	o When referral is made, Region will notify OECA of NSIs in referral's litigation report; Region will send OECA the lit report only if the case contains NSIs o Separate section in lit report will identify, describe NSIs o 30 days for ORE review o ORE and Region will discuss, agree on ORE involvement o Memo from ORE DD to RC will memorialize agreement o ORE DD can opt out of case entirely where appropriate	o When referral is made, Region will make and document its determination that there are no NSIs in the case, but no requirement to inform OECA by providing lit report o Separate section in lit report will state that there are no NSIs in case o Because OECA is receiving no formal notice of these cases, Regions must provide adequate advance notice through other avenues of communication, such as weekly RC reports, if cases are likely to attract significant press or other public attention o ORE Divisions will review determinations during Regional audits	o Region will notify OECA of new NSIs as soon as Region identifies them o Informal notice (e.g., phone calls) o Expedited ORE review, with first priority on response to NSI rather than on memorializing agreement o ORE and Region will discuss, agree on ORE involvement o Memo from ORE DD or designee to RC will memorialize agreement, generally within 30 days o ORE DD can decide where appropriate that ORE will have no involvement
Admin Cases under $500,000	o Same procedures as for administrative cases of $500,000 or over	o Preferably before filing admin complaint, but no later than concurrent with filing, Region will make/document determination of no NSIs, but no requirement to notify OECA by providing one page form o One page form signed by RC or designee, stating no NSIs in case; form will be kept in Regional files o ORE Divisions will review determinations during Regional audits	o Same as for administrative cases of $500,000 or over, except that ORE DD or designee can decide where appropriate that ORE will have no involvement

OUTLINE OF GENERAL PROCEDURES FOR REGIONAL ENFORCEMENT CASE REDELEGATION

November 1, 1994

I. JUDICIAL CASES W/ BOTTOM LINE PENALTY OF $500,000 OR OVER

A. Referral Stage

1. Region identifies case with nationally significant issues.[1]

Timing: At same time Region sends referral (i.e., a direct/indirect referral, pre-referral negotiation package, or consent decree enforcement package) to Department of Justice (DOJ), Region will send referral to Office of Enforcement and Compliance Assurance (OECA) as notification of nationally significant issues in case.

Method: Office of Regional Counsel (ORC) will describe and discuss nationally significant issues in referral's litigation report, in a separate section that already exists for this purpose. Region will provide OECA will full referral package, including attachments.

Decision on Extent of Involvement: Appropriate Office of Regulatory Enforcement (ORE) Division within OECA will have 30 days after receipt of notice for ORE review. Within this timeframe, ORE staff or branch chiefs, as appropriate, will discuss case with Regional counterparts and seek agreement on the extent and duration of OECA involvement, e.g., concurrence or consultation, to be followed by letter from ORE Division Director to Regional Counsel (RC) memorializing agreement.[2] ORE Division Director can also opt out of case entirely where appropriate. If Division Director and RC cannot agree, elevation to ORE Office Director.

---

[1] "Case with nationally significant issues" includes all nationally significant cases or issues as defined in the guidelines attached to Steve Herman's July 11, 1994 Redelegations Memorandum and in the various media-specific issues lists prepared by the Office of Regulatory Enforcement.

[2] "OECA involvement" refers only to OECA's formal role in enforcement case management, not to informal ORE/Regional communications or activities of other OECA offices (e.g., Office of Compliance).

2. No nationally significant issues.

Timing: At same time Region sends referral to DOJ, Region sends referral to OECA as notification that there are no nationally significant issues in case.

Method: In already-existing section of litigation report, ORC will state that there are no nationally significant issues in case, and recommend that OECA opt out. Regions will provide OECA with data sheet and litigation report, but no referral attachments. OECA will request attachments as necessary.

Review of determination: Appropriate ORE Division will have 30 days after receipt of notice to review the ORC recommendation and decide whether OECA will opt out. If ORE agrees, the ORE Division Director will inform the RC via a form letter and opt out of the case.[3] If ORE identifies nationally significant issues, the ORE staff or branch chiefs, as appropriate, will discuss them with Regional counterparts and seek agreement on the extent and duration of OECA involvement, to be followed by letter from the ORE Division Director to RC memorializing agreement. If Division Director and RC cannot agree, elevation to ORE Office Director.

3. No nationally significant issue, and a categoric opt out case (for example, Clean Air Act Asbestos NESHAP demolition/renovation cases).

Timing: At same time Region sends referral to DOJ, Region will make and document determination that the case contains no nationally significant issues and that it falls within a pre-approved category of opt outs, but no requirement to send referral to OECA as notification.

Method: In already-existing section of litigation report, ORC will make and document determination that the case contains no nationally significant issues and that it falls within a pre-approved category of opt outs. Regions not required to provide litigation report or other portions of referral. Because OECA is receiving no formal notice of these cases, ORC must provide adequate advance notice

---

[3] Since after this point ORE will no longer be formally involved in the case unless a nationally significant issue arises later in the proceedings, ORC will need to provide OECA with as early notice as possible regarding subsequent significant developments in the litigation (e.g., trial or settlement) and significant press or other public attention. This applies to all instances where ORE opts out of a case.

through other avenues of communication, including the weekly RC reports to the Assistant Administrator, of major litigation milestones (e.g., settlement, trial) and significant press or other public attention.

Review of Determination: ORE will review categoric opt out determinations during Regional audits.

B. Post-Referral Stages (in cases where OECA originally opted out)

Note: The redelegation itself states that the Regional Counsel are responsible for identifying nationally significant issues "as they arise", and for informing OECA "as soon as they are identified." Accordingly, even where OECA has originally opted out of a case, there is a continuing obligation for the RCs to inform OECA of any nationally significant issues that emerge during the course of litigation. This approach accords with the Redelegations Memorandum's overall insistence on flexibility and common sense.

Timing: As soon as issues identified.

Method: As informally as possible, with emphasis on trust, common sense, and providing the earliest possible warning of new issues, rather than on written notice. For example, a phonecall from ORC to ORE branch chief could serve as notice.

Decision on Extent of Involvement: ORE staff or branch chiefs, as appropriate, will discuss case with Regional counterparts and seek agreement on the extent and duration of OECA involvement, e.g., concurrence or consultation. Agreement will be memorialized by letter from ORE Division Director to RC as soon as possible, generally within 30 days after notice; however, first priority will be quick response to new substantive issue. ORE Division Director can also decide where appropriate that ORE will have no involvement. If Division Director and RC cannot agree on approach, elevation to ORE Office Director.

II. ADMINISTRATIVE CASES WITH PROPOSED OR BOTTOM LINE PENALTY OF $500,000 OR OVER[4]

Note: Only Toxics and RCRA cases presently fall into this category.

A. Filing Stage

1. Region identifies nationally significant issues.

Timing: As soon as Region becomes aware of issue. The preference is that the issue be raised prior to filing the complaint, but no later than concurrent with filing.[5]

Method: One page form signed by the Regional Counsel or designee identifying issues and proposing level of ORE involvement, sent to appropriate ORE Division. Region will also provide proposed or filed complaint, decision memo and/or other existing information to parallel information provided in judicial referral.

Decision on Extent of Involvement: Within 10 days of receipt of notice, ORE staff or branch chiefs, as appropriate, will discuss case with Regional counterparts and seek agreement on the extent and duration of OECA involvement, e.g., concurrence or consultation, to be followed by ORE Division Director or designee, as appropriate, countersigning and returning one page form rather than sending separate letter. (If after discussions ORE decides to opt out, the ORE Division Director must countersign.) Note that the administrative complaint can be filed before ORE countersigns form. Countersigned form will be kept in Regional files. Disputes would be elevated to ORE Office Director.

2. No Nationally Significant Issues

Timing: Same timing as above. Region will notify ORE that no such issues appear in case.

---

[4] If the Region has proposed a penalty in the administrative complaint without calculating a separate bottom line penalty, the proposed penalty should be used. If a separate bottom line penalty has been calculated, it should be used instead. See Redelegations Memorandum, p.3.

[5] For a few small classes of RCRA cases specified in the RCRA redelegations approach, ORE involvement must occur before filing to comport with existing RCRA delegations or guidance.

Method: Same form as above, but will state that there are no nationally significant issues and recommend that ORE opt out of the case. Regional Counsel, not designee, must sign form because ORC is recommending that ORE opt out.

Decision on Extent of Involvement: Same as above, except that ORE Division Director, not designee, must countersign form if ORE opts out. This parallels the procedure for opting out in judicial cases over $500,000 (I.A.2. above).)

B. **Post-Filing Stages (in cases where OECA originally opted out**

Timing: As soon as issues identified.

Method: One page form signed by the Regional Counsel or designee, sent to appropriate ORE Division. (Note that using this form, the same as for other stages of the administrative program, will eliminate the need for a separate return letter from ORE to ORC.)

Decision on Extent of Involvement: Within 10 days of receipt of notice, ORE staff or branch chiefs, as appropriate, will discuss case with Regional counterparts and seek agreement on the extent and duration of OECA involvement, e.g., concurrence or consultation, to be followed by ORE Division Director or designee, as appropriate, countersigning and returning one page form. (If ORE decides to have no involvement, the ORE Division Director must countersign.) Countersigned form will be kept in Regional files. Disputes would be elevated to ORE Office Director.

III. JUDICIAL CASES WITH BOTTOM LINE PENALTY UNDER $500,000

Note: Both the Redelegations Memorandum and the redelegation itself make clear that it is the Regional Counsel's responsibility to identify nationally significant issues in all single Region judicial and administrative enforcement cases below $500,000. "The Regional Counsel will, in the first instance and in keeping with this guidance, make and document the determination whether such a matter raises an issue of national significance." Redelegations Memorandum, p.3. "The Regional Counsel are responsible in the first instance for identifying such cases and/or issues as they arise ...." Redelegation, p.2.

The proposed implementation plan for these cases (described in detail below) would require ORC to formally notify ORE only if the case contained a nationally significant issue. For a case with no such issues, RC would still need to make,

document and file its determination, but would not have to notify ORE of the case. ORE and the Regions would continue to develop informal avenues of communication.

A. Referral Stage

1. Region identifies nationally significant issues.

Timing: At same time Region sends referral to DOJ, Region will send referral to OECA as notification, but only if there are nationally significant issues in the case.

Method: Office of Regional Counsel (ORC) will describe and discuss nationally significant issues in referral's litigation report, in a separate section that already exists for this purpose. Region will provide OECA will full referral package, including attachments.

Decision on Extent of Involvement: Same as for judicial cases over $500,000. Within 30 days of receipt of notice, ORE staff or branch chiefs, as appropriate, will discuss case with Regional counterparts and seek agreement on the extent and duration of OECA involvement, e.g., concurrence or consultation, to be followed by letter from ORE Division Director to RC memorializing agreement. ORE Division Director can also opt out of case entirely where appropriate. If Division Director and RC cannot agree, elevation to ORE Office Director.

2. No nationally significant issues.

Timing: At same time Region sends referral to DOJ, Region will make and document determination that the case contains no nationally significant issues, but no requirement to send referral to OECA as notification.

Method: In already-existing section of litigation report, ORC will make and document determination that the case contains no nationally significant issues. Region not required to provide litigation report or other portions of referral. Because OECA is receiving no formal notice of these cases, ORC must provide adequate advance notice through other avenues of communication, including the weekly RC reports to the Assistant Administrator, of major litigation milestones (e.g., settlement, trial) and significant press or other public attention.

Review of determination: ORE Divisions will review determinations during Regional audits.

B. Post-Filing Stages (cases w/ no prior OECA involvement)

Timing, method and decision on extent of involvement will be same as for judicial cases above $500,000 (I.B. above), except that letters memorializing agreements could be from ORE to ORC Branch Chief rather than from ORE Division Director to RC. ORE DD must still sign letter if ORE decides to have no involvement in case.

V. ADMINISTRATIVE CASES WITH PROPOSED OR BOTTOM LINE PENALTY OF UNDER $500,000

A. Filing Stage

1. Region identifies nationally significant issues.

Timing, method and decision on extent of involvement same as for administrative cases over $500,000 (II.A.1. above).

2. No nationally significant issues.

Timing: In same timeframe as for administrative cases over $500,000, ORC will use one page form to make and document determination that there are no such issues in case, but no requirement to provide OECA with form as notification.

Method: Same one page form as above, but will state that there are no nationally significant issues. Regional Counsel or designee will sign form, which will be kept in Regional files. Because OECA is receiving no formal notice of these cases, ORC must provide adequate advance notice through other avenues of communication, including the weekly RC reports to the Assistant Administrator, of major litigation milestones (e.g., settlement, trial) and significant press or other public attention.

Review of Determination. ORE Divisions will review determinations during Regional audits.

B. Post-Filing Stages (cases w/ no prior OECA involvement)

Timing, method, and decision on extent of involvement could be same as for administrative cases over $500,000 (II.B. above), except that ORE DD or designee can countersign form if ORE decides to have no involvement.

*** PRIVILEGED/CONFIDENTIAL/DO NOT RELEASE UNDER FOIA ***

Standard Form to Specify Office of Regulatory Enforcement Involvement in Cases

Case name: _____

Location of facility: City _____, State _____, Region ____

Forum (check one):

ALJ (or other presiding officer) ___ EAB ___
District or Circuit Court ___ (specify District/Circuit: _____)

Status of case (check all that apply):

Prefiling, in development	___	Dispositive pleadings imminent	___
Filed and pending	___	Trial or hearing imminent	___
Filed and stayed	___	Settlement negotiations ongoing	___
Filed and active	___		

Primary Violations (narrative or listing of sections):

Nationally significant issue(s):

Regional legal and program staff contacts (names, phone numbers, FAX numbers):

Nature of Office of Regulatory Enforcement involvement/assistance proposed by Region:

Signature: _____ _____
Appropriate Regional Manager — Date Signed

Concur: _____ _____
Appropriate ORE Manager — Date Signed

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

A-4

AUG 9 1990

MEMORANDUM

OFFICE OF
ENFORCEMENT AND
~~COMPLIANCE MONITORING~~

SUBJECT: Documenting Penalty Calculations and Justifications in EPA Enforcement Actions

FROM: James M. Strock
Assistant Administrator

TO: Addressees

This memorandum institutes a uniform system for documenting penalty calculations and explaining how they are consistent with the applicable penalty policy in all EPA enforcement actions. It expands on the September 14, 1987 Guidance on Processing of Consent Decrees (GM-64) and requirements in several media specific penalty policies. The system will allow regional and OE management to assure that EPA settlement agreements comply with applicable penalty policies, and will provide documentation for our actions for purposes of oversight review. The memorandum sets out the information regarding the penalty which must be discussed at each stage of litigation. The exact format of the discussion is left to the discretion of each program. All discussions of the agency's settlement position regarding penalties are, of course, strictly enforcement confidential workproduct, should be clearly labeled as such and should not be released.

Effective immediately, every settlement package transmitted from the Regional Administrator or Regional Counsel to Headquarters for concurrence must include a written "Penalty Justification." This should include an explanation of how the penalty, including the economic benefit and gravity component, was calculated. The Region should then discuss in detail the justification for any mitigation of either component. In particular, reference should be made to the factor or language in the penalty policy that is relied upon to justify the mitigation, and a discussion must be included detailing why mitigation is warranted in the particular case. For administrative cases, a Penalty Justification should be prepared for circulation within the Office of Regional Counsel with a final consent agreement or order. It may not be circulated to the agency official who signs the final order as the presiding agency official, usually the Regional Administrator, because it could constitute ex parte communication which would have to be shared with defendants under 40 C.F.R. Part 22.

