

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
THE BARDEN CORPORATION,) **Docket No. CAA -1-2000-0070**
)
Respondent.)

NOTICE OF RECEIPT OF EXPARTE CORRESPONDENCE

The undersigned has received the attached correspondence from Respondent dated October 15, 2002 requesting that the penalty of \$281,050 imposed after hearing in this matter be mitigated, in whole or in part, by its agreement to implement "unplanned environmentally friendly capital improvements." This correspondence raises issues of filing/service and jurisdiction.

First, it is noted that a certificate of service did not accompany the correspondence and it is, thus, unclear whether the original thereof has been filed with the Regional Hearing Clerk or the Clerk of the Environmental Appeals Board (EAB) and whether the Complainant has been served with a copy of the correspondence. Rule 22.5(a) of the Environmental Protection Agency's Consolidated Rules of Practice (40 C.F.R. § 22.5(a)), which govern this proceeding, provides that the original of all documents served in connection with this action shall be filed with the Regional Hearing Clerk, or the Clerk of the Board where the proceeding is before the EAB, and that a copy of such documents be served on all other parties and the Presiding Officer or EAB. In addition, the Rule requires that a "certificate of service" be attached to such documents evidencing such service. As a result, the communication is being considered *ex parte* and therefore, pursuant to Rule 22.8 (40 C.F.R. § 22.8), by its attachment hereto is being served upon all other parties to this action.¹

Second, to the extent that the correspondence seeks further reconsideration² of the Initial Decision issued on August 9, 2002, Respondent has not shown "an intervening change in the controlling law . . . or the need to correct a clear error or prevent manifest injustice," when the adjudicator has "'overlooked or misapprehended the law or facts or the position of one of the parties.'" *Southern Timber Products*, 3 E.A.D. 880, 889 (EAB, Feb. 28, 1992)(quoting *City of*

¹ In addition, a courtesy copy of this Notice is being served upon the EAB, which previously issued an Order in this matter after the Initial Decision was issued by the undersigned.

² The undersigned, by Order dated October 1, 2002, already ruled upon a Motion for Reconsideration of the Initial Decision filed by Respondent.

Detroit, TSCA App. No. 89-5 (CJO Feb. 20, 1991), slip op. at 2). The correspondence simply asserts, in addition to issues previously argued, that since September 11, 2001 it has suffered a negative change in its financial circumstances, that Respondent has signed off on a project to eliminate TCE from its facility, and that it believes there was some level of incompetence on the part of its environmental consulting firm. Moreover, Respondent provides no explanation as to why these issues were not raised in its prior Motion for Reconsideration. *Seriatim* requests of this type waste the judicial and legal resources of all parties and are strongly disfavored.

Finally, it is noted that Respondent has cited no authority for the undersigned to grant the type of equitable relief it requests in its correspondence, *i.e.*, offsetting a monetary penalty previously imposed in an initial decision by an environmentally beneficial project completed after issuance of the initial decision.³ Jurisdiction over this type of relief may rest at this point in time with the Environmental Appeals Board and/or the Administrator.⁴

Susan L. Biro
Chief Administrative Law Judge

Dated: October 21, 2002
Washington, D.C.

³ There is authority and precedent, however, for paying a penalty in installments, rather than in a lump sum. *See*, 40 C.F.R. § 13.18 providing that “where the Administrator determines that a debtor is financially unable to pay the indebtedness in a single payment or that an alternative payment mechanism is in the best interest of the United States, the Administrator may approve repayment of the debt in installments. . . .” *See also, New Waterbury, Ltd.*, 5 E.A.D. 529, 549 (EAB 1994); *Leonard Strandley*, 3 E.A.D. 718, 724 (CJO 1991). Respondent did not request a payment schedule before the Initial Decision was issued, so none was considered by the undersigned at that time.

⁴ By virtue of an Order of the EAB, dated September 5, 2002, Respondent was given 15 days from the date of the undersigned’s Order on the Motion for Reconsideration, *i.e.*, until October 16, 2002 to file its appeal. The Clerk of the Board has indicated that as of October 17, 2002 no such appeal was filed.