FEB 25 1993
ECDC
Printed on Recycled Paper

When the factor relied upon to justify mitigation is litigation risk, the Region should state the probable outcome of litigation along with legal and factual analysis which supports its conclusion. For judicial cases, this should be done in consultation with the Department of Justice. Specific discussion of the evidentiary problems, adverse legal precedent, or other litigation problems in the case should be included. If the required discussion of the penalty is contained in the litigation report or subsequent correspondence between the ORC and OE, the settlement package from the Region may reference this discussion along with an attachment of the previous documentation.

A similar discussion of Penalty Justification should also be included in every settlement package transmitted from the Associate Enforcement Counsels for the signature of the Assistant Administrator. The Headquarters staff may, however, reference the discussion in the regional memorandum when it is sufficient. Seriously deficient Penalty Justifications will be returned to the Region to allow a proper analysis to be prepared before the Assistant Administrator for Enforcement reviews a consent decree for signature.

In addition, each Office of Regional Counsel case file and all OE files in cases in which OE is involved should contain at all times during the course of an enforcement action documentation of the current bottom line agreed upon by the litigation team. For civil administrative cases, this will begin with the filing of the administrative complaint. For civil judicial cases, this will begin with the litigation report, which should include the penalty proposed by the Region initially. The litigation report should clearly indicate how the gravity and economic benefit components were calculated under the applicable penalty policy and discuss in detail any mitigation that is proposed. Significant uncertainties which could result in further mitigation should also be identified.

The OE attorney assigned to the case will then determine if OE concurs with the penalty proposed by the Region in reviewing the referral. OE concurrence will be documented in writing, placed in the OE case file and provided to the Region. If OE does not concur with the penalty proposed by the Region in the referral, the assigned OE attorney will prepare a memorandum to the Region stating with specificity the basis(es) of the nonconcurrence.

Once the enforcement action is initiated or pre-filing negotiations begin, the litigation team should document any agreed upon changes to the bottom line penalty based upon new information or circumstances which arise during the course of the enforcement action. This documentation must, at a minimum,

include a memorandum to the file recording how both the gravity and economic benefit components were calculated, the basis in the applicable penalty policy and in the specific facts of the case for any mitigation, and the changed circumstances or new information which justify modification of the bottom line. This will be especially beneficial in cases where there are changes in the litigation team over time. It will enable new attorneys assigned to the case to know what the current bottom line penalty is and how that has been determined over the course of the case.

These requirements will serve several functions. It will ensure that management has adequate information to judge consistency with the applicable penalty policies in specific cases and in the various enforcement programs overall. It also will ensure that every regional case file and all OE files in cases in which OE is involved have written documentation of how the penalty obtained was calculated and justified in terms of the penalty policy. This is essential for reviews or audits of our settlements.

Addressees:

Regional Administrators
Regions I-X

Deputy Regional Administrators
Regions I-X

Regional Counsels
Regions I-X

E. Donald Elliott
General Counsel

Headquarters Compliance Program Division Directors

Associate Enforcement Counsels

Richard B. Stewart
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

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

OCT 3 1991

MEMORANDUM

OFFICE OF ENFORCEMENT

SUBJECT: Credentials Certification Policy

FROM: Raymond B. Ludwiszewski
Acting Assistant Administrator

TO: Regional Administrators, Regions I - X

This policy establishes minimum requirements for a credentials certification program for EPA technical enforcement staff prior to their designation or use as Agency witnesses.

Background

In August 1990, this office developed an options paper for establishing a credentials certification program for EPA technical enforcement staff. We distributed this options paper to the Regional Counsels for their initial reactions. The paper reviewed issues and options for establishing an EPA policy to require our technical enforcement personnel to certify the accuracy of their credentials. The need for this policy was underscored this past summer when we discovered that our main factual and expert witness on two water cases in one Region had misrepresented her academic credentials in a deposition and in an affidavit.[1]

The comments we received on the options paper raised a number of concerns, primarily related to resource investment. In accordance with these comments, we modified the initial program to reduce resource costs by allowing for greater regional flexibility in implementation. We distributed a draft of a revised credentials certification policy on February 15, 1991, for review to all Regional Counsels and Deputy Regional Administrators. Seven Regions responded to this modified policy, two of which were pleased with the revised policy and had no substantive comments. Two Regions continued to express some concerns about the resources needed to implement these certification requirements.

---

[1] The employee has since resigned from the agency, been indicted by a federal grand jury, and pled guilty to one count of perjury. She was sentenced on May 17, 1991 to six months home detention, five years probation, and a $2,000 fine.

Printed on Recycled Paper

In contrast, another Region was concerned that the revised policy's reliance on a visual examination of a framed degree would not be adequate to determine if the degree was authentic and from an accredited institution. While this may be a valid concern, given our limited resources and the fact that we have not to date encountered any instances in which an employee has secured a degree through fraudalent means, we are prepared at this juncture to rely upon visual examination of degrees as a minimum certification.

Another Region pointed out that even if personnel offices are performing an appropriate credentials review at the time of hiring, a problem may arise when an employee obtains additional credentials during his or her tenure at EPA. Since these new credentials would not have been subject to the initial hiring scrutiny, this Region suggested each Region require a periodic (e.g., yearly) sworn credentials update by each employee. We agree that keeping track of changes in credentials is a problem area.[2] The suggested annual update to address the problem appears to be a reasonable approach. It should work best if employees are required to provide official copies of the supplemental credentials to the personnel office or another central office. Regions are free to use this approach or they may rely on the ORC attorney initiated certification checks conducted before an EPA employee is identified as a witness.

Several Regions expressed support for working with personnel offices to ensure that adequate procedures are in place for verifying credentials at the time of hiring. Further, one Region pointed out the need to apply the policy to headquarters witnesses and to OE attorneys when OE attorneys are the lead attorney on the case. We found these and other comments helpful, and the final policy has been revised accordingly.

In summary, as we all recognize, there is a trade-off between resources that may be devoted to implementing a certification program and the risk of a potential credentials falsification incident. We believe that we could not design and implement a certification program that would completely eliminate the risk of falsification. Thus, we have tried to structure a policy that will significantly reduce the risk of future credentials falsification problems without unduly straining limited enforcement resources. The policy should be flexible enough to allow each Region to develop an appropriate credentials certification program.

---

[2] Indeed, this was the situation which caused the recent perjury incident.

We are now asking each Region to establish a program that, at a minimum, satisfies three basic requirements:

1. Certification Check

Each Office of Regional Counsel must establish procedures by which the ORC staff attorneys perform a credentials check of all EPA witnesses in our enforcement cases before an EPA employee or contractor is allowed to sign an affidavit/declaration, be deposed, or testify on behalf of EPA. Similarly, we would not submit a list of witnesses to the opposing side (for a judicial trial or an administrative hearing) until the litigation team had verified the accuracy of the credentials of all of our witnesses.

Each ORC attorney may ask the immediate EPA supervisor of, or the contracting officer for, each witness to perform an appropriate check of the credentials of his or her employee, or contractor, who will be a witness. The verifying official may perform this credentials check either by asking to see the person's credentials (e.g., degree) or by calling the awarding institution. If the degree or professional accreditation is on display in our witness's office, the credentials check may be as simple as reviewing the displayed credentials. If the verifying official has previously verified the employees's credentials, there will be no need to perform another check (assuming the employee's credentials have not changed). Alternatively, the Region may establish a central point (such as in the Region's personnel or administrative office) to conduct such verifications, or the Region may decide to have ORC attorneys conduct the credentials check themselves.[3] The verifying official, if not the ORC attorney, should document in a memorandum to the ORC attorney, that this verification has been completed and how the verification was accomplished. A standard form for this purpose can be developed. If the ORC attorney does the verification, the attorney should document this information in a memorandum to the file.

This verification process applies to all persons who may testify on behalf of EPA, including EPA employees in the Regions, at EPA laboratories, or at Headquarters, and all contractors or consultants retained by EPA or the Department of Justice. If the ORC attorney has difficulty performing a credentials check of an EPA witness located at EPA Headquarters, the ORC attorney should solicit the assistance of the appropriate OE staff attorney. In

[3] Since witness lists and affidavits are often prepared during the press of litigation, Regions should ensure that the verifying procedures they establish can be implemented simply and quickly.

cases where OE is the lead Agency attorney, the OE attorney is responsible for performing the certification checks (with the assistance of an ORC attorney for witnesses located in a Regional office).

One option a Region may wish to explore is to have the Region's personnel office do a one-time independent verification check of the credentials of all Regional employees. If this was done for all existing employees and new employees were properly screened at the time of hiring, then ORC attorneys would only need to verify any new or additional credentials that an EPA Regional employee may have obtained during his or her tenure at EPA. While this option may entail the expenditure of considerable resources initially, in the long run it may save resources and will minimize the need to do full credentials checks during the rush of litigation.

2. Education and Training

Each Region should educate their enforcement staff on the importance of truthfully representing their credentials in all dealings with the public, including enforcement cases. All employees should be informed of the negative consequences of falsification of credentials, both to the Agency and to the individual. Specifically, employees should be reminded what constitutes perjury, that it is a felony to lie under oath, and that falsification or even exaggeration of credentials may be grounds for immediate removal from their jobs and referral for criminal prosecution. In addition, employees should be reminded of the importance of truthfully stating their professional opinions. This information could be communicated via a memorandum to all Regional employees and should be integrated into Regional training programs. The Office of Enforcement will be stressing these same points in our basic inspector training manual.

3. Personnel Procedures

Each Region should set up a meeting to review how its personnel office verifies that EPA Regional employees have the credentials they claim they have at the time of hiring. Please emphasize to your personnel offices the importance of their role in independently verifying credentials.

These three requirements must be institutionalized as part of each Region's standard operations and should be reviewed periodically to ensure that the procedures are being implemented. Please keep in mind that these three requirements are only a minimum and by themselves may not be a perfect system for eliminating the risk that the Agency will be hurt by a misrepresentation.

Required Action

Each Region should complete implementation of these procedures by August 15, 1991. Please advise me by no later than August 30, 1991, of the actions you have taken to implement this policy. If you have any questions regarding this policy, you may call Scott Fulton, Director of Civil Enforcement, at 382-4540. David Hindin is the OE staff attorney contact, 475-8547.

Thank you for your cooperation and assistance.

Attachment

cc: Regional Counsels, Regions I - X
Charlie Grizzle, OARM
Associate Enforcement Counsels, OE
Robert Heiss, OE
Frank Covington, OE (NEIC)
John Cruden, DOJ

From In the Matter of Celltech Media, Inc., aka Health Care Products, Inc.,Docket Nos. FIFRA 95-H-04, FIFRA 93-H-02F, and I.F.& R. VIII-90-279C, Complainant's Prehearing Exchange (Feb. 26, 1996)

IV.PENALTIES

Although Complainant will present at hearing factual evidence relevant to the determination of a proper penalty for the violations charged, Complainant does not intend to have a witness testify to the appropriateness of the proposed penalty unless directed to do so by the Presiding Officer. The appropriateness of the penalty is more an issue of statutory interpretation than of fact. Interpretation of statutory language is an issue of law and policy, not an issue of fact. See generally Stissi v. Interstate and Ocean Transport, 765 F.2d 370, 374 (2d Cir. 1985), and International Society for Krishna Consciousness v. Rochford, 425 F.Supp. 734, 739 (N.D. Ill. 1977). It is improper for a witness to present "evidence" on legal issues in an evidentiary hearing. See Adalman v. Baker, Watts & Co. 807 F.2d 359, 368 (4th Cir. 1986); Marx & Co., Inc. v. Diners' Club, Inc., 550 F.2d 505, 510 (2d Cir. 1977) (_expert testimony on law is excluded because _the tribunal does not need the witnesses' judgment...the judge (or the jury as instructed by the judge) can determine equally well...._ The special legal knowledge of the judge makes the witness' testimony superfluous._); McCormick on Evidence, § 12 at 26-27 (Such testimony "amounts to no more than an expression of the [witness'] general belief as to how the case should be

decided."). Any challenges to Complainant_s interpretation and application of the statutory factors in penalty assessment should be made through legal and policy arguments rather than through argument with a fact witness. Arguments as to the merits of the Agency's assumptions and statutory interpretations are properly presented in briefs and oral argument.

Complainant_s argument for the appropriateness of the proposed penalties in these consolidated cases is presented below.

A. The Statutory Factors

FIFRA strictly regulates the sale, distribution and use of the one category of toxic chemicals whose specific, intended purpose is to cause harm to living things. Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361, states that a registrant, commercial applicator, wholesaler, dealer, or distributor of pesticides may be assessed a civil penalty of up to $5,000 for each violation of FIFRA. In determining the amount of the penalty, FIFRA requires that the EPA consider the appropriateness of the penalty to the size of the business of the person charged, the effect of the penalty on the person's ability to continue in business, and the gravity of the violation. (FIFRA section 14(a)(4), 7 U.S.C. § 1361(a)(4))

1. Gravity

FIFRA does not define _gravity of the violation_, but it is reasonable and appropriate to interpret this expression as

encompassing the concepts of risk, harm, and culpability. Risk is commonly defined as the combination of the probability of an adverse outcome occurring and the severity of that adverse outcome. The possible violations of FIFRA may be roughly ranked in terms of their inherent risk, so that, for example, a misuse violation would generally pose a greater risk than would a minor error on an annual production volume report. The former example would directly increase risk to health and the environment as it pertains to the actual use of a pesticide in a manner that EPA has in essence prohibited, while in the latter example the only direct consequence of the violation is that EPA does not have the complete and accurate information it needs to consider the risks posed by the pesticide or to monitor compliance with FIFRA. It would not be reasonable to construe _gravity of the violation_ in a manner that did not give considerable weight to this sort of ranking of the risks resulting from violations.

All violations pose some increase in risk to health or the environment, but not all violations result in actual harm. Although the regulatory provisions of FIFRA generally direct the Administrator to act in such a manner as to minimize _unreasonable adverse effects_ that expression is defined at FIFRA section 2(bb) to mean unreasonable risk. It is appropriate to give greater weight to risk than to harm in assessing penalties for violations of FIFRA, in part because whether such harms occur at all often depends on factors wholly outside the violator_s control. For example, if two persons commit exactly the same violation, one may result in greater harm than the other

for no reason other than the direction the wind blows, differing sensitivities among the exposed persons, or geese choosing to feed in one field rather than another. Accordingly, while some consideration should be given to actual harm, risk is a better measure of the gravity of a violation and should be given greater weight in assessing penalties.

It is also appropriate to give greater weight to risk than to harm because harm is often difficult to assess. For example, many human health harms from pesticide exposure are transient and mistaken for something else, or else cause long-term effects that are not manifest for years. Environmental harms such as wildlife kills and ecosystem degradation are typically difficult to discern and difficult to attribute to a particular event. As EPA observed in the diazinon cancellation proceeding, the number and frequency of adverse effects on wildlife cannot be precisely quantified. _Due to the widespread failure to observe, report, investigate, and diagnose bird kills, reported kills represent only _the tip of the iceberg_ of total actual kills._ In the Matter of Ciba-Geigy Corp., Remand Decision , 55 Fed. Reg. 31133, 31140 (July 31, 1990).

The toxicity of the pesticide involved in a violation also influences the risk associated with the violation, and therefore the gravity of the violation. Plainly, the misuse of a highly toxic pesticide poses a greater risk than the misuse of a less toxic pesticide.

Culpability, in its broadest sense, involves elements of scienter, malice, recklessness, negligence, good faith, control

over the circumstances and persons involved in the violation, and history of compliance or noncompliance. Where culpability is greatest, violations are treated as criminal violations. Civil enforcement is appropriate for unintentional violations, including violations that occur despite a person_s best efforts to comply with the law, despite poor judgment by a person_s agent, and despite otherwise unblemished records of compliance. While each of these factors is relevant to the gravity of the violation, they must be subordinate to considerations of the risks associated with the violation. Consideration of the purposes of FIFRA reveal why this must be so.

The overriding purpose of FIFRA is to prevent pesticides from causing unreasonable risks. FIFRA generally prohibits sale and distribution of pesticides unless registered by EPA, and conditions EPA approval of registration upon an EPA determination that:

> [W]hen considered with any restrictions imposed [by EPA as conditions of registration] ... it will perform its intended function without unreasonable adverse effects on the environment[, and] when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

FIFRA section 3(b)(5).

Where Congress includes penalty and enforcement provisions in a statute, those provisions are presumably intended to further the purposes of the statute. As the primary purpose of FIFRA is to reduce risk and prevent unreasonable risk, it follows that

implementation of the civil penalty provisions of FIFRA section 14(a) should be harmonious with that primary purpose. A degree of a violator_s culpability does not alter the risk that results from a failure to comply with FIFRA or the regulations promulgated thereunder. Culpability, therefore, is not relevant to the main purpose of FIFRA. Accordingly, Congress_ goal of reducing risks of pesticides is best furthered in penalty assessment by making the risk of harm inherent in a violation the predominate factor in assessing a civil penalty, while making culpability and other factors subordinate.

2. Size of Business

FIFRA section 14(a)(4) requires that EPA consider the appropriateness of the penalty to the size of the business of the person charged. Size of business is not defined in FIFRA, but could reasonably be measured in terms of assets, number of employees, quantities of pesticides used and/or produced, number of pesticides used and/or produced, etc. A financial measure seems the most appropriate choice in light of the financial nature of civil penalties, and gross revenue is the best-defined and most easily accessible financial measure of the size of businesses.

Once a method of determining the size of a business is selected, one must decide how to take it into account. One way to take the size of a business into account would be to make penalties directly proportional to the size of the business, but this would make precise quantification of the size of business a

key issue in every case. An alternative approach of establishing certain thresholds would avoid this burden in the majority of cases. It is less important to distinguish between companies with gross sales of $500,000 and $600,000 than it is to distinguish large companies which have (or reasonably should have) sophisticated regulatory compliance programs and smaller companies that may not be able to afford them. A three-tier system which distinguishes between true small businesses, mid-size businesses with substantial resource limitations, and larger businesses is an efficient and meaningful method of implementing the statutory requirement to consider the appropriateness of the penalty to the size of the business.

3. Ability to Continue in Business

FIFRA section 14(a)(4) requires EPA to consider the effect of a penalty on the person's ability to continue in business. The Tenth Circuit has interpreted this as placing on the Agency an affirmative duty to include in the record evidence concerning the effect of a penalty on the person's ability to continue in business, even where the respondent does not contest the penalty. Katzson Bros., Inc. v. EPA, 839 F.2d 1396, 1400-01 (10th Cir. 1988). Section 14(a)(4), however, does not prohibit the assessment of a penalty that would force a company out of business, as the statute only requires that EPA "consider...the effect on the person's ability to continue in business...."

B. Application of the Statutory Factors

Following interpretation of the penalty factors mandated under FIFRA section 14, the next step is to consider how these statutory factors apply to the facts of the present cases.

1. Gravity

All of the violations at issue pertain to a pesticide registered for uses such as sterilizing surgical instruments and disinfecting hard surfaces such as countertops, operating tables, and medical equipment in hospitals. The risks associated with sterilants are two-fold: There is the risk of adverse effects to health or the environment as a result of exposure to the pesticide, and the risks of infection when the sterilant does not perform as expected.

EPA has established four categories based on acute toxicity, each requiring a different signal word on the pesticide label to alert users to the risk of acute toxicity associated with the product. See 40 C.F.R. § 156.10(I). From lowest acute toxicity to highest acute toxicity, the required signal words are _Caution_, _Warning_, _Danger_, and _Poison_. WipeOut meets the criteria of Toxicity Category I, and requires the signal word _Danger_. WipeOut is thus among the more acutely toxic pesticides registered by EPA, indicating that the gravity of violations involving WipeOut should generally be considered higher than average based on acute toxicity alone.

In the case of a sterilant, however, risks of infection resulting from inefficacy probably exceed those associated with

WipeOut_s substantial acute toxicity. The single registered product at issue in these actions is used for sterilization of medical equipment used in invasive medical and veterinary procedures. Such instruments include, for example, dental instruments and endoscopes. These instruments, if not properly sterilized, may transmit pathogenic microorganisms between patients. For this reason, the efficacy of the sterilizing solutions used on the instruments is crucial, and the gravity of inefficacy is severe.

In addition, the multiple unregistered products are used for many different antimicrobial purposes to protect the public from infectious risks posed by microorganisms. None of these unregistered products ever completed the EPA review procedure for sterilant or disinfectant products. Moreover, no registered glutaraldehyde based sterilant product has glutaraldehyde levels as low as Respondent's unregistered products. Therefore, persons relying on these products were without the expected assurance that such products work as claimed, and consequently experienced an unreasonable risk of infection.

In this case, as in most, it is easier to identify the risk associated with violation than it is to identify actual harms. It has not been possible to count or to identify the persons who contracted diseases as a consequence of misplaced reliance on the ineffective sterilant WipeOut. It is fortunate that WipeOut_s inefficacy was identified through EPA_s own testing, rather by epidemiologists investigating a disease outbreak. As discussed above, it is appropriate in assessing penalties to give greater

weight to the risk of the violation than to actual harm.

Turning to the relative risks inherent in the specific violations at issue, most present substantial risk. The majority of the counts allege sale of sterilants that are misbranded owing to their inefficacy, specifically, sale of sterilants that do not kill pathogens as claimed. The pesticide is intended for use in hospitals, under circumstances where risk of infection is high owing to the routine presence of pathogens, the likelihood of surgery and other invasive procedures, and the likelihood that the persons and domestic animals exposed already have stressed immune systems. Compared to the entire range of risks that FIFRA is intended to regulate, the sale of sterilants that do not kill pathogens as claimed poses risks that are clearly at the high end of the spectrum.

The second largest group of counts allege sale of unregistered products. FIFRA is at its heart a licensing law, prohibiting the sale and distribution of pesticides unless the pesticides satisfy the requirements for registration. In the registration process, EPA performs risk assessments on each pesticide, and determines the particular uses and conditions of use, if any, that will allow the pesticide to be used without unreasonable risk. The introduction into commerce of an unregistered pesticide plainly circumvents the entire regulatory and risk management system intended under FIFRA, and is therefore a violation of considerable gravity.

Several other counts charge Respondent with misbranding by making on behalf of the product pesticidal claims that differ

from those approved by EPA in registration. Like the sale of an unregistered product, this violation thwarts the registration system established by FIFRA. EPA manages the risks inherent in pesticides by approving each pesticide for certain uses and disallowing others, based upon a weighing of the risks and benefits posed by each use. For each permitted use, EPA specifies the amount of pesticide to be used, the timing of the application, and other precautions to assure that the use does not pose unreasonable risks.

Registrant's WipeOut Cold Sterilizing Solution bears the following claims, among others: "May be reused as a high level disinfecting solution and will maintain 100% efficacy for 45 days..."; "Safe for Scopes..."; "Disinfection was achieved in 15 minutes at 68 degrees fahrenheit against M. Tuberculosis and M. bovis..."; "WipeOut activated solution may be diluted 1:1 with water...After activation, the WipeOut solution will maintain 100% efficacy for 45 days..."; and "For use on all hard non-porous surfaces...." All these claims are substantially different from the accepted labeling for the product, and all relate to use of the product to protect humans from infectious pathogens. The risks associated with these differing claims is identical to the risks posed by an unregistered pesticide product, namely that there has been no Agency review of whether the particular use of the product poses an unreasonable risk. This is a grave and substantial risk, implicating concerns for public health.

Respondent is charged with failure to submit to EPA information concerning unreasonable adverse effects of a

pesticide, as required under section 6(a)(2) of FIFRA. _Congress recognized that the risk-benefit balance initially performed at the time of registration could change upon reevaluation of the existing information or as new information concerning the risks or benefits of a pesticide became available._ Chemical Specialties Manufacturers Ass'n v. EPA, 484 F. Supp. 513, 516 (1980). Section 6(a)(2) assures that if, after EPA has registered a pesticide, a registrant becomes aware of new information which indicates that the pesticide might pose greater or different risks than were evaluated during registration, the registrant is obligated to submit such information to EPA for its consideration. Depending upon the significance of such information, EPA might seek to cancel or suspend the pesticide registration, modify label precautions, require additional testing, or simply wait and watch to see if the adverse effect is confirmed elsewhere. The specific information Respondent failed to submit to EPA was that a batch of its pesticide product did not work when used in accordance with its label instructions. This information, withheld from EPA for more than a year, would have allowed the Agency to take action to prevent needless risks to the public relying on the batch of sterilant Respondent knew to be ineffective. Moreover, by depriving EPA of this new information concerning the adverse effects of the pesticide, Respondent delayed EPA_s general reevaluation of the risks and benefits posed by the pesticide, and prevented EPA from taking timely actions appropriate to protect health and the environment.

Respondent is charged with failure to maintain the

underlying raw data from studies submitted to EPA in support its registration application for WipeOut Cold Sterilizing Solution, EPA Reg. No. 58994-1.

With respect to retention of documentary raw data and other similar records connected with registration support data, the Agency has concluded that such data should be retained for the life of the registration of the pesticide. Such retention affords both the applicant and the Agency the opportunity to conduct further studies and investigations at any time during which the pesticide is being used and entering the environment. Pesticide Programs; Good Laboratory Practice Standards; Final Rule, 48 Fed. Reg. 53946, 53961-62 (Nov. 29, 1983).

In the absence of the underlying raw data, it is impossible for EPA to assess the accuracy or reliability of studies upon which EPA relies in assessing the risks and benefits of a pesticide. Without recourse to the raw data, EPA may not be able to determine whether a single batch failure, such as described in connection with Count XXXVI, is an isolated, batch-specific failure or whether failures are likely to occur routinely.

Respondent is charged with failure to label its product with either an EPA Registration Number or an EPA Establishment Number. FIFRA prescribes regulatory scheme of cradle to grave labeling of pesticides to protect man and the environment from unreasonable risks. One of the major functions of EPA Registration Numbers and EPA Establishment Numbers is to provide a ready method for identifying and responding to product which have problems. These problems can include matters such as contamination,

misformulation or, particularly for sterilants such as the registered product at issue in this matter, inefficacy. A pesticide label without the required identifying information can make it more difficult for the Agency and the registrant to appropriately respond to any unreasonable risk to human health or the environment posed by a pesticide. This inability to manage risk effectively creates a significant risk in and of itself.

As discussed above, evaluating the gravity of a violation reasonably includes consideration of the violator_s culpability. In the present case, Respondent_s violations apparently have resulted from negligence. All of the violations charged could have been prevented by Respondent had it exercised due diligence. Respondent has no history of prior violations, however, the fact that EPA has identified so many different violations of different requirements of FIFRA indicates that Respondent_s overall compliance program is substantially deficient. This suggests a non-trivial level of negligence and a moderately high level of culpability.

In summary of the gravity component of the violations in this case, it is demonstrated that the violations pose an unreasonable risk to health and the environment, that they may well have resulted in actual harm, and that Respondent_s culpability is moderately high. Consideration of the facts of this case supports a finding that the gravity of the violations at issue is great, suggesting that penalties at the high end of the range would be appropriate.

2. Size of Business

The size of a business may reasonably be determined by a company's gross revenues from all revenue sources during the prior calendar year, as this figure is readily accessible for publicly held corporations and provides a meaningful characterization of the relative sizes of businesses. Respondent and its subsidiary Meditox had total annual sales of approximately 3.8 million in 1992. Respondent is a major manufacturer and one of the leading companies in the sterilant industry. Respondent_s business is clearly a substantial one, and is of a size that should properly be held accountable for strict compliance with laws that protect health and the environment. Accordingly, the penalty assessed should be at the high end of the scale in consideration of size of business.

3. Ability to Continue in Business

Respondent and its Meditox Subsidiary had total annual sales of approximately $3.8 million in 1992. Respondent has asserted that paying the proposed penalty would compromise its ability to continue in business, but has made minor effort to substantiate this assertion.

C. The FIFRA Enforcement Response Policy

1.The Role of the FIFRA ERP in Administrative Penalty Proceedings

The discussion above presents interpretations of the statutory factors that must be considered in the assessment of a

civil penalty, and application of those factors to the specific facts of the present case. While this analysis is essential in broadly evaluating the appropriateness of the proposed penalty, when it comes time to choose for each violation a specific dollar figure, an element of subjectivity inevitably enters in. In order to avoid purely ad hoc penalty assessments, with their attendant risks of arbitrary and capricious decision making, the Agency employs a collection of penalty policies.

The FIFRA Enforcement Response Policy (_FIFRA ERP_) sets forth a comprehensive, rational and reasonable framework for applying each of the statutorily-mandated factors to the facts of a case and places each type of FIFRA violation in context with the other types of FIFRA violations. The FIFRA ERP, like EPA_s other penalty policies, is designed to promote three specific goals -- deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems. See EPA General Enforcement Policy # GM-21: Policy on Civil Penalties, at 1 (Feb. 16, 1984).

Fair and equitable treatment requires that the Agency_s penalties must display both consistency and flexibility. The consistent application of a penalty policy is important because otherwise the resulting penalties might be seen as being arbitrarily assessed. Thus violators would be more inclined to litigate over those penalties. This would consume Agency resources and make swift resolution of environmental problems less likely.

But any system for calculating penalties must have enough flexibility to make adjustments to reflect legitimate differences

between similar violations. Otherwise the policy might be viewed as unfair. Again, the result would be to undermine the goals of the Agency to achieve swift and equitable resolutions of environmental problems.

Id. at 4.

Any assessment of a civil penalty must explain how the penalty assessed reflects the facts of the case and the statutorily-mandated factors in order to make a record of the agency action for purposes of judicial review. This record must show that the Agency interpreted and applied the statutorily-mandated penalty factors to the facts of the case when assessing a penalty. The Presiding Officer may adopt the interpretations of those statutory factors advocated by either party, or may adopt a completely different interpretation, provided that it is consistent with the statute and prior decisions of the Environmental Appeals Board. Regardless of what interpretation of the statutory factors a Presiding Officer relies upon in assessing a penalty, the decision is subject to reversal pursuant to section 706(2)(A) of the Administrative Procedure Act if arbitrary or capricious. Accordingly, the interpretation and application of the statutory factors must be rational and consistent, and must be clearly articulated in order to allow for meaningful review by the EAB or the Federal Courts of Appeals. The D.C. Circuit has made it clear that administrative adjudications must be supported by findings and reasons that appear in the record:

One basic procedural safeguard requires the administrative

adjudicator, by written opinion, to state findings of fact and reason that support its decision. These findings and reasons must be sufficient to reflect a considered response to the evidence and contentions of the losing party and to allow for a thoughtful judicial review if one is sought.... Moreover, a court "cannot 'accept appellate counsel's post hoc rationalizations for agency action'; for an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" Harborlite Corp. v. ICC, 613 F.2d 1088, 1092 (D.C. Cir. 1979) (quoting FPC v. Texaco, Inc., 417 U.S. 380, 397, 41 L. Ed. 2d 141, 94 S. Ct. 2315 (1974)) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69, 9 L. Ed. 2d 207, 83 S. Ct. 239 (1962)). See also Morton v. Dow, 525 F.2d 1302 (10th Cir. 1975) (agency's decision upheld because the Administrative Law Judge made the necessary findings on the ultimate issues, clearly indicated his reasoning, and gave evidence to support his conclusions).

A Presiding Officer must employ some consistent methodology for interpreting the statutory factors and applying them to the facts of the cases, or else resort to ad hoc penalty assessment, where the necessary policy judgments and assumptions are made anew in each case. Through an ad hoc penalty assessment, the penalty for any violation could fall anywhere between zero and the statutory maximum, depending on how the statutory factors are interpreted and how the facts are weighed in that case. An ad hoc approach would not meet minimum standards of fairness and rationality, and would be more subject to challenge as arbitrary

and capricious. Although the FIFRA ERP does not represent the only rational or reasonable methodology for interpreting and applying the requirements of FIFRA section 14, the Presiding Officer must apply some penalty assessment methodology that is at least as rational and reasonable as that in the FIFRA ERP.

Where the Presiding Officer finds that the rationale and approach of a penalty policy, in whole or in part, is appropriate in a particular case, it is permissible for the Presiding Officer to set forth the specific reasons for the penalty assessment by reference to the reasoning and approach of the applicable penalty policy. As the Board observed in DIC Americas:

By referring to the penalty policy as a basis for assessing a particular penalty, the presiding officer is incorporating the underlying rationale of the policy into her decision. The reference to the policy becomes, in effect, a form of "shorthand" for explaining the rationale underlying the penalty assessment. DIC Americas at 7. Regardless, though, of whether the Presiding Officer agrees with the statutory interpretations or follows the penalty rationale advocated by one party, the Presiding Officer must in each case explain how the statutory factors were applied to the facts of the case to reach the penalty assessed. The Consolidated Rules of Agency Practice require that "the Presiding Officer shall set forth the specific reasons for the increase or decrease" from the penalty proposed in the complaint. 40 C.F.R. § 22.27(b).

The FIFRA ERP describes a comprehensive five step process to determine administrative civil penalties consistent with the

criteria of FIFRA section 14(a)(4) and appropriate to the facts and circumstances of the particular case:

These steps are: (1) determination of gravity or "level" of the violation using Appendix A of this ERP; (2) determination of the size of business category for the violator, found in Table 2; (3) use of the FIFRA civil penalty matrices found in Table I to determine the dollar amount associated with the gravity level of violation and the size of business category of the violator; (4) further gravity adjustments of the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator, using the 'Gravity Adjustment Criteria' found in Appendix B; and (5) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business, in accordance with the criteria established in this ERP.

(FIFRA ERP, p. 18, CX 83)

This five step process addresses factors specific to the violator_s conduct and the consequences of the specific violations. Each of the five steps outlined above is discussed below in regard to the violations charged in each complaint.

2. FIFRA 93-H-02

The Complaint in FIFRA 93-H-02 proposes a civil penalty of $200,000. This proposed penalty was calculated in accordance with the statutory factors articulated in FIFRA as captured by the July 2, 1990 FIFRA ERP (CX 83).

Step 1: Determination of gravity or level of violation

The first step is to determine the intrinsic gravity level of the violation. Appendix A of the FIFRA ERP contains a listing of anticipate violations of FIFRA and assigns to each a gravity level. Violations with the highest intrinsic gravity are assigned to level 1, and those of the lowest gravity are assigned to level 4. According to Appendix A of the ERP, the sale or distribution of a pesticide which is misbranded, in that the label has a statement, design, or graphic representation which is false or misleading, as alleged in Counts I-XXXIV, is a level 2 violation. (FIFRA ERP, p. A-1, CX 83; Penalty Worksheet, CX 82) The sale or distribution of a registered pesticide if any claims made for it as a part of its sale or distribution substantially differ from any claims made for it in registration under FIFRA section 3, as alleged in Count XXXV, is a level 2 violation. (FIFRA ERP, p. A-1, CX 83; Penalty Worksheet, CX 82) The failure of a registrant, wholesaler, dealer, retailer, or other distributor to file reports required by FIFRA, as alleged in Count XXXVI, is a level 2 violation. (FIFRA ERP, p. A-6, CX 83; Penalty Worksheet, CX 82) The failure to submit any records required by or under FIFRA section 8, as alleged in Counts XXXVII-XL, is a level 2 violation. (FIFRA ERP, p. A-3, CX 83; Penalty Worksheet, CX 82)

Step 2: Determination of Size of Business

The second step is to consider the appropriateness of the penalty relative to the size of the business. Penalties under

the FIFRA ERP can vary depending on the size of the business, as determined by the violator_s gross revenues from all revenue sources during the prior calendar year (FIFRA ERP, p. 20, CX 83). Business are grouped into three tiers, large (gross revenues in excess of $1,000,00), medium (gross revenues between $300,001 and $1,000,000) and small (gross revenues $300,000 or less).

Respondent and its Meditox Subsidiary has total annual sales of approximately $3.8 million in 1992. (Dun and Bradstreet Reports, CX 82C and 82D). Respondent is therefore in size of business category I, for section 14(a)(1) violators whose gross revenues exceed $1,000,000 annually. (FIFRA ERP, p. 20, CX 83; Penalty Worksheet, CX 82)

Step 3: Determination of Dollar Amount

Third, the gravity level and size of business are applied to the FIFRA Civil Penalty Matrix to determine a penalty appropriate for the nature of the violation and the size of business. The matrix is designed so that small businesses that commit less serious violations are penalized much less severely than large businesses that commit more serious violations. For FIFRA section 14(a)(1) violators in size of business category I who have committed gravity level 2 violations, the FIFRA Civil Penalty Matrix indicates a base penalty of $5,000. (FIFRA ERP, p. 19, CX 83; Penalty Worksheet, CX 82)

Step 4: Gravity Adjustments to Base Penalty

The fourth step is to adjust the base penalty for the

toxicity of the specific pesticide involved, the actual or potential harm to human health or the environment, and the compliance history and culpability of the violator using a set of five "Gravity Adjustment Criteria" described in Appendix B of the FIFRA ERP. This process, which assigns a numeric value to each of the Gravity Adjustment Criteria, provides additional flexibility allowing EPA to carefully tailor the penalty to the facts of and circumstances of the instant case. The separate values are summed as aggravating or mitigating factors to adjust the penalty upwards or downwards. Accordingly, culpable conduct by violators with a poor compliance history creating a great risk to human health or the environment will be penalized more severely that a merely negligent first time violator who does not create a major human health or environmental risk.

For the first criteria, _pesticide_, Respondent was given a value of 2, because its product labels contain the signal word "danger" based on its acute toxicity. (FIFRA ERP, p. B-1, CX 83; Penalty Worksheet, CX 82)

For the second criteria, _harm to human health_, Respondent was given the value 5 because of actual serious or widespread harm to human health. (FIFRA ERP, p. B-1, CX 83; Enforcement Case Reviews, CX 12B, 30B, 49C, 51C; Penalty Worksheet, CX 82)

For the third criteria, _environmental harm_, Respondent was given a value of 5 because of actual serious or widespread harm to human health. (FIFRA ERP, p. B-1, CX 83; Enforcement Case Reviews, CX 12B, 30B, 49C, 51C; Penalty Worksheet, CX 82)

For the fourth criteria, _compliance history_, Respondent

was given a value of 0 for having no prior violation. (Penalty Worksheet, CX 82)

For the fifth criteria, _culpability_, Respondent was given a value of 2 because its culpability is unknown but presumed to be negligent. (Penalty Worksheet, CX 82) The sum of the gravity adjustment factors is 14.

According to Table 3 of the FIFRA ERP, a gravity adjustment value of 18 requires a 15 percent upwards adjustment of the penalty (FIFRA ERP, p. 22, CX 83). However, the base penalty of $5,000 per violation determined in Steps 1 through 3 above can not be increased for Respondent because it is already at the statutory maximum for FIFRA section 14(a)(1) violators. (FIFRA ERP, p. 22, Table 3, footnote **, CX 83; Penalty Worksheet, CX 82)

Step 5: Ability to Continue in Business

The fifth step is to consider the impact of the penalty on the violator_s ability to remain in business. Based on the Dun and Bradstreet Report for Health Care Products (CX 82C) and the Dun and Bradstreet Report for Health Care Products Meditox Subsidiary (CX 82D), Complainant believes that Respondent can pay the proposed penalty without significant impact on its ability to continue in business.

3. FIFRA 95-H-04

The analysis above for the misbranding counts in FIFRA 93-H-02 applies without alteration to the misbranding counts in FIFRA 95-H-04. Respondent is also charged with 40 counts for

sale or distribution of an unregistered pesticide, which is a Gravity Level 2 violation. (FIFRA ERP, p. A-1, CX 83; Penalty Worksheet, CX 82A) Size of business is Category 1, as in FIFRA 93-H-02, which yields a base penalty of $5,000 according to the Civil Penalty Matrix (FIFRA ERP, p. 19, CX 83; Penalty Worksheet, CX 82A) Gravity adjustment factors are the same as used in FIFRA 93-H-02, with one qualification. The pesticide toxicity for the unregistered pesticides has not been determined and so, is not available for use as an adjustment factor. In its absence, Complainant has used the same gravity adjustment factor as in FIFRA 93-H-02 given that the greatest risk is the risk of infection owing to inefficacy and given that the unregistered products contain the same active ingredient as the registered product.

4. I. F. & R. VIII-90-279C

The current FIFRA Enforcement Response Policy was issued on July 2, 1990, superseding the prior EPA policy, the FIFRA Civil Penalty Assessment Guideline, issued July 31, 1974. The complaint in I. F. & R. VIII-90-279C predates the 1990 FIFRA ERP and reflects penalty calculations under the 1974 penalty policy. The above discussion of the penalty calculations in FIFRA 93-H-02 and FIFRA 95-H-04 are based on the 1990 FIFRA ERP and reflects the Agency_s current interpretation and implementation of the statutory factors for these violations. Complainant has not sought to amend the complaint in I. F. & R. VIII-90-279C to seek the higher penalties called for under current policy. Accordingly, rather than discuss in detail the mechanics of the

1974 penalty policy, Complainant merely notes that the current FIFRA ERP calls for higher penalties than proposed in the I. F. & R. VIII-90-279C complaint and refers to the above discussion as fully supportive of penalties at least as high as those sought in I. F. & R. VIII-90-279C.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

SEP 21 1994
Environmental Protection Agency
REGION VII

REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	EPCRA Docket No. VII-94-T-381-E
	)	
GEC Precision Corporation	)	COMPLAINT AND NOTICE OF
Wellington, Kansas	)	OPPORTUNITY FOR HEARING
	)	
Respondent	)	

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 325 of the Emergency Planning and Community Right-to-Know Act of 1986 (hereinafter "EPCRA"), 42 U.S.C. § 11045.

2. This Complaint serves as notice that the United States Environmental Protection Agency (hereinafter "EPA") has reason to believe that Respondent has violated EPCRA, 42 U.S.C. § 11001 et. seq. and the regulations promulgated thereunder and codified at 40 C.F.R. Part 372, governing the submission of toxic chemical release inventories by owners and operators of covered facilities.

Parties

3. The Complainant, by delegation from the Administrator of the EPA, and the Regional Administrator, EPA, Region VII, is the Director, Air and Toxics Division, EPA, Region VII.

4. The Respondent is GEC Precision Corporation, an aircraft parts and equipment company, incorporated and registered to do business in the State of Kansas, located at 1515 Highway 81 North, Wellington, Kansas 67152.

Statutory and Regulatory Requirements

5. Section 313 of EPCRA and 40 C.F.R. §§ 372.22 and 372.30 require the owner or operator of a facility that: (a) has 10 or more full time employees; (b) has a Standard Industrial Classification (SIC) code of 20 through 39; and (c) that manufactured, processed or otherwise used a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. §-372.65, in excess of the threshold quantity established under Section 313(f) of EPCRA and 40 C.F.R. § 372.25 during the calendar year, to

EXHIBIT

EXHIBIT
C-1
000367

complete and submit a toxic chemical release inventory form (hereinafter "Form R") to the Administrator of EPA and to the State in which the subject facility is located by July 1 for the preceding calendar year for each toxic chemical known by the owner or operator to be manufactured, processed, or otherwise used in quantities exceeding the established threshold quantity during that preceding calendar year.

6. As set forth at Section 313(f) of EPCRA and 40 C.F.R. § 372.25, the reporting threshold amount for calendar year 1987 for chemicals manufactured or processed at a facility is 75,000 pounds, 50,000 pounds for calendar year 1988, and 25,000 pounds for calendar years subsequent to and including 1989. The reporting threshold for a toxic chemical otherwise used at a facility is 10,000 pounds for calendar years subsequent to and including 1987.

VIOLATIONS

The Complainant hereby states and alleges that Respondent has violated EPCRA and regulations thereunder as follows:

Count I

7. On or about May 17, 1994, an authorized EPA representative conducted an inspection pursuant to EPCRA § 313 at Respondent's facility located at 1515 Highway 81 North, Wellington, Kansas 67152.

8. Respondent has 10 or more full-time employees, as defined at 40 C.F.R. § 372.3, at said facility.

9. Respondent's facility is in SIC Codes 20 through 39.

10. Respondent is a person as defined at Section 329(7) of EPCRA and is the owner or operator of a facility as defined at Section 329(4) of EPCRA.

11. The May 17, 1994, inspection of Respondent's facility revealed that in calendar year 1992, Respondent otherwise used 1,1,1 Trichloroethane in excess of 10,000 pounds.

12. 1,1,1 Trichloroethane is a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65.

13. Respondent failed to submit a Form R for 1,1,1, Trichloroethane to the Administrator of EPA and to the State of Kansas by July 1, 1993.

14. Respondent's failure to submit a Form R for 1,1,1 Trichloroethane by July 1, 1993, is a violation of EPCRA § 313, 42 U.S.C. § 11023, and of the requirements of 40 C.F.R. Part 372.

15. Pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045, and based upon the facts stated in paragraphs 7 through 14 above, it is proposed that a civil penalty of $17,000 be assessed against Respondent.

Count II

16. The facts stated in paragraphs 7 through 10, are herein restated and incorporated.

17. The May 17, 1994, inspection of Respondent's facility revealed that in calendar year 1992, Respondent otherwise used methyl ethyl ketone (MEK) in excess of 10,000 pounds.

18. Methyl ethyl ketone (MEK) is a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65.

19. Respondent failed to submit a Form R for methyl ethyl ketone (MEK) to the Administrator of EPA and to the State of Kansas by July 1, 1993.

20. Respondent's failure to submit a Form R for methyl ethyl ketone (MEK) by July 1, 1993, is a violation of EPCRA § 313, 42 U.S.C. § 11023, and of the requirements of 40 C.F.R. Part 372.

21. Pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045, and based upon the facts stated in paragraphs 16 through 20 above, it is proposed that a civil penalty of $17,000 be assessed against Respondent.

Count III

22. The facts stated in paragraphs 7 through 10, are herein restated and incorporated.

23. The May 17, 1994, inspection of Respondent's facility revealed that in calendar year 1991, Respondent otherwise used methyl ethyl ketone (MEK) in excess of 10,000 pounds.

24. Methyl ethyl ketone (MEK) is a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65.

25. Respondent failed to submit a Form R for methyl ethyl ketone (MEK) to the Administrator of EPA and to the State of Kansas by July 1, 1992.

26. Respondent's failure to submit a Form R for methyl ethyl ketone (MEK) by July 1, 1992, is a violation of EPCRA § 313, 42 U.S.C. § 11023, and of the requirements of 40 C.F.R. Part 372.

27. Pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045, and based upon the facts stated in paragraphs 22 through 26 above, it is proposed that a civil penalty of $17,000 be assessed against Respondent.

Count IV

28. The facts stated in paragraphs 7 through 10, are herein restated and incorporated.

29. The May 17, 1994, inspection of Respondent's facility revealed that in calendar year 1990, Respondent otherwise used methyl ethyl ketone (MEK) in excess of 10,000 pounds.

30. Methyl ethyl ketone (MEK) is a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65.

31. Respondent failed to submit a Form R for methyl ethyl ketone (MEK) to the Administrator of EPA and to the State of Kansas by July 1, 1991.

32. Respondent's failure to submit a Form R for methyl ethyl ketone (MEK) by July 1, 1991, is a violation of EPCRA § 313, 42 U.S.C. § 11023, and of the requirements of 40 C.F.R. Part 372.

33. Pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045, and based upon the facts stated in paragraphs 28 through 32 above, it is proposed that a civil penalty of $17,000 be assessed against Respondent.

Relief

34. Section 325(c) of EPCRA, authorizes a civil penalty of up to $25,000 per day for each violation of the Act. The penalties proposed in paragraphs 15, 21, 27, and 33 above are based upon the facts stated in this Complaint, and on the nature, circumstances, extent, and gravity of the above-cited violations, as well as the Respondent's history of prior violations and degree of culpability, in accordance with EPCRA and the Enforcement Response Policy for Section 313 of EPCRA.

35. A Summary of the Proposed Penalties is contained in the enclosed Penalty Calculation Summary attached hereto and incorporated herein by reference.

000370

36. Payment of the total penalty - $68,000 - may be made by certified or cashier's check payable to the Treasurer, United States of America, and remitted to:

Mellon Bank
EPA - Region VII
Regional Hearing Clerk
P.O. Box 360748M
Pittsburgh, Pennsylvania 15251

Note that payment of the proposed penalty alone does not satisfy Respondent's legal obligation to file a complete and accurate Form R as required by Section 313 of EPCRA and 40 C.F.R. Part 372. Failure or refusal to file Form R may subject Respondent to additional civil penalties of up to $25,000 per day of violation.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Answer and Request for Hearing

37. In accordance with 5 U.S.C. Section 554, Respondent has the right to request a hearing to contest any material fact contained in this Complaint above or to contest the appropriateness of the proposed penalty set forth herein. Such a hearing will be held and conducted in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, one copy of which is enclosed herein.

38. To avoid being found in default, which constitutes an admission of all facts alleged in this Complaint and a waiver of the right to hearing, Respondent must file a written answer and request for hearing within twenty (20) days of service of this Complaint and Notice of Opportunity for Hearing. Said answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondent intends to place at issue; and (c) whether a hearing is requested.

39. The denial of any material fact or the raising of any affirmative defense shall be construed as a request for hearing. Failure to deny any of the factual allegations in the Complaint

constitutes an admission of the undenied allegations. Said answer shall be filed with the following:

Regional Hearing Clerk
United States Environmental Protection Agency
Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

40. If Respondent fails to file a written answer and request for a hearing within twenty (20) days of service of this Complaint and Notice of Opportunity for Hearing, such failure will constitute a binding admission of all allegations made in this Complaint and a waiver of Respondent's right to a hearing under EPCRA. A Default Order may thereafter be issued by the Regional Administrator and the civil penalties proposed herein shall become due and payable without further proceedings.

Informal Settlement Conference

41. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:

Anne E. Rauch
Attorney
United States Environmental Protection Agency
Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101
Telephone 913/551-7010

42. Please note that a request for an informal settlement conference does not extend the twenty (20) day period during which a written answer and request for a hearing must be submitted.

43. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Consent Order issued by the Regional Judicial Officer, EPA Region VII. The issuance of such a Consent Agreement and Consent Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein.

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true and correct copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, United States Environmental Protection Agency, 726 Minnesota Avenue, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a true and correct copy of the signed original Complaint and Notice of Opportunity for Hearing; a copy of the Penalty Calculation Summary; a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22; and a copy of the August 10, 1992, Enforcement Response Policy for Section 313 of EPCRA to the following registered agent for GEC Precision Corporation:

The Corporation Company, Inc.
515 South Kansas Avenue
Topeka, Kansas 66603

Sept. 21, 1994
Date

Bonnie Andrews
Bonnie Andrews

44. If Respondent has neither achieved a settlement by informal conference nor filed an answer within the twenty (20) day time period allowed by this Notice, the penalties proposed above may be assessed by the entry of a Default Order.

Date 9/20/94

William A. Spratlin, Director
Air and Toxics Division

Anne E. Rauch
Attorney
Office of Regional Counsel

Enclosures: Penalty Calculation Summary
Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22
Enforcement Response Policy for Section 313 of EPCRA

PENALTY CALCULATION FOR
GEC Precision Corporation
Wellington, Kansas
EPCRA Docket No. VII-94-T-381-E

COUNT I

VIOLATION:	Failure to report toxic chemical release inventory emissions for 1,1,1 Trichloroethane in a timely manner during reporting year 1992.
EXTENT:	LEVEL B - Description: Less than 10 times reporting threshold; greater than $10 million annual sales; greater than 50 employees
CIRCUMSTANCE:	LEVEL 1 - Description: Failure to submit 1992 Form R report for 1,1,1 Trichloroethane by July 1, 1993
GRAVITY BASED PENALTY:	$17,000 + Adjustments: None
PROPOSED PENALTY:	$17,000

COUNT II

VIOLATION:	Failure to report toxic chemical release inventory emissions for methyl ethyl ketone (MEK) in a timely manner during reporting year 1992.
EXTENT:	LEVEL B - Description: Less than 10 times reporting threshold; greater than $10 million annual sales; greater than 50 employees
CIRCUMSTANCE:	LEVEL 1 - Description: Failure to submit 1992 Form R report for methyl ethyl ketone (MEK) by July 1, 1993
GRAVITY BASED PENALTY:	$17,000 + Adjustments: None
PROPOSED PENALTY:	$17,000

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

MAY 24 1995

MEMORANDUM

SUBJECT: Penalty Calculation for GEC Precision Corporation, Wellington, Kansas, EPCRA Docket No. VII-94-T-381-E

FROM: Mark A. Smith
Environmental Scientist
Toxic Substances Control Section

TO: Anne Rauch
Office of Regional Counsel

The following information supports the appropriateness of the U.S. Environmental Protection Agency, Region VII's assessment of civil penalties in regard to the subject administrative action. The proposed penalties were calculated pursuant to the August 10, 1992, Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-To-Know Act (EPCRA).

The purpose of the above-mentioned Enforcement Response Policy (ERP) is to assure that enforcement actions for violations of EPCRA Section 313 are arrived at in a fair, uniform, and consistent manner. Furthermore, the ERP aims to provide appropriate enforcement responses for violations committed, as well as, providing deterrent from the violation of Section 313.

The ERP states that the determination of the gravity-based penalty is made according to two factors, which are the circumstance and the extent of the violation. These two factors are incorporated into a matrix which allows the determination of an appropriate base penalty amount. After the base penalty has been determined, upward or downward adjustments may be made to the base penalty in consideration of the following factors: voluntary disclosure; history of prior violations; delisted chemicals; attitude; other such matters as justice may require; supplemental environmental projects; and, ability to pay. According to the ERP, the first three of the above adjustment factors may be made prior to issuing the civil complaint. The total proposed penalty is determined by calculating the penalty for each violation on a per chemical, per facility basis, and then applying any appropriate penalty adjustment factors.

Facility Information

GEC Precision Corporation is listed in the Dun & Bradstreet Database (D&B) with a Standard Industrial Classification (SIC) code of 3728 - principally involved in the manufacture of aircraft parts and equipment. GEC Precision Corporation otherwise used chemicals listed under EPCRA Section 313 above thresholds required for reporting during calendar years 1990, 1991, and 1992. According to D&B, annual sales at GEC Precision were greater than $10 Million, and GEC Precision employed more than 50 employees.

Summary of Alleged Violations

GEC Precision Corporation failed to report the otherwise use of methyl ethyl ketone (MEK), a listed chemical under EPCRA Section 313, for calendar years 1990, 1991, and 1992. GEC Precision Corporation also failed to report the otherwise use of 1,1,1-Trichloroethane (TCA), a listed chemical under EPCRA Section 313, for calendar year 1992.

Penalty Calculations

Circumstance Level: According to the ERP, the circumstance of the violation is determined by the seriousness of the violation as it relates to the availability and accuracy of the information to the community, to states, and to the government. The ERP states that failure to report in a timely manner (Category I - failure to submit report one year or more after the July 1 due date) the otherwise use of a listed EPCRA Section 313 chemical is a "Level 1" circumstance.

Extent Level: The extent factor for a violation is based on the quantity of EPCRA Section 313 chemical otherwise used by the facility in violation, and the size of the total corporate entity in violation. The size of the total corporate entity is defined by the amount of sales or number of employees of all sites taken together owned or controlled by the domestic or foreign parent company. According to the ERP, a facility with total corporate entity sales of $10 million or more and 50 employees or more, which uses a Section 313 chemical less than 10 times the threshold level is a "Level B" extent.

Summary of Proposed Penalties

COUNT I

VIOLATION: Failure to report toxic chemical release inventory emissions for 1,1,1 Trichloroethane in a timely manner during reporting year 1992.

EXTENT:	LEVEL B - Description: Less than 10 times reporting threshold; $10 million or more annual sales; 50 employees or more
CIRCUMSTANCE:	LEVEL 1 - Description: Failure to submit 1992 Form R report for 1,1,1 Trichloroethane by July 1, 1993
GRAVITY BASED PENALTY:	$17,000 + Adjustments: None
PROPOSED PENALTY:	$17,000

COUNT II

VIOLATION:	Failure to report toxic chemical release inventory emissions for methyl ethyl ketone (MEK) in a timely manner during reporting year 1992.
EXTENT:	LEVEL B - Description: Less than 10 times reporting threshold; $10 million or more annual sales; 50 employees or more
CIRCUMSTANCE:	LEVEL 1 - Description: Failure to submit 1992 Form R report for MEK by July 1, 1993
GRAVITY BASED PENALTY:	$17,000 + Adjustments: None
PROPOSED PENALTY:	$17,000

COUNT III

VIOLATION:	Failure to report toxic chemical release inventory emissions for methyl ethyl ketone (MEK) in a timely manner during reporting year 1991.
EXTENT:	LEVEL B - Description: Less than 10 times reporting threshold; $10 million or more annual sales; 50 employees or more
CIRCUMSTANCE:	LEVEL 1 - Description: Failure to submit 1991 Form R report for MEK by July 1, 1992

GRAVITY BASED PENALTY:	$17,000 + Adjustments: None
PROPOSED PENALTY:	$17,000

COUNT IV

VIOLATION:	Failure to report toxic chemical release inventory emissions for methyl ethyl ketone (MEK) in a timely manner during reporting year 1990.
EXTENT:	LEVEL B - Description: Less than 10 times reporting threshold; $10 million or more annual sales; 50 employees or more
CIRCUMSTANCE:	LEVEL 1 - Description: Failure to submit 1990 Form R report for MEK by July 1, 1991
GRAVITY BASED PENALTY:	$17,000 + Adjustments: None
PROPOSED PENALTY:	$17,000

TOTAL PROPOSED PENALTY: $68,000

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

JUN 16 1995

MEMORANDUM

SUBJECT: Addendum to the Penalty Calculation for GEC Precision Corporation, Wellington, Kansas, EPCRA Docket No. VII-94-T-381-E

FROM: Mark A. Smith
Environmental Scientist
Toxic Substances Control Section

TO: Anne Rauch
Office of Regional Counsel

In response to Administrative Law Judge Vanderhayden's request, the following information represents the views of the U.S. Environmental Protection Agency, Region VII, concerning the gravity of the alleged violations, including the actual or potential harm to man and the environment resulting from Respondent's illegal conduct. The following includes Respondent's history, if any, of compliance with the Emergency Planning and Community Right-to-Know Act (EPCRA).

Under Section 313 of EPCRA, facilities that meet certain criteria are required to report their releases, transfers, and other activities as required under the Pollution Prevention Act of 1990 for toxic chemicals. The report in which this information is submitted is known as the Form R. The information on the Form R is required to be submitted to the U.S. EPA and the designated State agency in which the facility is located. Reports are due by July 1 of each year for activities that occurred at the facility during the previous calendar year. A facility must submit a separate Form R for each chemical that meets the reporting requirements. Respondent met the pertinent reporting criteria under Section 313 of EPCRA, but failed to submit Form R's to the EPA and to the State of Kansas.

By not submitting Form R information to the State and to EPA, Respondent's releases, transfers, and pollution prevention activities were not included in the Toxics Release Inventory (TRI) database. The TRI database gives the public direct access to information about environmental releases of toxic chemicals for more than 23,000 industrial facilities located in communities around the nation. TRI data have been used by industry, public interest groups, state and local governments, the U.S. Congress and EPA to assess major opportunities for reducing risks to public health and the environment. TRI data have helped industry identify and analyze areas where source substitution may be

RECYCLE

possible and wastes minimized. Finally, TRI data have aided in the identification of pollution prevention activities and projects. Lacking this information, the public is deprived of its "Right-To-Know" the magnitude of potential harm associated with living in the community near facilities which release toxic chemicals.

In this instance, the Respondent has since reported releases of methyl ethyl ketone (MEK) and 1,1,1-Trichloroethane, which is an ozone depleter, into the environment. Because of the basic nature of toxic chemicals, i.e. health effects are often not apparent until several years after exposure, actual harm to humans is not immediately identifiable. That fact, however, underpins the importance of the community having the opportunity to know its potential harm and make long-term plans to minimize its exposure. The local community in Respondent's facility area has not had the necessary information provided to it via Form R reporting thereby frustrating any desire that may have been prompted to perform such planning.

Regarding other information that may have been available from the company, many companies report data on chemical emissions to EPA and to the States under other environmental laws, such as the Clean Air Act, the Resource Conservation and Recovery Act, and the Clean Water Act. Specifically, some of the information reported under the CAA is reported as a class or compound of chemicals to one medium, such as volatile organic compounds (VOC's) emissions to the air. The scope of TRI reporting is much broader. The EPCRA Section 313 TRI data provide information regarding releases of specific toxic chemicals to the air, water, and to the land; source reduction, recycling, treatment, and pollution prevention activities are reported; and, the public has direct access to the information.

Enforcement of EPCRA Section 313 ensures that the public has access to timely and accurate chemical release information. Respondent's violations of EPCRA Section 313 were identified as the result of an on-site inspection conducted by EPA. Respondent's violations were not identified as the result of Respondent seeking compliance assistance. In fact, Respondent was on the mailing list of companies sent an invitation to EPA, Region VII's regularly scheduled compliance assistance workshops in Respondent's area. Furthermore, a compliance history of Respondent with EPCRA does not exist since Respondent had not submitted a Form R until after the time of the inspection by EPA.

In summary, by not reporting under EPCRA Section 313, Respondent's toxic chemical emissions were not included in the TRI database. Respondent's violations prevented the public, industry, state and local governments from having a basic tool for understanding the management and control of toxic chemicals in their community.

mandatory road map rather than a guideline. It again goes back to the purpose of the document which is to ensure that EPA has broken it out into ten different regions and all ten regions as well as the headquarters office are complying in assessing penalties in the same manner.

THE COURT: Ms. Rauch, do you have any follow-up in light of my few questions to the witness?

MS. RAUCH: No.

THE COURT: Ms. Hoffman?

MS. HOFFMAN: No.

THE COURT: Mr. Smith, thank you.

MS. RAUCH: We have one more witness. If there's no objection, Ms. Fain will do the direct questioning of this witness.

THE COURT: Good morning, Ms. Fain.

MS. FAIN: Good morning. On behalf of EPA this morning, Your Honor, I would like to call Mr. James Hirtz, please.

JAMES F. HIRTZ,
having been first duly sworn, was
examined and testified as follows:

DIRECT EXAMINATION

BY MS. FAIN:

Q Mr. Hirtz, will you please state your full name for the reporter, please.

A My name is James Francis Hirtz.

Q Would you please state your place of employment and the address.

A I'm employed with United States Environmental Protection Agency, Region VII, at 726 Minnesota Avenue, Kansas City, Kansas, 66101.

Q Mr. Hirtz, what is your position at the Environmental Protection Agency?

A I'm an Environmental Engineer.

Q How long have you been in that position?

A I've been employed with the Agency for nine years in that position.

Q Do you have any formal education?

A I received a Bachelor of Sciences Degree from the University of Missouri-Rolla with a degree in Chemical Engineering.

Q Do you have any training beyond your degree in

relation to what you do at the Environmental Protection agency?

A Yes, I have.

Q Can you tell us what that is, sir?

A I received training at the Federal Law Enforcement Training Center in Lithgow, Georgia, as well as training in estimating techniques as well as training in negotiation skills.

Q Can you tell us what your duties and responsibilities are as an environmental engineer at the EPA?

A I'm the TRI Coordinator, Toxic Release Inventory Coordinator for Region VII as well as the TSCA 5 and 8 Coordinator in the Toxic Substances Control Act. I also perform inspections and case review for both Acts.

Q Are there any other duties and responsibilities that you have?

A I'm also a member of several national work groups.

Q Sir, can you tell us some things about national work groups as they apply to your duties at the Environmental Protection Agency?

A I'm a member of the National EPCRA 313 Enforcement Response Policy work group as well as

the 313 Interpretive Guidance work group.
Q What was your role -- you mentioned that you participated in the work group pertaining to the Enforcement Response Policy for EPCRA 313. What was your role in that work group, sir?
A As a regional representative we were asked to help develop an Enforcement Response Policy or make amendments to the existing Enforcement Response Policy that was in place. As part of the requirements of going through it, we looked at existing Enforcement Response Policies under the statutes as well as the new requirements that were required under EPCRA for purposes of 313 reporting to make modifications to the present-day Enforcement Response Policy.
Q How long did the work group exist?
A The work shop -- excuse me, the work group started in April of 1991 and we concluded with our final product around July of '92.
Q Now, when the work group formulated the Enforcement Response Policy, were there statutory factors such as the ones that Mr. Smith just discussed and the ones that are found in the statute? Were those taken into account?
A Yes, they were.

Q Can you tell us why you would take those factors into account?

A The first responsibility as far as the Enforcement Response Policy is actually to determine if a violation exists. It's basically broken down into three considerations whether or not the company is in compliance with the existing Act, whether or not the violations warrants a notice of non-compliance for minor deviations of the rule, and the third one is a policy to establish an administrative action in which the heart of the Enforcement Response Policy is about.

Q Now, Mr. Hirtz, I would like to go through the statutory factors and just would like for you to explain how was the nature of the violation considered when the work group assessed the penalty?

A The nature was basically setting up that an administrative action or civil penalty is warranted, and then we developed the use of the circumstance levels and the extent levels to develop the gravity penalty matrix for the final establishment of determining a penalty for the appropriate violations of the Act.

Q How was circumstances of the violation considered?

THE WITNESS: Do you mind if I stand?

THE COURT: Please.

A For the circumstances we basically broke it down into six different levels, and these were the levels that we were looking at. As far as Level 1 is a failure to report in a timely manner which is a Category 1. It's principally that companies fail to submit a TRI report or a Form R as required under EPCRA. And the reason that this is the most significant of the violations is that this is a chemical specific reporting requirement if they meet the conditions of the law.

This information is used by both EPA in the local communities for purposes of emergency planning and right-to-know. And emergency planning at least on the federal side we use it for initiatives like the environmental justice, we use it for purposes of pollution prevention planning, and the community has the opportunity to gather chemical specific information on the chemicals themselves as well as the emissions for their community so they themselves can take an

active role in exercising change or identifying a dialogue with industry itself to make hopefully useful changes that are occurring in the community.

Level 2 is failure to supply notification. And this is the primary avenue that we use to help the manufacturers who use toxic chemicals in a process to know that they're required to report under EPCRA 313.

It requires that if you receive a product from a manufacturer as far as a raw material that you're using in your process that identifies that chemical that's within that product as subject to reporting under the EPCRA 313 provisions. So we have requirements in which we can enforce the manufacturers to notify their customers that these chemicals are indeed regulated by law.

Level 3 deals with data quality violations. It is the responsibility of EPA as well as for the industry to submit a Form R and take a look at making sure that the emission estimates are performed correctly. If emission estimates are done incorrectly, basically you're making a faulty data base with information that

may be skewed. So we also perform data quality inspections at sites to ensure that the information submitted by industries are correct.

And the last one is a Level 4, failure to report in a timely manner, and this is a Category 2. Category 2 is basically when the information, which is the Form R, is submitted within the course of a year to EPA. It is still late after the deadline reporting date of July 1st.

The relevance for a Level 4 versus a Level 1, if the information is submitted after a year, EPA is not able to put this information into the toxic release inventory which is the computer system. This computer system is used to help organize and identify information associated with the submissions from industry. Now, this organization is used to help develop national reports as well as state diskettes which the communities as well as the general community use to help identify the emissions in their geographical location.

Now if the information is submitted within the year, EPA has the ability to help speed along getting this information into the

national report, so the harm is much less if we receive it shortly after the deadline reporting date, but as the days extend getting closer to a year it impedes the EPA by trying to get that information into the system. So that's why that's set up as a Level 4.

Level 5 and Level 6 are pretty much voluntary disclosure violations in which EPA has been notified by the facilities that they should have submitted Form R's and they are making the step forward by giving the information to the EPA.

Q Okay. Thank you. Mr. Hirtz, can you also explain to us how the extent of the violation was taken into consideration by the work group?

A For the extent, we're looking at three primary issues as far as the amount of chemicals that are otherwise used or processed at the facility for setting up thresholds. For otherwise used there's a 10,000-pound threshold and for manufacturing and processing it's a 25,000-pound threshold. So we're looking at whether or not ten times or more of that threshold of that 313 chemical substance was handled by the facility.

This was set up in order to help

identify what the potential for exposure could be at the plant due to material handling operations. If it increases by greater than ten times the amount, the potential for exposure to the general employees is much more. Also, it helps identify that they were significantly over the threshold requirements as required by the rule. We also look at 50 employees or more to help identify that quite a few employees had the potential to be exposed to this chemical substance during the handling practices.

The other requirement that we deal with is the identification of $10 million in corporate sales. This is the opportunity to help identify large corporations from small corporations because we did not want to have economic considerations used against small businesses. We wanted to identify larger businesses from small businesses. And those were the three conditions that we looked at.

Q What about the gravity of the violation?

A The gravity of the violation is used to take a look at the circumstance levels as well as the extent levels to develop a matrix to help determine the appropriate penalty for those two.

Q Now, you heard the testimony provided by Mr. Smith concerning other factors that is part of the statute. Did the work group consider those other factors, adjustment factors?

A Yes, they did. Those factors were put into place to help the EPA look at the conditions associated with those factors to aid the EPA in settling cases.

Q Do you mind just going through each one of the factors we're talking about, culpability, ability to pay.

A Factors that we looked at were primarily the attitude. As far as other adjustments, we also looked at the culpability, whether or not the chemical involved was a de-listed chemical. Also, the other adjustment factors included SEPs as far as supplemental and environmental projects.

MS. FAIN: Your Honor, I have no other questions.

THE COURT: Ms. Hoffman?

MS. HOFFMAN: I have two questions, Mr. Hirtz.

CROSS EXAMINATION

BY MS. HOFFMAN:

Q First of all, I wanted to ask you, are you familiar with the National Emission Data System maintained by the USEPA?

A As required under the Clean Air Act? Is that the one you're referring to?

Q I'm referring to the data system referred to in correspondence from the State of Kansas received by the respondent.

A I have a general familiarity with that data base.

Q Assuming that the chemical reported to the State of Kansas were in fact the same chemicals subsequently reported on Form R, is the information available -- or the information in both systems that's available to the community, is it fair to say that that information is identical?

A No.

Q Is it fair to say that the information is summarized in such a way so that the community in which the business is located has an indication of the chemicals that are being used by the facility?

A No.

A Yes, I was.

Q And also of the amending complaints that are before the Court today, is that correct?

A Yes, that's correct.

Q In the course of preparing those complaints, did you have an occasion to calculate a penalty for both Respondent Group Eight and Respondent Wausau?

A Yes, I did.

Q And did you consult any guidance or the assistance of any internal EPA document with regard to calculating that penalty?

A Yes, I used the Polychlorinated Biphenyls Penalty Policy of April 9, 1990.

MR. WAGNER: Your Honor, I would tender to the Court Complainant's Trial Exhibit #20. Provide a copy to the court reporter, to each Counsel. I would identify this document as Polychlorinated Biphenyl Penalty Policy of the United States Environmental Protection Agency dated April 9, 1990.

JUDGE LOTIS: The document will be so identified.

(Whereupon, Complainant's Exhibit #20 was marked for identification.)

BY MR. WAGNER:

Q Mr. Bonace, could you tell us what the Polychlorinated Biphenyl PCB Penalty Policy of U.S. EPA is, this Exhibit 20?

A Pardon me?

Q What is Complainant's Trial Exhibit 20?

A That is the Polychlorinated Biphenyl Penalty Policy.

Q What is the significance of this document to the work you've been doing in the PCB unit?

A This is the document I would use for developing penalties for PCB complaints.

Q Could you give us a brief description of the breakdown of the PCB Penalty Policy?

A The Penalty Policy has two basic sections; the Gravity Based Penalty and adjustment factors to the Gravity Based Penalty.

Q What is the standard procedure in the PCB unit of using that Penalty Policy to calculate penalties of enforcement actions?

A The procedure is the review the inspection reports involved in the case and to apply the Penalty Policy to problems described in the inspection reports.

Q Did you have an occasion to determine, with

regard to the complaint you were preparing against Respondent Wausau, what violation to allege in the complaint?

A Yes, I did.

Q What violation did you determine to allege in the complaint?

A Improper disposal.

Q Is that the only violation in your preparation of the complaint against Respondent Wausau?

A Yes, it is.

Q Did you have an occasion to assess a penalty for that complaint or that violation also?

A Yes, I did.

Q And could you tell us how you did that using the Penalty Policy?

A Okay. The first thing to do is to develop the Gravity Based Penalty using the penalty matrix and extent and circumstances. The circumstances which are found on Page 10 and 11 describe major disposal as a Level 1 violation. Extent, which involves the amount of material in a particular violation for disposal violations is found on Page 6 and 7. Since the situation with Wausau involved greater than 25 gallons, quite a bit more than 25 gallons of PCB fluid, that violation is of major extent. When you

refer to the matrix on Page 9 you see that major extent, level 1 is a $25,000 penalty.

JUDGE LOTIS: What about the one you previously referred to, this major disposal is that also in the matrix?

THE WITNESS: In the matrix it says level 1, if you look there on Page 10. Level 1 lists a number of types of violations.

JUDGE LOTIS: Level 1 relates to -- I see. You viewed this as a major disposal.

THE WITNESS: Yes.

JUDGE LOTIS: That was because why?

THE WITNESS: All PCB violations are considered to be the most serious violations at level 1 and there is really no alternative for disposal. There is a minor disposal in which a PCB article has a small leak on the surface.

JUDGE LOTIS: This was a level 1 for what reason?

THE WITNESS: Because PCB oil was taken out of a transformer and shipped for disposal to a facility that was not designed to handle PCB disposal.

JUDGE LOTIS: It would be level 2 if what had happened?

THE WITNESS: Okay, there would be no instance of disposal that would fall in level 2, but there are examples of level 2 violations involving failure to register a PCB transformer with the local department and such.

JUDGE LOTIS: I see. Please proceed. Thank you.

BY MR. WAGNER:

Q Mr. Bonace, with regard to the nature of the violation, what would be the nature of the violation?

A All PCB violations are considered chemical control in nature.

Q Did you have an occasion to review the adjustment factors set forth in the Penalty Policy?

A Yes, I did.

Q On what page are those found?

A Adjustment factors begin on Page 14, the bottom of Page 14.

Q What is the first adjustment factor?

A Culpability.

Q And where is that found?

A On Page 15.

Q What were your considerations with regard to culpability as an adjustment factor?

A Culpability did not change the Gravity Base Penalty of $25,000.

Q Did you consider any --

JUDGE LOTIS: (interrupting) Excuse me, what does that mean? What you just said I just don't understand.

THE WITNESS: When you calculate the $25,000 penalty, then you look at these other factors to see if it should be increased or decreased.

JUDGE LOTIS: Or stay the same.

THE WITNESS: Or stay the same.

JUDGE LOTIS: And what did you say as to culpability?

THE WITNESS: It did not change the penalty.

JUDGE LOTIS: What does that mean in terms of their culpability?

THE WITNESS: Well, okay, I can explain that. If you look on Page 14 there are three levels of culpability. Level 1 is a willful violation and level 2 is the violator had knowledge or control and that's where the penalty stays the same. Level 3 is, lack knowledge, lack control and still the violator was reasonably prudent and responsible. Then there's an opportunity for lowering the penalty as much as 25%.

JUDGE LOTIS: Alright, please proceed.

BY MR. WAGNER:

Q Now, $25,000 is the maximum penalty permitted on the TSCA 4 violation, is that correct?

A That's correct.

Q So it was impossible for you to consider increasing this penalty.

A That's correct.

Q Why did you decide not to decrease the penalty because of the culpability factor?

A Because it appeared that the violator had knowledge that PCB's were on site.

Q What did you base that determination on?

A I had received a letter from Wausau responding to my letter to Mr. Schrott in which I informed him of the PCB transformer on his property.

Q Would those be the two letters you just earlier identified in your testimony?

A Yes.

Q That would be Complainant's Trial Exhibit #14 and Complainant's Trial Exhibit #19?

A I see 14 on the letter to Mr. Schrott. I don't see a number on the Wausau letter.

Q The Wausau letter of --

A (interrupting) Of April 10, 1989.

Q With regard to the next adjustment factor, can you identify that for us under the Penalty Policy?

A That is history of prior violations.

Q How are you to consider the history of prior violations in regard to penalty?

A This considers whether the company had a history of a prior TSCA or particularly a PCB violation.

Q What happens if they did have a prior violation?

A In certain circumstances, the penalty would go up 25, 50 or 100%.

Q What if they did not have a history of a prior violation?

A The penalty would remain unchanged.

Q Did you have knowledge of any prior violation of Wausau?

A No, I did not.

Q With regard to the next adjustment factor, would you identify that for us, please?

A That's ability to continue in business.

Q What page is that on?

A That's on the bottom of Page 16.

Q Did you consider that adjustment factor in Wausau's penalty?

A Yes, I did.

Q What was your determination there?

A This section refers to whether the payment penalty would cause a business to have to close. I saw no evidence that Wausau could not afford to pay this penalty.

Q When did you calculate this penalty, approximately?

A I don't recall the date. I imagine it was in late '89 or early '90.

Q It would be shortly before the filing of the initial complaint, is that correct?

A Yes, that's correct.

Q Subsequent to the time that you initially determined this penalty and particularly this adjustment factor, had you come into any information through pre-hearing exchanges or any other exchange of information during the course of these cases that would cause you to change your determination as to this adjustment factor, the ability to pay?

A No, I did not.

Q Mr. Bonace, are there any other adjustment factors that you considered?

A No other adjustment factors appeared appropriate.

Q With regard to your penalty calculations --

JUDGE LOTIS: (interrupting) Excuse me. On that last question and answer, on Page 17 of the policy statement, it has the heading, other factors. Are you saying you considered them and found no adjustment was appropriate based on these factors?

THE WITNESS: Yes, that's correct.

JUDGE LOTIS: Alright.

BY MR. WAGNER:

Q Mr. Bonace, let me ask you to just be a little bit more specific, there are some specific factors set forth here with regard to attitude at the bottom of Page 17.

A Yes.

Q Did you consider that specifically with regard to the Wausau penalty?

A Yes, I did.

Q Why did you determine not to make any reduction for attitude?

A Because it did not appear that the violator was making good faith efforts to comply with the PCB regulations.

Q With regard to voluntary disclosure at the top of Page 18.

A Wausau, as I recall, did not voluntarily disclose the problems that occurred.

Q With regard to the cost of the violations to the government.

A This refers to cost expended in an administrative proceeding under Section 16 of TSCA and I knew of no such cost.

Q With regard to economic benefit of non compliance.

A I knew of -- I did not know of any economic benefit of non compliance.

Q With regard to Group Eight, the complaint against Group Eight, did you have an occasion to develop that complaint also and determine the violations to be alleged in that complaint?

A Yes, I did.

Q How many violations did you include in Group Eight's complaint?

A Six, I believe.

Q And were any of those six violations the same violation as was alleged in Wausau's complaint?

A Yes, Count 6 was the same, improper disposal.

Q With regard to the Gravity Base of the penalty for that particular violation. For the record, I would

just that would be Count 6 of the complaint, violation for unlawful disposal. With regard to that violation, was your calculation of the Gravity Base component of the penalty the same as you testified to in Wausau?

A Yes, it is.

MR. WAGNER: Your Honor, I would ask the Court and Mr. Christensen if they would want him to restate that Gravity Base component?

JUDGE LOTIS: No.

BY MR. WAGNER:

Q Mr. Bonace, with regard to the other five violations that were alleged in the Group Eight complaint, Count 1, 2, 3, 4, and 5, could you indicate how you calculated the penalty pursuant to the Penalty Policy with regard to those violations?

A Yes, I will. Count 1, was there a Count 1?

Q Yes. Count 1 was the failure to dispose of one PCB transformer and two PCB contaminated transformers within one year of placement in storage. Violation of 40 CFR 761.65-A.

A The transformers on the Group Eight property were in storage at least since the fire in 1987 and from that date to the date of our first inspection exceeds one year, the maximum time allowed for storage for disposal of

a PCB article. That type of violation, the circumstance for that type of violation is found on Page 12. It's a level 4 violation. It's the first number 3 you come to on Page 12 -- excuse me, the first number 2, storage.

Q Toward the top of the page?

A That's right. Storage of PCB in excess of one year is the level 4 violation.

Q The circumstances of that violation?

A That is the circumstance. Level 4, the extent.

Q The extent, yeah.

A Okay. The extent for the storage violation was significant because, as you see on Page 4 of the Penalty Policy, the gallonage of PCB fluid in the transformers exceeded 220 gallons but was less than 1100 gallons. From that, looking at the matrix for a level 4 significant extent violation you have a $6000 penalty.

Q With regard to Count 2 of the complaint against Group Eight, it alleges that Group Eight stored one PCB transformer and two PCB contaminated transformers in a facility lacking a roof, walls, and an impervious floor with 6 inch continuous curbing in violation of 40 CFR 761.65 B-1. Can you indicate how you calculated the gravity base of that violation?

A Certainly. Storing PCB articles in a storage

area that lacks a roof, walls, and 6 inch curbing of impervious floors is a level 2 violation. These transformers were stored out of doors without any roof, walls or curbing.

Q Where on the policy do you find it's a level 2?

A On Page 11, the first number 5 you come to it says, major storage.

Q And further components?

A The extent is the same as the previous violation, the same equipment was involved. Greater than 220 gallons, less than 1100. If you look on the matrix then you see that a level 2 significant extent violations has a $13,000 penalty.

Q With regard to Count 3 of the complaint which alleged that Group Eight did not mark its PCB transformer or PCB contaminated transformers with the date they were placed in storage for disposal in violation of 40 CFR Section 761.65 C-8. Can you indicate to the Court how you calculated the gravity component of that?

A Yes. Like Count 1, this is considered a minor storage, as you see on Page 12, #2, minor storage and the extent is the same as the previous two violations; significant because the same equipment is involved and you have a $6000 penalty for a level 4 significant extent.

Q With regard to Count 4 of the complaint against Group Eight it alleged that Group Eight failed to marked its PCB transformer with a PCB label, a violation of 40 CFR Section 761.48 2. Could you indicate how you calculated that penalty?

A Yes, I can. The transformers on the Group Eight property had no PCB labels, no official PCB label or any PCB label of any kind. That is considered major marking where someone unfamiliar with the equipment might not be aware there were PCB's. That's found on Page 11, the first number 4, major marking. It's a level 2 violation.

Q The extent?

A The extent is significant because the PCB transformer contained 236 gallons and the range for significant extent is 220 to 1100 and therefore, you have a level 2 significant extent. $13,000 penalty for that violation.

Q With regard to Count 5 of the complaint against Group Eight which alleged that Group Eight did not mark the PCB storage area with the PCB label in violation of 40 CFR Section 761.4810. Would you indicate to His Honor how you calculated that gravity component?

A Yes, I can. That also is considered major marking like the previous violation, level 2, and that's

found on Page 11. The extent is the same as the previous several violations because the same gallonage for the transformers involved is of significant extent and in the matrix you see level 2 significant extent has a $13,000 penalty.

JUDGE LOTIS: Counsel, are these all involved with the same equipment, the same 3? Are all counts directed toward the same 3 transformers?

MR. WAGNER: Yes, Your Honor.

THE WITNESS: If I may?

JUDGE LOTIS: Please explain, yes.

THE WITNESS: The one count for the failure to mark the PCB transformer involves the one transformer.

JUDGE LOTIS: Which count was that?

THE WITNESS: Count 4, I believe. Because transformers that contain less than 500 parts per million do not require that label.

JUDGE LOTIS: Thank you very much.

BY MR. WAGNER:

Q Mr. Bonace, in connection with your work with the PCB unit you have worked with PCB rule on numerous occasions I take it, is that correct?

A Yes, that's correct.

Q Are there are any presumptions that are provided

for under the PCB rule?

A Yes, there is a -- one of the presumptions involving transformers?

Q Yes.

A A mineral oil transformer that has not been tested for PCB's is assumed to be PCB contaminated and contain a level of PCB concentration ranging between 50 and 500 parts per million.

Q With regard to nameplated PCB transformers such as Askarel, are there any presumptions there?

A Yes, a nameplated transformer is always considered to be greater than 500, usually quite a bit greater than 500 parts per million and therefore a PCB transformer by definition.

Q Did you utilize any of these presumptions with regard to any of the 7 transformers on the Great Eight property as with regard to any of these penalties?

A I did utilize those presumptions in addition to some other information.

Q And what was the other information you had?

A There were some tests, some PCB samples that were run at the expense of CIW Company of the equipment on Group Eight property.

Q How did you come to have those results?

A Those results came to us through an inspection at CIW Company.

Q Do you know who conducted the inspection?

A I believe that was Patricia Spitzley.

Q Do you recall who did the analysis that was provided in those inspection reports?

A The company was called, I believe, Dihydro -- I can't remember the second part.

Q In any event, the results were part of the inspection report you prepared.

A Yes, they were.

Q And that you reviewed.

A Yes.

Q I'd now like to move, Mr. Bonace, to the adjustment factors with regard to the penalty calculated for Group Eight. When you considered adjustment factors for Group Eight did you consider adjustment factors in the same fashion, taking all six counts in the complaint into consideration?

A Yes. They all were considered to have the same adjustment factor.

Q Could you run us through your consideration of the adjustments factors?

A As you see in the complaint, the gravity base

penalties did remain in the complaint so no adjustment factors were applied. Culpability, the penalty was not lowered because I felt the violator had knowledge or control. I had spoken to the owner myself and written him a letter about the PCB equipment on his site.

Q With regard to history of prior violations.

A I knew of no history of prior violations by Group Eight.

Q So no adjustment was made.

A So no adjustment was made for history.

Q With regard to ability to continue in business.

A I was never given any information that Group Eight could not continue in business after paying the penalty.

Q Subsequent to the preparation of the complaint against Group Eight and the filing of the complaint against Group Eight, have you ever been provided any other information or has U.S. EPA been provided any other information, to your knowledge, concerning Group Eight's financial status that would cause you to change your determination with regard to this factor?

A No. To my knowledge, U.S. EPA has received no other information to change the ability to pay.

Q Are you familiar with the documents provided in

Group Eight's pre-hearing exchange?

A Yes, I am.

Q So your statement includes those documents.

A Yes.

Q With regard to other factors as justice may require did you consider those with regard to Group Eight?

A Yes, I did.

Q Specifically with regard to attitude at the bottom of Page 17?

A The penalty was not changed for attitude.

Q And why is that?

A It did not seem appropriate to lower the penalty for good faith efforts to comply with the appropriate regulations. As to raising them, I did not choose to do that.

Q And with regard to voluntary disclosure?

A To my recollection, Group Eight did not disclose these violations to the EPA.

Q With regard to cost of violation to the government?

A This does not appear to apply to Group Eight.

Q And with regard to economic benefit of non compliance?

A Once again it does not appear to apply.

Q Were there any other considerations you made with regard to Group Eight's penalty?

A Not that I recall.

Q With regard to the penalty against Wausau Insurance Company, you prepared the amended complaint or were involved in the preparation of the amended complaint?

A Yes, I was.

Q Is the penalty proposed in that complaint the same as in the original complaint?

A Yes, I believe so.

Q $25,000?

A Yes, to my recollection, yes.

Q And with regard to the various penalties for the six counts in Group Eights' amended complaint, did those proposed penalties remain the same as in the original complaint?

A I believe they remained the same.

MR. WAGNER: May I just have on brief moment, Your Honor.

Your Honor, I have no further questions of this witness.

JUDGE LOTIS: Before cross examination, let's take a recess. My watch says it's about 5 after 10:00, let's come back at 20 after 10:00.

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

MAY 28 1996

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act

FROM: Robert Van Heuvelen, Director
Office of Regulatory Enforcement

TO: Regional Counsels, Regions I - X
Director, Office of Environmental Stewardship, Region I
Director, Division of Enforcement and Compliance Assurance, Region II
Director, Compliance Assurance & Enforcement Division, Region VI
Director, Office of Enforcement, Compliance & Environmental Justice, Region VIII
Regional Enforcement Coordinators, Regions I-X

A. INTRODUCTION

On March 29, 1996, President Clinton signed into law H.R. 3136, the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), P.L. 104-121, which had been added as an amendment to legislation raising the federal debt limit. ORE has been working closely with representatives of other OECA offices, a number of EPA regional offices, as well as the Department of Justice on implementation of this new law. SBREFA contains numerous provisions which will affect the manner in which the Federal government conducts enforcement against small businesses and small communities, and requires the Federal Government to implement a number of programs within one year of enactment. However, some provisions are effective immediately. In particular, sections 331 and 332 of the law amend the Equal Access to Justice Act[1] ("EAJA") to allow the awarding of attorneys fees to non-prevailing parties in an administrative or civil judicial enforcement action.

[1] 28 U.S.C. § 2412; 5 U.S.C. § 504. See also 40 C.F.R. § 17 (Implementation of the Equal Access to Justice Act in EPA Administrative Proceedings).

000416

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on 100% Recycled Paper (40% Postconsumer)

This memorandum is intended to provide interim guidance to reduce the Agency's risk of creating a cause of action in an administrative or judicial penalty action under SBREFA's amendments to the EAJA. This guidance does not address whether EAJA claims may apply to corrective action orders or cost recovery actions. These issues will be dealt with in a subsequent guidance being developed by the Office of Site Remediation Enforcement (OSRE).

Attached to this memorandum is a summary of some of the other provisions of SBREFA that are significant for enforcement purposes (see Attachment 3). As we work through these additional provisions, in conjunction with OECA's Office of Planning and Policy Analysis, we will provide further guidance and information as appropriate.

B. BACKGROUND ON CHANGES TO EQUAL ACCESS TO JUSTICE ACT

The revisions to EAJA made by SBREFA are a significant departure from the current state of EAJA law, which in general allows only a "prevailing party" to recover attorney's fees where the position of the government is not substantially justified. Sections 331 and 332 of SBREFA amend the EAJA to allow the award of attorney's fees to a non-prevailing party[2] in an administrative or civil enforcement action where "the demand by the agency is substantially in excess of the decision of the adjudicative officer[3] and is unreasonable when compared with such decision, under the facts and circumstances of the case." "Demand" is defined in both sections as "the express demand" of the United States or Agency "which led to the adversary adjudication," but excludes "a recitation of the maximum statutory penalty" in the administrative or civil complaint "or elsewhere when accompanied by an express demand for a lesser amount." Because section 504 of EAJA defines an adversary adjudication as "an adjudication under section 554 of this title,"[4] this provision may apply to any administrative enforcement action

---

[2] For purposes of these subsections only, a "non-prevailing party" must be a "small entity" as defined by § 601 of Title 5. "Small entity" includes, but is not limited to, small non-profit organizations not dominant in their fields, small governmental jurisdictions up to 50,000 in population, and small businesses ranging up to 1,500 employees and up to $25 million in annual receipts. Under the applicable Small Business Administration regulations, different criteria apply to different SIC categories. See Small Business Size Regulations, 61 Fed. Reg. 3,286 (January 31, 1996) (to be codified at 13 C.F.R. § 121).

[3] Or, in the case of a civil judicial action subject to § 332, "the demand by the United States is substantially in excess of the judgment finally obtained by the United States." The "legislative history" generated after passage of the legislation of SBREFA suggests that "demand" includes the value of any injunctive relief. See 142 Cong. Rec. S3242 (daily ed. March 29, 1996)(statement of Sen. Bond); 142 Cong. Rec. E571-573 (daily ed. April 19, 1996)(statement of Rep. Hyde). Please consult with ORE prior to relying on this.

[4] See 5 U.S.C. § 504(b)(1)(C).

required to be brought using procedures subject to § 554 of the Administrative Procedure Act (APA),[5] as well as to any civil judicial complaint filed on or after March 29, 1996.

SBREFA may allow a party which has been adjudged fully liable for violations of an environmental law to recover attorney's fees for its defense against the action if the court or adjudicating officer finds that the Agency's penalty demand was unreasonable and excessive, based on the record and the facts and circumstances of the case. As a result, in order to minimize the risk of a finding that the agency's penalty proposal is both unreasonable and excessive, agency practitioners should continue to make reasonable and appropriate proposals for specific penalties based upon the best evaluation of the facts at hand, the statutory penalty factors, and the applicable penalty policies. However, this new law creates additional exposure to EAJA awards as a result of Agency litigation, and concerns about possible awards may affect litigation decisions. With this in mind, Agency practitioners should consider the following options in preparing for litigation, drafting a complaint, and responding to EAJA claims.

C. ADMINISTRATIVE ENFORCEMENT

1. Maintain Consistency With Current Procedures

Implementation of SBREFA, and the changes to EAJA, are not incompatible with strong, fair and effective enforcement. As noted above, we are confident that our current practice of proposing specific penalties in administrative complaints, consistent with applicable EPA pleading penalty policies, will not result in significantly increased exposure to possible EAJA awards under SBREFA. In this regard, we urge the Agency's litigation teams and managers to craft complaints and develop litigation strategies with an awareness of the changes, but do not hesitate to initiate an action or to seek penalties for clear violations. Please continue to develop proposals for civil penalties that are reasonable and appropriate to the facts and circumstances of the case. In addition, it is highly advisable to include as standard language in any consent agreement a statement that each party agrees to bear its own costs and fees.

2. Options Where Ability to Pay and Other Factors Are Uncertain

As a general practice, we recommend that the litigation team identify and assess all information relevant to liability and the proper amount of a penalty prior to issuance of a complaint. If your preparations do not produce enough reliable information to develop a defensible, specific proposed penalty amount, you should consider one of the following three options:

---

[5] 5 U.S.C. § 551 et. seq. Thus, formal administrative enforcement actions brought using the Consolidated Rules of Practice at 40 C.F.R. Part 22 may be subject to an EAJA claim.

a. *Issue a Pre-filing "Show Cause" or Settlement Letter Seeking Additional Information on Penalty Issues.*

Prior to filing a complaint, issue a pre-filing "show cause" or settlement letter in which the respondent is asked for any relevant information (including inability to pay) EPA should consider in determining an appropriate penalty. We advise practitioners to be cautious about including specific penalty proposals in these pre-filing letters. If, after such information is received, settlement does not occur, this information will assist in developing a more accurate, appropriate, and defensible penalty proposal for the complaint. Some Headquarters and Regional offices have adopted this practice, and it appears to work well. A model letter is attached for your consideration at Attachment 1.

b. *Reference Ability to Pay, Affirmative Defenses in Letter Accompanying the Complaint or in the Complaint Itself.*

In a cover letter accompanying a complaint, or in the complaint itself, state clearly that the penalty proposed may be adjusted if the respondent establishes *bona fide* issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty. Consider indicating in the complaint that the proposed penalty was developed based upon the best information available to the Agency at the time, and in consideration of the statutory factors, etc. Such indications may be relevant to the "facts and circumstances" language of SBREFA referenced above, and may work to mitigate the amount of any EAJA fee award. Model complaint language is attached as Attachment 2.

c. *Use "Notice Pleading" for the Penalty*

In cases where information relevant to proposing an appropriate penalty cannot be obtained before issuing the complaint and there are nonetheless reasons to proceed with the action, the litigation team should consider "notice" pleading -- that is, pleading "up to the statutory maximum amount" for each violation alleged. This notice pleading approach would not eliminate the need to make a definite penalty proposal, but would postpone it until full information about the case, including all violations and respondent's defenses, are known, so that the Agency can produce better informed penalty proposals. Note, that if a respondent defaults by failure to answer, it will be necessary to develop a specific penalty proposal in the motion for default judgment, in order to comport with the current default procedures in 40 C.F.R. § 22.17(a), which assume a proposed penalty in the complaint. In any event, a specific penalty proposal and argument will still have to be developed for the purposes of a hearing. Sample language for notice pleading in administrative complaints is included in attachment 2.

3. Adjust the Penalty Proposal as Necessary

In the event of an EAJA claim, the Agency may be able to successfully argue that the assessed penalty should be compared to the Agency's best offer before an adjudication, rather than the penalty initially proposed in the complaint or in any pre-filing proposal. In all cases, attorneys should ensure that the respondent receives a written proposal containing a specific penalty amount based on the most current assessment of all the facts in the case before each adjudication occurs. This proposal should be made as far in advance of the adjudication as possible. Of course, whenever the Agency's understanding of the facts and legal issues in a case changes in such a way as to significantly impact the appropriate settlement penalty, the Agency should present the respondent with a written revised settlement offer.

D. CIVIL JUDICIAL ENFORCEMENT

When referring a civil judicial action to the Department of Justice (DOJ), any proposal made by EPA in a pre-filing negotiation must be disclosed to DOJ, including any proposal related to injunctive relief.[6] Informing DOJ of any Agency proposal made prior to referral is essential to allow the Department to assess the potential for EAJA concerns in each case. In addition, where the SIC code for the defendant is known, or an analysis of the defendant's classification as a "small entity" has been made, please include that information in the litigation report forwarded to DOJ so that the Department will be on notice that the defendant may be eligible under EAJA for a possible fee award.

E. NEXT STEPS

Additional guidances and updates will follow as we move to implement SBREFA's provisions. In the meantime, if you have questions regarding SBREFA's impact on administrative or judicial enforcement, contact Robert Kinney (202-564-3712), Scott Garrison (202-564-4047) or David Hindin (202- 564-6004). If you have questions about other aspects of SBREFA implementation, please contact Kate Perry, who is in OECA's Office of Planning and Policy Analysis (202-564-4059), or the appropriate ORE division.

Attachments (3)

cc: OECA Office Directors
ORE Division Directors
ORE Branch Chiefs
Deputy Assistant Attorneys General, Environment and Natural Resources Division, DOJ
Section Chiefs, Environmental Enforcement and Environmental Defense Sections, DOJ

---

[6] See fn. 3, supra., regarding the relationship between "demand" under SBREFA and injunctive relief sought.

Attachment 1

EXAMPLE PRE-FILING LETTERS

Example 1

Dear _____:

This is to notify you that the U.S. Environmental Protection Agency is prepared to bring a civil administrative or judicial enforcement proceeding against [name] for violations of the [statute]. The complaint will allege that [name] has violated [section] of the [statute], and [regulation section], in that [name][describe violation]. The complaint will seek civil penalties for these violations.

Before filing the complaint, however, we are extending to you the opportunity to advise the Agency of any factors you believe that the Agency should consider before issuing the civil complaint. Relevant factors might include any evidence of reliance on compliance assistance provided by EPA or State agencies exercising delegated authority, misidentification of the proper party, or financial factors bearing on your ability to pay a civil penalty. Even if you are unaware of any mitigating or exculpatory factors, we are extending to you the opportunity to commence settlement discussions concerning the above-described violations.

It is our intention to file the civil administrative complaint two weeks from today, unless you first advise us of substantial reasons not to proceed as planned. Please direct your response to [name, address, phone number]. Thank you for your prompt attention to this matter.

Example 2

Dear _____:

The Environmental Protection Agency ("the Agency") has reason to believe that [name] may be in violation of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA" or "the Act") for selling and distributing a pesticide in violation of FIFRA § 12(a)(1)(C).

Under § 12(a)(1)(C) of FIFRA, it is unlawful for any person to distribute or sell any registered pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration under section 3 of the Act. FIFRA § 2(gg) defines "To Distribute or Sell" as "to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver....".

The Agency has learned that [name], a registrant as defined in FIFRA §2(y), may be selling and/or distributing a registered pesticide, the composition of which differs from the composition as described in the confidential statement of formula submitted in connection with the product's

gives new powers to the Small Business Ombudsman. Specifically, the SBA ombudsman will provide a "means to comment on the enforcement activity" by EPA personnel which are conducting an enforcement action. An "enforcement action" includes an "audit, on-site inspection, compliance assistance effort, or other enforcement related communication ...." This does not appear to be limited to past and/or completed actions, but applies at any point in the enforcement process -- including while the case is in active litigation. There is also a provision made for a business which is currently being enforced against to make a confidential referral to the Inspector General "regarding agency employees conducting compliance or enforcement activities . . . ." The legislative history indicates that this is intended to address instances where Agency personnel are not following established policies, or where a policy is, in effect, allowing the Agency to enforce too zealously.

The SBA's regional boards are to report to the SBA Ombudsman on those "excessive enforcement actions" and recommend changes to "enforcement policy or practice." The boards are also to "rate" the "enforcement activities" of agency personnel in reports to Congress. The legislative history likens this to a "customer satisfaction" index. The boards must be established by the SBA within 180 days after enactment.

3. Rights of Small Entities in Enforcement Actions

OECA's June 1995 *Interim Policy on Compliance Incentives for Small Businesses* is essentially codified by Section 323 of the Act (the legislative history indicates that the policy satisfies the section's requirements). Accordingly, while this section directs that each covered Federal agency to establish a program within one year to implement this section, EPA has already done this, although a final version of the *Interim Policy* will be issued shortly. In addition, the *Policy on Incentives for Self-Policing* (the Audit Policy) also appears to satisfy the criteria in this section of the new law.

4. Other Enforcement Impacts

Because the Act is still being analyzed, the full extent of its impact remains to be determined. However, the provisions of more immediate concern are, hopefully, noted above. There are other provisions which raise enforcement concerns -- such as the termination under Section 342 of ongoing and future enforcement actions brought under a rule for which a court has found that Regulatory Flexibility Act adherence was not sufficient. Many of the Act's other provisions affecting enforcement seem to be focused on changes to the rulemaking process, provisions for legislative veto of new rules, etc.

000422

registration. Specifically, it has come to the Agency's attention that [product name] may have been formulated with [chemical] as an active ingredient, which was not registered with the Agency.

Therefore, the Environmental Protection Agency requests that your company submit to this office **within fifteen (15) business days of receipt of this letter** the following information regarding the above named products. Provide all records and documents relating to:

1. the dates of sale and/or distribution of the product,
2. the quantity (pounds or gallons) of products sold and/or distributed,
3. the locations of all sale and/or distribution sites,
4. all shipping records,
5. a copy of the full product labeling associated with the product,
6. any product packaging inserts or flyers used in the marketing aspects of the product,
7. any information that would indicate the source of the [chemical] as an active ingredient used in the production of the [pesticide product],
8. product chemistry and physical characteristic data supporting [pesticide product] as being similar or identical in composition or labeling to EPA Registration [number],
9. the process used to produce [chemical] as an active ingredient, and
10. your legal relationship to [affiliated corporation]

Following receipt of the requested information, the Agency may wish to meet with representatives of [name] to further discuss this matter and allow [name] additional opportunity to show cause why the Agency should not proceed with enforcement action.

Please direct your response to [name, address, phone number]. Thank you for your prompt attention to this matter.

Attachment 2

EXAMPLE NOTICE PLEADING LANGUAGE

Example 1:

CIVIL PENALTY

Section 14(a)(1) of FIFRA, 7 U.S.C. Section 136l(a)(1), authorizes the assessment of a civil penalty of not more than $5,000 for each violation of FIFRA. The penalty assessed must reflect the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation.

Example 2:

CIVIL PENALTY

Section 16 of TSCA, 15 U.S.C. Section 2615, provides that any person who violates TSCA shall be liable for a civil penalty in an amount not to exceed $25,000 for each violation, and that each day a violation continues shall constitute a separate violation of TSCA. The penalty assessed must reflect the nature, circumstances, extent and gravity of the violations, and, with respect to Respondent, 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.

Example 3:

Civil Penalty

Pursuant to Section 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(B), any person who has violated [insert appropriate statutory requirement of the Act] may be assessed a civil penalty by the Administrator that may not exceed $10,000 per day for each day during which the violation continues, as long as the total amount of such a penalty does not exceed $125,000. Therefore, Complainant requests that the Administrator, after consideration of the statutory assessment factors set forth at Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), assess a civil penalty against Respondent of up to $10,000 per day for each day during which a violation(s) cited in this complaint continues.

Attachment 3

OTHER PROVISIONS OF SBREFA

SBREFA has a very broad reach, and will likely apply to a sizable percentage of the regulated community. It applies to all "small entities," as that term is defined in 5 U.S.C. § 601, 15 U.S.C. § 632, and in SBA regulations codified at 13 C.F.R. Part 121. The universe of "small entities" is larger than the definition used in Section 507 of the Clean Air Act and OECA's "Policy on Compliance Incentives for Small Businesses," both of which use a 100-employee limit. The SBA regulations define "small" by reference to *either* a company's number of employees (e.g., up to 1500, or greater) *or* a company's annual receipts (up to $25,000,000), depending on the company's SIC code. The Act's definition of "small entities" also includes "small governmental jurisdictions" (smaller than 50,000 persons), and "small organizations" (e.g., non-profits), further expanding the reach of this Act. SBREFA requires the Agency to establish within a year of enactment a number of programs to benefit this segment of the community, some of which are summarized below.

1. Programs to Provide Advice and Guidance to a "Small Entity"-- Potential Evidentiary Impact

Section 313 of SBREFA requires each department and agency of the Federal government to establish a program to "answer inquiries" or give "advice" on "interpreting and applying the law to specific sets of facts" provided by a small entity. The legislative history indicates that this provision contemplated a range of mechanisms, many of which are already commonly used by the Agency to provide this kind of information, including the use of hotlines. However, the effect of this kind of guidance in an enforcement action may have been given greater weight by a provision specifying that "[i]n any civil or administrative action against a small entity, guidance given by an agency applying the law to facts provided by the small entity may be considered evidence of the reasonableness . . . of any . . . fines, penalties or damages . . . ." Given the informal nature of some forms of advice provided by different parts of the Agency (both Regional- and Headquarters-based), this has the potential to affect an enforcement case involving a violator who was provided with an inconsistent or erroneous interpretation of law as applied to the facts at issue. Whether this provision in fact imbues such advice with any greater evidentiary weight than already afforded under current law is an open question.

Nevertheless, this provision tends to highlight the issues which might arise in an action involving a party who had relied in good faith on erroneous advice or guidance provided by the Agency. However, because the Agency has in place a number of Headquarters and Regional-based mechanisms to provide advice and guidance to both large and small entities, this provision raises the potential for forum-shopping by a business. As such it will place a premium on the Agency's ability to ensure a reasonable consistency in interpretations when a business is provided with guidance that qualifies under this section. The "program" to be established under this section for responding to inquiries must be established within 1 year.

2. Oversight of EPA Enforcement Personnel by the SBA

Section 322, on "Oversight of Regulatory Enforcement" by the Small Business Administration, establishes regional boards chaired/run by the Small Business Administration, and